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UNITED STATES REPORTS

VOLUME 380

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1964

MARCH 1 THROUGH APRIL 29, 1965

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

UNITED STATES
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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 [1]

STANLEY REED, ASSOCIATE JUSTICE.
SHERMAN MINTON, ASSOCIATE JUSTICE.[2]
CHARLES E. WHITTAKER, ASSOCIATE JUSTICE.

NICHOLAS DEB. KATZENBACH, ATTORNEY GENERAL.[3]
ARCHIBALD COX, SOLICITOR GENERAL.
JOHN F. DAVIS, CLERK.
HENRY PUTZEL, jr., REPORTER OF DECISIONS.
T. PERRY LIPPITT, MARSHAL.
HELEN NEWMAN, LIBRARIAN.

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*Notes on p. IV.

NOTES.

[1] Mr. Justice Frankfurter, who retired effective August 28, 1962 (371 U. S. VII), died on February 22, 1965. See *post,* p. VII.

[2] Mr. Justice Minton, who retired effective October 15, 1956 (352 U. S. VII), died on April 9, 1965.

[3] Mr. Katzenbach, who had been Acting Attorney General since September 3, 1964, was nominated by President Johnson on January 28, 1965, to be Attorney General; the nomination was confirmed by the Senate on February 10, 1965; he was commissioned on February 11, 1965; and he took the oath on February 13, 1965.

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.)

DEATH OF MR. JUSTICE FRANKFURTER.

SUPREME COURT OF THE UNITED STATES.

MONDAY, MARCH 1, 1965.

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

THE CHIEF JUSTICE said:

"It is on a note of sadness that we open this session of the Court because, since we last met, our friend and Brother, Felix Frankfurter, has passed away.

"It was twenty-six years ago on January 30th that Mr. Justice Frankfurter took his seat on this Court. One week ago he died after a gallant fight for the restoration of the health which he had lost three years ago. In more than 23 years of service here, he had one of the longest and, without doubt, one of the most brilliant careers in the history of the Court.

"He was one of the most knowledgeable of men. He came to his high position with a combination of scholarship and public experience rarely equalled. As a scholar, teacher, public servant, man of letters, patron of the arts, and the confidant of Presidents, he had already made great contributions to the life of our Nation. But, notwithstanding his manifold activities, the law was always his preoccupation. He caught its spirit early in life, and to his very last day devoted himself fervently to its development under the Constitution which he revered.

"His death leaves a great void in the communities of scholars and jurists, but fortunately his written words, so pregnant with meaning, will be a heritage for all who love the law and believe in it as the sheet anchor of our civilization.

"We of the Supreme Court who knew him so well mourn his passing, both as our associate and friend, but we also know that his ebullient spirit would want us to get on with our always unfinished work."

PRESENTATION OF THE ATTORNEY GENERAL.

SUPREME COURT OF THE UNITED STATES.

MONDAY, MARCH 8, 1965.

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

Mr. Solicitor General Cox presented the Honorable Nicholas deB. Katzenbach, Attorney General of the United States.

THE CHIEF JUSTICE said:

"Mr. Attorney General, the Court welcomes you to the performance of the important duties which devolve upon you as the chief law officer of the Government, and as an officer of this Court. Your commission will be recorded with the Clerk."

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1964.

UDALL, SECRETARY OF THE INTERIOR *v.* TALLMAN ET AL.

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

No. 34. Argued October 22, 26, 1964.—Decided March 1, 1965.

Since their promulgation, the Secretary of the Interior has consistently construed Executive Order No. 8979 and Public Land Order No. 487, relating to the disposition of public lands located in the Kenai National Moose Range in Alaska, not to bar the issuance of oil and gas leases. His interpretation has been made a repeated matter of public record, and a number of leases have been developed, at great expense, in reliance on it. If, therefore, his interpretation of the orders is not unreasonable, courts must respect it. Pp. 4–18.

(a) The Secretary's interpretation of Executive Order No. 8979, which withdrew the lands covered by it from "settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska," though not the only interpretation permitted by the language of the order, is a reasonable interpretation. Pp. 19–23.

(b) *Wilbur* v. *United States ex rel. Barton*, 60 App. D. C. 11, 46 F. 2d 217 (1930), aff'd *sub nom. United States ex rel. McLennan* v. *Wilbur*, 283 U. S. 414, distinguished. Pp. 21–23.

(c) The reasonableness of the Secretary's interpretation of Public Land Order No. 487 follows *a fortiori* from the reasonableness of his interpretation of Executive Order No. 8979. P. 23.

116 U. S. App. D. C. 379, 324 F. 2d 411, reversed.

Wayne G. Barnett argued the cause for petitioner. With him on the briefs were *Solicitor General Cox, Roger P. Marquis* and *Edmund B. Clark.*

Charles F. Wheatley, Jr., argued the cause for respondents. With him on the brief was *Robert L. McCarty.*

Briefs of *amici curiae,* urging reversal, were filed by *Clayton L. Orn, Marvin J. Sonosky, Oscar L. Chapman, Martin L. Friedman* and *Marion B. Plant* for Marathon Oil Company et al., and by *Abe Fortas, Joseph A. Ball, Gordon A. Goodwin, Francis R. Kirkham, Turner H. McBaine* and *Clark M. Clifford* for Richfield Oil Corporation et al.

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

At issue in this case is the effect of Executive Order No. 8979 and Public Land Order No. 487 upon the Secretary of the Interior's authority to issue oil and gas leases.

Between October 15, 1954, and January 28, 1955, D. J. Griffin and other persons—hereinafter collectively referred to as the Griffin lessees—filed applications for oil and gas leases on approximately 25,000 acres located in the Kenai National Moose Range in Alaska. On August 14, 1958, the respondents filed offers to lease the same lands. Section 17 of the Mineral Leasing Act of 1920 provides, in relevant part, that "the person first making application for the lease who is qualified to hold a lease . . . shall be entitled to a lease of such lands without competitive bidding. . . ." 41 Stat. 443 (1920), as amended by 60 Stat. 951 (1946), 30 U. S. C. § 226 (1958 ed.). The Bureau of Land Management of the Department of the Interior determined that the Griffin lessees were the persons who had applied first, and issued to them leases on the tracts, effective September 1, 1958. Respondents' applications were reached for processing in

October 1959, and were rejected on the ground that the lands had been leased to prior applicants.[1]

From the rejection of their applications, respondents appealed to the Director of the Bureau of Land Management and then to the Secretary of the Interior, both of whom affirmed the decision. 68 I. D. 256 (1961). Respondents then brought an action in the nature of mandamus, in the United States District Court for the District of Columbia, to compel the Secretary to issue oil and gas leases to them. The District Court granted summary judgment in favor of the Secretary dismissing the complaint. The Court of Appeals for the District of Columbia Circuit reversed, holding that Executive Order No. 8979, the order creating the Moose Range in 1941, and Public Land Order No. 487, issued by the Secretary in 1948,[2] had withdrawn the lands in controversy from availability for leasing under the Mineral Leasing Act, and that the lands remained closed to leasing until they were reopened by a revised departmental regulation on August 14, 1958. The court therefore held that the Griffin applications, filed while the land was closed, were ineffective, rendering the leases issued on them nullities; the respondents, as the persons first making application

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[1] Lease offers are processed in the order of filing and a lease on a given tract is issued as soon as an acceptable offer is reached. In the instant case, the Secretary's order of August 2, 1958, 23 Fed. Reg. 5883, directed that all lease offers filed within 10 days of August 14, 1958, would be treated as simultaneously filed, and that a public drawing would be held to determine the priorities among them. See 43 CFR § 295.8 (1964). The drawing was held on September 4, 1959, and respondents prevailed. Thus their offers were processed before all other offers filed between August 14 and August 24, 1958; upon processing, however, it was discovered that the land was already covered by the leases issued to the Griffin lessees.

[2] Public Land Order No. 487 encompassed the land for which respondent Coyle applied; the land for which the other nine respondents filed is covered by Executive Order No. 8979.

after the promulgation of the 1958 regulation, were held to be entitled to the leases. 116 U. S. App. D. C. 379, 324 F. 2d 411 (1963). We granted certiorari, 376 U. S. 961.

We conclude that the District Court correctly refused to issue a writ of mandamus, and accordingly reverse the decision of the Court of Appeals. Since their promulgation, the Secretary has consistently construed both orders not to bar oil and gas leases; moreover, this interpretation has been made a repeated matter of public record. While the Griffin leases and others located in the Moose Range have been developed in reliance upon the Secretary's interpretation, respondents do not claim to have relied to their detriment upon a contrary construction. The Secretary's interpretation may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation; courts must therefore respect it. *McLaren* v. *Fleischer,* 256 U. S. 477, 481; *Bowles* v. *Seminole Rock Co.,* 325 U. S. 410, 413–414.

I.

The Mineral Leasing Act of 1920, 41 Stat. 437, 30 U. S. C. § 181 *et seq.* (1958 ed.), gave the Secretary of the Interior broad power to issue oil and gas leases on public lands not within any known geological structure of a producing oil and gas field. Although the Act directed that if a lease was issued on such a tract, it had to be issued to the first qualified applicant, it left the Secretary discretion to refuse to issue any lease at all on a given tract. *United States ex rel. McLennan* v. *Wilbur,* 283 U. S. 414. The Act excluded from its application certain designated lands,[3] but did not exclude lands within wildlife refuge areas.

[3] Section 1 of the Act excludes "lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (36

The Kenai National Moose Range was created in 1941 by Executive Order No. 8979, 6 Fed. Reg. 6471, by which approximately two million acres of the public domain were set aside "as a refuge and breeding ground for moose." The order provided that "[n]one of the above-described lands excepting [a defined area] shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska . . . ." On November 8, 1947, the Secretary promulgated the first general regulation dealing with the issuance of oil and gas leases within wildlife refuges. It provided simply that such leases had to be subjected to an approved unit plan and contain a provision prohibiting drilling or prospecting without the advance consent of the Secretary. 12 Fed. Reg. 7334.

On June 16, 1948, the Secretary issued Public Land Order No. 487, 13 Fed. Reg. 3462:

> "[T]he public lands within the following-described areas in Alaska [including most of that portion of the Moose Range which had been excepted from Executive Order No. 8979] are hereby temporarily withdrawn from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation:
>
> . . . . . .
>
> "This order shall take precedence over, but shall not modify . . . the reservation for the Kenai Na-

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Stat. 961), and those in incorporated cities, towns, and villages and in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oil-shale reserves, except as hereinafter provided . . . ," 41 Stat. 437–438 (1920), as amended, 60 Stat. 950 (1946), 30 U. S. C. § 181 (1958 ed.).

> tional Moose Range made by Executive Order No. 8979 of December 16, 1941 . . . ."

Thus neither Executive Order No. 8979 nor Public Land Order No. 487 expressly withdrew the lands to which it applied from oil and gas leasing. In 1951, however, the Secretary set aside, for uses inconsistent with mineral leasing, minor portions of the lands covered by Public Land Order No. 487:

> "[T]he following-described public lands in Alaska are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining laws and the mineral-leasing laws . . . ."[4]

Had the Secretary thought that Public Land Order No. 487 had already withdrawn the lands covered by it from appropriation under the mineral-leasing laws, his reference to such laws in the 1951 orders would have been superfluous.

By an intra-agency memorandum dated August 31, 1953, the Director of the Bureau of Land Management advised the Regional Administrators of the Bureau and managers of the local land offices that "a possible revision of policy and regulations" on leasing in wildlife refuges was being studied, and directed them that "[p]ending the completion of this study and the possible revision of existing regulations, you will suspend action on all pending oil and gas lease offers and applications for lands within such refuges." It is not disputed, and subsequent memoranda make clear, that the 1953 memorandum did not purport to prevent either the issuance of leases with

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[4] See Public Land Order No. 751 of August 29, 1951, 16 Fed. Reg. 9044, which withdrew 160 acres for the Civil Aeronautics Administration, and 88.86 acres for townsite purposes, and Public Land Order No. 778 of December 29, 1951, 17 Fed. Reg. 159, which withdrew a number of tracts, aggregating 4,280 acres, for the use of the Army.

the approval of the national office or the continued filing of lease offers.[5] During late 1954 and early 1955, a number of individuals filed applications for oil and gas leases in the northern half of the Moose Range; among these applications were those of the Griffin lessees. Action on them was suspended in accordance with the 1953 directive, but none was rejected on the ground that the land in question was closed to leasing.[6]

On September 9, 1955, the Secretary issued Public Land Order No. 1212, 20 Fed. Reg. 6795, revoking in its entirety Public Land Order No. 487. After granting certain preferences, it provided:

> "6. Any of the lands described in paragraphs 4 (a), 4 (b) or 4 (d) of this order then remaining unappropriated, *shall become subject to* such application, petition, selection, or other form of appropriation by the public generally as may be authorized by the public-land laws, *including the mineral-leasing laws* . . . .
>
> "7. Commencing at 10:00 a. m. on the 182nd day after the date of this order, any of the unsurveyed lands described in paragraph 4 (c) not settled upon by veterans or other persons entitled to credit

[5] See memorandum, February 15, 1954, Director, Bureau of Land Management, to Assistant Secretary of the Interior; memorandum, August 12, 1955, Director, Bureau of Land Management, to Area Administrator, Area 4 (Alaska); 102 Cong. Rec. A6582.

[6] In his report for the fiscal year ending June 30, 1955, the Governor of Alaska stated:

"Residents of Alaska and major oil companies have continued to file lease applications and send exploratory parties into various parts of the Territory. The Kenai Moose Reserve on the Kenai Peninsula is covered with 325 lease applications awaiting decision of the Secretary of the Interior as to what stipulations for the protection of wildlife should be inserted in leases, if they are issued."

Rep. Alaska Gov. 60–61 (1955); see also Rep. Secy. Int. 65 (1953).

for service *shall become subject to* settlement and other forms of appropriation by the public generally, *including leasing under the mineral-leasing laws* . . . ." (Emphasis added.)

Respondents make much of the italicized language, which does appear to be inconsistent with the Department's prior interpretation of Public Land Order No. 487 and its actual leasing practices. However, on October 14, 1955—35 days after it was promulgated but before it went into effect, and years before the respondents entered the picture—Public Land Order No. 1212 was amended to delete the references to the mineral-leasing laws. 20 Fed. Reg. 7904.

On December 8, 1955, the anticipated revision of the 1947 refuge-leasing regulation was promulgated. 20 Fed. Reg. 9009. It was more restrictive than the old regulation, and gave increased power to the Fish and Wildlife Service to approve or disapprove oil and gas development of refuges. It listed in an Appendix A a number of refuges (not including Kenai) in which, because of their importance to the preservation of rare species of plant and animal life, no leasing at all would be permitted. In Appendix B it listed certain areas (including a small part of the Moose Range not involved here) "with respect to which the Fish and Wildlife Service reports that oil and gas development might seriously impair or destroy the usefulness of the lands for wildlife conservation purposes . . . ." In such Appendix B areas, leasing was to be permitted only upon the approval by the Director of the Fish and Wildlife Service of "a complete and detailed operating program for the area." In all other wildlife areas the regulation provided that "[o]il and gas leases may be issued" provided they contain specified conditions requiring approval by the Fish and Wildlife Service of the type of prospecting to be conducted, and adoption by the

lessee of a unit plan approved by the Service. Respondents argue that even if it be assumed that (as is clearly the case) the 1955 regulation treated the lands in controversy as open to leasing, the regulation is not probative of the availability of the lands for leasing *prior to 1955*, and is therefore no evidence that the Secretary viewed the lands as open to leasing at the time the Griffin applications were filed. We think, however, that if the Secretary had been of the opinion that he was changing the status of that part of the Moose Range not covered by Appendix B, rather than merely imposing additional restrictions on leasing therein, he would have done so in terms more express than those used in the 1955 regulation. He did not refer to the Range as a whole; the only reference by name was to those parts of the Range which were specified in order to *except* them from the general provision that "[o]il and gas leases may be issued" in wildlife refuges. Though this specification supports the inference that the regulation was drafted on the assumption that the remainder of the Range was open to leasing, such indirect implication—however clearly it confirms the preexisting availability of the Range—would have been a technique inappropriate for effecting a *change* of the Range's status. Moreover, the President's 1952 delegation to the Secretary of power to make or modify withdrawals had directed that "[a]ll orders issued by the Secretary of the Interior under the authority of this order *shall be designated as public land orders* and shall be submitted . . . for filing and for publication in the FEDERAL REGISTER." Executive Order No. 10355, 17 Fed. Reg. 4831 (emphasis added). It may be that a document not labeled a public land order could in legal effect constitute an exercise of that power; however, if the Secretary had meant to exercise such power, it is likely that he would

have done so in the manner directed by the President's delegation.[7]

When bills were introduced in Congress early in 1956 to restrict oil and gas leasing in wildlife refuges, the House Committee on Merchant Marine and Fisheries and the Subcommittee on Merchant Marine and Fisheries of the Senate Committee on Interstate and Foreign Commerce held extensive hearings thereon. The bills as introduced only forbade the Secretary to "dispose of" lands in wildlife refuges, and the question arose during the hearings whether that language would apply to the issuance of oil and gas leases. A representative of the Department asserted, without contradiction, that the granting of an oil and gas lease was not a "disposition" and would not be affected by the language as proposed. Hearings before the House Committee on Merchant Marine and Fisheries on H. R. 5306, etc., 84th Cong., 2d Sess., p. 98. An amendment was accordingly proposed specifically restricting oil and gas leasing. Neither committee reported

[7] It appears that the Bureau regarded the amended regulations as automatically vacating the 1953 suspension order; however, upon the almost immediate introduction in Congress of bills further to restrict leasing in wildlife refuges, the field offices were directed once again to withhold final action on lease applications. See *Richard K. Todd et al.*, 68 I. D. 291, 298 (1961).

In further support of the claim that the 1955 regulation is worthless as an indication of the pre-existing status of the lands covered thereby, respondents urge that Appendix B listed "wildlife refuges which were closed by the terms of the orders creating them." However, of the 176 refuges listed in Appendix B, respondents point to only one: the Salt Plains in Oklahoma. Moreover, only a small part of the Salt Plains (543 acres out of over 30,000) was specifically withdrawn from appropriation under the mining and mineral-leasing laws Public Land Order No. 144, 8 Fed. Reg. 9430. It is therefore doubtful that a simple listing in Appendix B of the "Salt Plains," large parts of which were admittedly open to leasing prior to 1955, was intended to open the small area closed by Public Land Order No. 144.

favorably on the bills. However, the House Committee submitted a report stating that it had been decided to try, for an experimental period of time, an arrangement whereby each proposed alienation or relinquishment of any interest the Fish and Wildlife Service had in lands under its jurisdiction would be submitted to the Committee, which would within 60 days approve or disapprove the action contemplated. H. R. Rep. No. 1941, 84th Cong., 2d Sess., pp. 12–13. This resolution of the issue suggests that the Committee accepted the Department's view that the Secretary had pre-existing authority to grant oil and gas leases in the Moose Range, and was concerned only with the way in which he exercised his discretion.

Pursuant to the agreement, the House Committee on Merchant Marine and Fisheries held public hearings on July 20 and 25, 1956, on a proposal from the Fish and Wildlife Service for the issuance of 30 oil and gas leases on 71,680 acres in the northern half of the Moose Range—located within the area encompassed by Executive Order No. 8979—for which lease applications had been filed in 1954 by *amicus curiae* Richfield Oil Corporation and others. The proposal contemplated that the leases would be subject to the Swanson River Unit plan of operation, which had been approved by the Bureau of Land Management, the Geological Survey and the Fish and Wildlife Service, all branches of the Department of the Interior. At the hearing on the proposal a spokesman for the National Wildlife Federation urged that Executive Order No. 8979 precluded the issuance of the leases. Transcript of Hearings before the House Committee on Merchant Marine and Fisheries, July 20 and 25, 1956, Lease of Portions of Kenai National Moose Range, pp. 17, 19, 24–26. But see *id.*, pp. 35–36; letter, July 24, 1956, Deputy Solicitor, Department of the Interior, to Hon. E. L.

Bartlett, Delegate to Congress from Alaska, following *id.*, p. 30. On July 25, 1956, however, the Committee's Chairman advised the Director of the Fish and Wildlife Service that the Committee unanimously had concluded that issuance of the leases would not be detrimental to the wildlife values of the Moose Range, and had concurred in the proposal to issue the leases.[8]

Following the Committee's approval the leases were issued, an exploratory well was drilled and oil was discovered in commercial quantities in July 1957. See Rep. Alaska Gov. 88 (1957); Rep. Secy. Int. 356 (1957); Rep. Secy. Int. 104, 199, 258, 356 (1958). The Swanson River leases soon became again a subject of congressional concern, when the Secretary of the Interior—realizing that although he had authority to issue leases on dry land, he lacked such authority with respect to lands beneath Alaskan inland navigable waters—asked Congress for authority to issue leases on Alaskan water bottoms, and to add to the leases already issued in Alaska and to applications pending there the water bottoms within their

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[8] Respondents seek to capitalize on the fact that although the Swanson River Unit was not located in any of the areas designated in Appendix B of the 1955 regulation, the applicants submitted, and obtained Service approval of, a detailed operating program for the unit. There are at least two possible explanations for the submission of the plan. First, the Fish and Wildlife Service could at any time designate areas not listed in Appendix B in which leasing "might seriously impair or destroy" conservation purposes and accordingly require advance approval of operating programs for them. Submission of a plan as to the Swanson River Unit might have been regarded as a means of insuring that the Service would not so designate the area. Second, the Secretary had directed his subordinates to withhold final action on lease applications pending a further revision of the regulations. The applicants may have submitted the plan in order to persuade the Department and the House Committee that the proposed leasing was consistent not only with existing regulations but also with any that were likely to be adopted.

boundaries.[9] The Senate Committee reported favorably on the proposed bill, saying:

> "In Alaska, there is at the present time only one area which is now subject to the Mineral Leasing Act where oil and gas is known to exist in paying quantities, this being on the Kenai Peninsula as previously described. If prior to the effective date of this act, the producing structure on the Kenai is defined, then the holders of upland leases in such areas might be forced to compete for areas beneath adjacent lakes and streams. The committee felt that this result would work to the disadvantage of those lessees and developers who have gone ahead and developed this area . . . ." S. Rep. No. 1720, 85th Cong., 2d Sess., p. 5.

The bill was subsequently enacted into law. 72 Stat. 322 (1958), 48 U. S. C. § 456 and 30 U. S. C. § 251 (1958 ed.).

Meanwhile, the controversy over the leasing policies to be followed in wildlife refuges was resolved by the adoption, on January 8, 1958, of another complete revision of the regulation. 23 Fed. Reg. 227, 43 CFR § 192.9. The revision represented a near-total victory for the conservationists. It altogether prohibited oil and gas leasing, unless necessary to prevent draining, in

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[9] In the hearings before the Senate Committee on Interior and Insular Affairs on the proposed bill, Mr. Gordon Goodwin, attorney for *amicus curiae* Richfield Oil Corporation, testified:

"Well, we have pending, and have had for 2 or 3 or more years, applications for leases in the Kenai moose range, and a few leases were issued in there, and that is where the discovery was made. But, shortly after that time, the Secretary suspended all leasing in the moose range . . . and he has never lifted it yet . . . . So we have not been able to do much business up there except to a very limited extent."

Hearings before the Senate Committee on Interior and Insular Affairs on H. R. 8054, 85th Cong., 2d Sess., p. 77.

wildlife refuges—with two exceptions: lands withdrawn for a dual purpose, and wildlife refuges located in Alaska. As to lands falling within these two excepted categories, the Bureau of Land Management and the Fish and Wildlife Service were to reach agreements specifying the lands which "shall not be subject to oil and gas leasing" and to decide on provisions to be required in leases issued on the remaining lands. The agreements were to become effective upon approval by the Secretary and publication in the Federal Register. The regulation further provided that "[a]ll pending offers or applications heretofore filed for oil and gas leases covering game ranges, coordination lands, and Alaska wildlife areas, will continue to be suspended until the agreements referred to . . . shall have been completed," and that no new lease applications would "be accepted for filing until the tenth day after the agreements . . . are noted on the land office records."

Pursuant to the regulation, there was published in the Federal Register on August 2, 1958, an order of the Secretary announcing the agreement reached with respect to the Moose Range. 23 Fed. Reg. 5883. The order decreed that certain lands within the Range (essentially the southern half) "are hereby closed to oil and gas leasing because such activities would be incompatible with management thereof for wildlife purposes." It then provided:

> "The balance of the lands within the Kenai National Moose Range are subject to the filing of oil and gas lease offers . . . . Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation 43 CFR 192.9 (d) will now be acted upon and adjudicated in accordance with the regulations.
>
> . . . . . .

> ". . . [L]ease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office . . . ." [10]

The agreement was noted in the Anchorage land office on August 4, 1958, and 10 days later respondents filed their applications.

Soon after the issuance of the regulation and the implementing order, the pending applications were acted upon; within the next two months, 294 leases covering 621,234 acres were issued in the area subject to Executive Order No. 8979, in response to applications (including those of the Griffin lessees) filed in 1954 and 1955. When these figures are added to those covering leases issued prior to 1958 (primarily those in the Swanson River area), it appears that in the area subject to Executive Order No. 8979, the Secretary issued a total of 331 leases covering 696,680 acres on applications filed during the period the Court of Appeals held that the area was closed to leasing. Thus, prior to the commencement of the instant suit, the Secretary had leased substantially the entire area

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[10] In announcing the order, the Secretary warned that there would be little land available to new applicants: "Most of these lands are now covered by applications that will be adjudicated under the regulations of the Department." Department of the Interior Press Release, July 25, 1958.

Respondents point to the fact that in a Press Release dated January 29, 1958, announcing the forthcoming (August) order, the Secretary had indicated that he was "opening" a part of the Moose Range to leasing. The choice of this term is wholly understandable in view of the facts that general instructions to local offices not to take final action on lease applications had been outstanding since 1953, and that the regulations of January 8, 1958, had provided that no new applications would be accepted for filing until a subsequent order was issued specifying the lands which would not be subject to leasing. Therefore, the order of August 2, 1958, did, in these two senses, "open" the Range to leasing.

in controversy; [11] the Solicitor General further assures us that the lessees and their assignees had, in turn, expended tens of millions of dollars in the development of the leases.

II.

When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Comm'n* v. *Aragon,* 329 U. S. 143, 153. See also, *e. g., Gray* v. *Powell,* 314 U. S. 402; *Universal Battery Co.* v. *United States,* 281 U. S. 580, 583. "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *Power Reactor Co.* v. *Electricians,* 367 U. S. 396, 408. When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.

> "Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless

[11] In the area excepted from Executive Order No. 8979 but encompassed by Public Land Order No. 487, the total number of leases issued on applications filed before the revocation of the latter order was 74 covering 116,878 acres.

> it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock Co.*, 325 U. S. 410, 413–414.

In the instant case, there is no statutory limitation involved. While Executive Order No. 8979 was issued by the President, he soon delegated to the Secretary full power to withdraw lands or to modify or revoke any existing withdrawals. See Executive Order No. 9146, 7 Fed. Reg. 3067; Executive Order No. 9337, 8 Fed. Reg. 5516; Executive Order No. 10355, 17 Fed. Reg. 4831. Public Land Order No. 487 was issued by the Secretary himself.

Moreover, as the discussion in Section I of this opinion demonstrates, the Secretary has consistently construed Executive Order No. 8979 and Public Land Order No. 487 not to bar oil and gas leases.

> "It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation." *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 472–473.

The Secretary's interpretation had, long prior to respondents' applications, been a matter of public record and discussion. The agreement worked out with the House Committee on Merchant Marine and Fisheries in 1956, and the approval of the Swanson River leases pursuant thereto,

though probably constituting no "legislative ratification" in any formal sense,[12] serve to demonstrate the notoriety of the Secretary's construction, and thereby defeat any possible claim of detrimental reliance upon another interpretation. Finally, almost the entire area covered by the orders in issue has been developed, at very great expense, in reliance upon the Secretary's interpretation. In *McLaren* v. *Fleischer,* 256 U. S. 477, 480–481, it was held:

> "In the practical administration of the act the officers of the land department have adopted and given effect to the latter view. They adopted it before the present controversy arose or was thought of, and, except for a departure soon reconsidered and corrected, they have adhered to and followed it ever since. Many outstanding titles are based upon it and much can be said in support of it. If not the only reasonable construction of the act, it is at least an admissible one. It therefore comes within the rule that the practical construction given to an act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years, will not be disturbed except for cogent reasons."

If, therefore, the Secretary's interpretation is not unreasonable, if the language of the orders bears his construction, we must reverse the decision of the Court of Appeals.[13]

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[12] See *Ex parte Endo,* 323 U. S. 283, 303, n. 24; *Boesche* v. *Udall,* 373 U. S. 472, 482–483; cf. *Peters* v. *Hobby,* 349 U. S. 331, 345; but cf. *Brooks* v. *Dewar,* 313 U. S. 354, 360–361.

[13] The failure of the court below to attach proper significance to the administrative practice seems to be attributable to the fact that it was misinformed concerning that practice. The respondents' brief in the Court of Appeals stated that "[n]o leases issued for any lands within the Kenai Range between 1941 and 1958" (p. 30), and that "[t]he discovery as well as the increased activity were in areas of the Peninsula outside of the Kenai National Moose Range" (p. 40).

III.

Executive Order No. 8979, 6 Fed. Reg. 6471, provided:

> "None of the above-described lands excepting [a described area] shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of the act of July 3, 1926, entitled 'An Act to provide for the leasing of public lands in Alaska for fur farming, and for other purposes', 44 Stat. 821, U. S. C., title 48, secs. 360–361, or the act of March 4, 1927, entitled 'An Act to provide for the protection, development, and utilization of the public lands in Alaska by establishing an adequate system for grazing livestock thereon', 44 Stat. 1452, U. S. C., title 48, secs. 471–471o . . . ."

"Settlement," "location," "sale" and "entry" are all terms contemplating transfer of title to the lands in question. It was therefore reasonable for the Secretary to construe "or other disposition" to encompass only dispositions which, like the four enumerated, convey or lead to the conveyance of the title of the United States—for example, "grants" and "allotments." Cf. Opinion of the Solicitor, 48 I. D. 459 (1921).[14] An oil and gas lease does not vest title to the lands in the lessee. See *Boesche* v. *Udall*, 373 U. S. 472, 477–478. Moreover, the term "public-land laws" is ordinarily used to refer to statutes governing the alienation of public land, and generally is distinguished from both "mining laws," referring to statutes governing the mining of hard minerals on public lands, and "mineral leasing laws," a term used to designate that group of statutes governing the leasing of public

[14] This view is taken in Hoffman, Oil and Gas Leasing on the Public Domain, p. 33 (1951).

lands for gas and oil. Compare Title 43 U. S. C., Public Lands, with Title 30 U. S. C., Mineral Lands and Mining.[15]

The reference in Executive Order No. 8979 to the 1926 and 1927 statutes also lends support to the Secretary's interpretation. For both statutes relate to leasing rather than alienation of title; it would be reasonable to infer from their specific addition that "disposition" was not intended to encompass leasing.[16] The Secretary also might reasonably have been influenced by a belief that in view of his overriding discretionary authority to refuse to issue an oil and gas lease on a given tract whenever he thought that granting a lease would undercut the purposes of the withdrawal, inclusion of such leases in the withdrawal order would have been unnecessary. Cf. *Haley* v. *Seaton,* 108 U. S. App. D. C. 257, 281 F. 2d 620 (1960).

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[15] Reference to the language of other withdrawal orders is not very fruitful. *Amici curiae* list 173 Executive and Public Land Orders issued between 1940 and 1952 which contained language expressly barring mineral leasing. Brief for Marathon Oil Co. and Union Oil Co. of California as *amici curiae,* pp. 6A–7A. However, respondents list 146 orders issued between 1936 and 1959 expressly permitting mineral leasing. Brief for Respondents, pp. 7a–10a.

[16] The Court of Appeals sought to explain the reference to the 1926 and 1927 Acts by construing the phrase "any of the public-land laws applicable to Alaska" to mean laws applicable both throughout the country and in Alaska, and opined that the 1926 and 1927 Acts were specifically added because they had application only in Alaska. However, the Secretary's interpretation of "any of the public-land laws applicable to Alaska" (as including, *inter alia,* laws relating to public lands located only in Alaska) is at least as natural as the Court of Appeals' interpretation (limiting the phrase to laws applicable throughout the country) and is beyond cavil a "reasonable" interpretation, which is the test the Court of Appeals should have been applying. Moreover, the Court of Appeals' conclusion that "disposition" was meant to include leasing renders the words "or to classification and lease," initiating the reference to the Acts of 1926 and 1927, superfluous.

Respondents' reliance upon *Wilbur* v. *United States ex rel. Barton,* 60 App. D. C. 11, 46 F. 2d 217 (1930), aff'd *sub nom. United States ex rel. McLennan* v. *Wilbur,* 283 U. S. 414, is misplaced. Involved in *Wilbur* was the meaning of language contained in the Pickett Act, 36 Stat. 847 (1910), 43 U. S. C. § 141 (1958 ed.).

> "[T]he President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska . . . ."

It is true that the Court of Appeals for the District of Columbia Circuit squarely held this language to be sufficient to authorize withdrawals from oil and gas leasing. Moreover, this Court affirmed, albeit on an alternative theory: that the Mineral Leasing Act merely authorized and did not compel the issuance of prospecting permits. 283 U. S., at 419. However, a word of history will place *Wilbur* in context and thereby demonstrate its irrelevance to the problem here. Prior to 1920, oil and gas rights in public lands were acquired in the same way as rights in other minerals—by a form of "location." One staked out a location and prospected for oil or other minerals; upon making a discovery, he became entitled to a patent to the land as well as the minerals. In 1909, responding to rapid reserve depletion in certain areas, the Interior Department issued an order pursuant to Presidential authorization:

> "In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in [a defined area of over 3 million acres in California and Wyoming] are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public land

laws. . . ." U. S. Geological Survey, Bull. 623, H. R. Doc. No. 868, 64th Cong., 1st Sess., 135 (1916); quoted, 236 U. S., at 467.

The power of the executive to make the withdrawal was upheld by this Court in 1915 in *United States* v. *Midwest Oil Co.*, 236 U. S. 459. In the meantime, however, Congress had, pursuant to the President's request, sought to remove all doubts about the legality of such orders by granting to him, in the Pickett Act, discretionary authority to withdraw public lands from "settlement, location, sale, or entry."

The Mineral Leasing Act of 1920 changed the procedure for acquiring oil and gas rights in public lands: the Secretary was empowered to issue prospecting permits and required, in the event a discovery was made under the permit, to issue a lease which entitled the lessee to extract the mineral, but gave him no right in the land itself.[17] From 1920 on, therefore, the language of the Pickett Act no longer technically encompassed leasing. Nonetheless, it was clear that the Act had been specifically designed to legitimize orders like the 1909 withdrawal order. The Court of Appeals reasonably concluded in *Wilbur* that the fact that Congress had in 1920 changed the procedure—from "location" to "leasing"—for acquisition of oil and gas rights afforded no reason for concluding that they had thereby intended to cut back the power granted in 1910. 60 App. D. C., at 14–15, 46 F. 2d, at 220–221. Thus neither that holding by the Court of Appeals nor this Court's affirmance in any way casts doubt upon the reasonableness of the Secretary's interpretation of the orders at bar, which were drafted long after the Mineral Leasing

[17] In 1935, the prospecting permit procedure was eliminated and the present direct leasing procedure substituted. Act of August 21, 1935, 49 Stat. 676–677, 30 U. S. C. §§ 223, 226 (1958 ed.).

Act had done away with location as a means of acquiring oil and gas rights.

The placement of the fish trap exception—"(except for fish trap sites)"—a phrase admittedly not relating to alienation of title to land, does tend to cut against the Secretary's interpretation of Executive Order No. 8979. However, it appears that the exception was designed to assure the Alaskans, whose livelihood is largely dependent on the salmon catch, that they could continue—despite the order—to use fish traps. Cf. *Organized Village of Kake* v. *Egan,* 369 U. S. 60. Since it was a reassurance not technically necessary and therefore not functionally related to any part of the regulation, it is no surprise to find it carelessly placed. Compare Executive Order No. 8857, 6 Fed. Reg. 4287, establishing the Kodiak National Wildlife Refuge. We do not think the position of the fish trap exception is sufficient to justify a court's overturning the Secretary's construction as unreasonable.

Public Land Order No. 487 withdrew the lands it covered from "settlement, location, sale or entry," but contained no reference to "other disposition." Nor did it contain anything analogous to the fish trap exception. The reasonableness of the Secretary's interpretation of Public Land Order No. 487 therefore follows *a fortiori* from the reasonableness of his construction of Executive Order No. 8979.

Reversed.

MR. JUSTICE DOUGLAS and MR. JUSTICE HARLAN took no part in the decision of this case.

SINGER *v.* UNITED STATES.

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

No. 42. Argued November 18, 1964.—Decided March 1, 1965.

Petitioner, a defendant in a federal criminal mail fraud case, claims that he had an absolute right to be tried by a judge alone if he considered such a trial to be to his advantage. *Held:* Federal Rule of Criminal Procedure 23 (a) sets forth a reasonable procedure governing proffered waivers of jury trials. A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. Although he may waive his right to trial by jury, *Patton* v. *United States,* 281 U. S. 276, there is no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him. Pp. 24–38.

326 F. 2d 132, affirmed.

Sidney Dorfman 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.*

Briefs of *amici curiae* were filed by *Victor Rabinowitz* and *Leonard Boudin* for Joni Rabinowitz, and by *Justin A. Stanley* for Nicholas Jacop Uselding.

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

Rule 23 (a) of the Federal Rules of Criminal Procedure provides:

> "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."

Petitioner challenges the permissibility of this rule, arguing that the Constitution gives a defendant in a federal criminal case the right to waive a jury trial whenever he believes such action to be in his best interest, regardless of whether the prosecution and the court are willing to acquiesce in the waiver.

Petitioner was charged in a federal district court with 30 infractions of the mail fraud statute, 18 U. S. C. § 1341 (1958 ed.). The gist of the indictment was that he used the mails to dupe amateur songwriters into sending him money for the marketing of their songs. On the opening day of trial petitioner offered in writing to waive a trial by jury "[f]or the purpose of shortening the trial." [1] The trial court was willing to approve the waiver, but the Government refused to give its consent. Petitioner was subsequently convicted by a jury on 29 of the 30 counts and the Court of Appeals for the Ninth Circuit affirmed. We granted certiorari, 377 U. S. 903.

Petitioner's argument is that a defendant in a federal criminal case has not only an unconditional constitutional right, guaranteed by Art. III, § 2, and the Sixth Amendment,[2] to a trial by jury, but also a correlative right to

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[1] R. 17.

[2] Art. III, § 2, of the United States Constitution provides:

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

have his case decided by a judge alone if he considers such a trial to be to his advantage. He claims that at common law the right to refuse a jury trial preceded the right to demand one, and that both before and at the time our Constitution was adopted criminal defendants in this country had the right to waive a jury trial. Although the Constitution does not in terms give defendants an option between different modes of trial, petitioner argues that the provisions relating to jury trial are for the protection of the accused. Petitioner further urges that since a defendant can waive other constitutional rights without the consent of the Government, he must necessarily have a similar right to waive a jury trial and that the Constitution's guarantee of a fair trial gives defendants the right to safeguard themselves against possible jury prejudice by insisting on a trial before a judge alone. Turning his attention to Rule 23 (a), petitioner claims that the Fifth, Sixth, Ninth, and Tenth Amendments are violated by placing conditions on the ability to waive trial by jury.

We have examined petitioner's arguments and find them to be without merit. We can find no evidence that the common law recognized that defendants had the right to choose between court and jury trial. Although instances of waiver of jury trial can be found in certain of the colonies prior to the adoption of the Constitution, they were isolated instances occurring pursuant to colonial "constitutions" or statutes and were clear departures from the common law. There is no indication that the colonists considered the ability to waive a jury trial to be of equal importance to the right to demand one. Having found that the Constitution neither confers nor recognizes a right of criminal defendants to have their cases tried before a judge alone, we also conclude that Rule 23 (a) sets forth a reasonable procedure governing attempted waivers of jury trials.

I.

English Common Law. The origin of trial by jury in England is not altogether clear. At its inception it was an alternative to one of the older methods of proof—trial by compurgation, ordeal or battle. I Holdsworth, A History of English Law 326 (7th ed. 1956). Soon after the thirteenth century trial by jury had become the principal institution for criminal cases, Jenks, A Short History of English Law 52 (5th ed. 1938); yet, even after the older procedures of compurgation, ordeal and battle had passed into disuse, the defendant technically retained the right to be tried by one of them. Before a defendant could be subjected to jury trial his "consent" was required, but the Englishmen of the period had a concept of "consent" somewhat different from our own. The Statute of Westminster I, 1275, 3 Edw. 1, c. 12, which described defendants who refused to submit to jury trial as "refus[ing] to stand to the Common Law of the Land," marks the beginning of the horrendous practice known as *peine forte et dure* by which recalcitrant defendants were tortured until death or until they "consented" to a jury trial.

It is significant that defendants who refused to submit to a jury were not entitled to an alternative method of trial,[3] and it was only in 1772 that *peine forte et dure* was officially abolished in England. By a statute enacted in that year, 12 Geo. 3, c. 20, a defendant who stood mute when charged with a felony was deemed to have pleaded guilty. Not until 1827, long after the adoption of our Constitution, did England provide by statute, 7 & 8

[3] It appears that many hardy defendants were willing to be tortured to death rather than submit to a jury trial, not because of any inherent distrust of the jury system but because of their desire to avoid a conviction and thereby prevent forfeiture of their lands and the resultant hardships for their descendants. Cf. I Holdsworth, *supra*, at 326.

Geo. 4, c. 28, for the trial of those who stood mute. Even this statute did not give the defendant the right to plead his case before a judge alone, but merely provided that he would be subject to jury trial without his formal consent.

Thus, as late as 1827 the English common law gave criminal defendants no option as to the mode of trial. The closest the common law came to such a procedure was that of the "implied confession," described briefly in 2 Hawkins, Pleas of the Crown, c. 31 (6th ed. 1787), by which defendants accused of minor offenses did not explicitly admit their guilt but threw themselves on the King's mercy and expressed their willingness to submit to a small fine. Despite the "implied confession," the court heard evidence and could discharge the defendant if it found the evidence wanting. Griswold, The Historical Development of Waiver of Jury Trial in Criminal Cases, 20 Va. L. Rev. 655, 660 (1934). It cannot seriously be argued that this obscure and insignificant procedure, having no applicability to serious offenses, establishes the proposition that at common law defendants had the right to choose the method of trial in all criminal cases. On the contrary, "[b]y its intrinsic fairness as contrasted with older modes, and by the favor of the crown and the judges, [trial by jury] grew fast to be regarded as the one regular common-law mode of trial, always to be had when no other was fixed." Thayer, A Preliminary Treatise on Evidence at the Common Law 60 (1898).

The Colonial Experience. The colonies which most freely permitted waiver of jury trial as a matter of course were Massachusetts and Maryland. The "first constitution" of Massachusetts—The Body of Liberties of 1641—contained as Liberty XXIX the following:

> "In all actions at law, it shall be the liberty of the plaintiff and defendant, by mutual consent, to choose

> whether they will be tried by the Bench or by a Jury, unless it be where the law upon just reason has otherwise determined. The like liberty shall be granted to all persons in Criminal cases."

It should be noted that Liberty XXIX's language explicitly provided that the right to choose trial by judge alone was subject to change "where the law upon just reason has otherwise determined." Moreover, those drafting and administering the Liberty recognized that it was a departure from the English common law. Grinnell, To What Extent is the Right to Jury Trial Optional in Criminal Cases in Massachusetts? 8 Mass. L. Q. No. 5, 7, 23–25 (1923). Several cases can be cited, at least up until 1692, in which defendants in Massachusetts waived jury trial and were tried by the bench. See Grinnell, *supra,* at 27–29; Griswold, *supra,* at 661–664. However, from 1692 on, in light of increasing hostility to the Crown, the colonists of Massachusetts stressed their right to trial by jury, not their right to choose between alternate methods of trial. Instead of being a settled part of the jurisprudence of Massachusetts at the time of the Constitutional Convention, the ability to choose between judge and jury had become a forgotten option in Massachusetts:

> "With the state of mind then existing among the colonists, presumably nobody bothered about this question of any one's wanting to waive a jury. The General Court was then concerned with the question of a man's right to a jury *when he asked for it,* which they thought in danger. The 'Body of Liberties' never having been printed and the nineteen original official manuscript copies having doubtless been lost or forgotten, the 'bar' (which did not begin to develop until the beginning of the 18th century) and

> the 18th century people, probably grew up without any general knowledge of the expressly optional character of the right to a jury established as a 'fundamental' by the common law of Massachusetts in the colonial period." [4]

It appears that from the early days of Maryland's colonization minor cases were tried by judges sitting alone. Bond, The Maryland Practice of Trying Criminal Cases by Judges Alone, Without Juries, 11 A. B. A. J. 699, 700 (1925). But the defendant who submitted his case to the judge was not considered on a par with the defendant who chose to have a jury hear his case, as is evidenced by a Maryland statute of 1793 which provided that submission to a judge would be considered an admission of crime (analogous to the "implied confession" of minor offenses under English common law) at least insofar as to render the person submitting his case to a judge liable for the costs of prosecution. In 1809, Maryland declared by statute that waiver of jury trial was to be encouraged and the willing defendant was to suffer no increased liability for so doing. It was not until 1823, however, that major cases began also to be submitted to judges alone, and the first major case so submitted caused some surprise and sharp comment in Maryland legal circles. See Bond, *supra*, at 701.

Other possible examples of optional jury trial procedures can be cited in colonial New Hampshire, Vermont, Connecticut, New Jersey and Pennsylvania.[5] See Gris-

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[4] Grinnell, *supra*, at 33.

[5] The Pennsylvania case of *Proprietor* v. *Wilkins*, Pennypacker's Pennsylvania Colonial Cases 88 (1892), decided in 1685–1686, is of interest in that the court tried a fornication case without a jury over the objection of the prosecution. The punishment involved in the case was a 10-pound fine. The case is, therefore, little authority for the proposition that defendants had the right to waive jury trials in all cases.

wold, *supra,* at 664–667. The most that can be said for these examples is that they are evidence that the colonists believed it was possible to try criminal defendants without a jury. They in no way show that there was any general recognition of a defendant's right to be tried by the court instead of by a jury. Indeed, if there had been recognition of such a right, it would be difficult to understand why Article III and the Sixth Amendment were not drafted in terms which recognized an option.

The Constitution and Its Judicial Interpretation. The proceedings at the Constitutional Convention give little insight into what was meant by the direction in Art. III, § 2, that the "Trial of all Crimes . . . shall be by jury." The clause was clearly intended to protect the accused from oppression by the Government, see III Farrand, Records of the Federal Convention 101 (James Wilson), 221–222 (Luther Martin) (1911); but, since the practice of permitting defendants a choice as to the mode of trial was not widespread, it is not surprising that some of the framers apparently believed that the Constitution designated trial by jury as the exclusive method of determining guilt, see The Federalist, No. 83 (Alexander Hamilton) (Cooke ed. 1961); IV Elliot's Debates 145, 171 (James Iredell) (2d ed. 1876); III Elliot's Debates 521 (Edmund Pendleton) (2d ed. 1876).

In no known federal criminal case in the period immediately following the adoption of the Constitution did a defendant claim that he had the right to insist upon a trial without a jury. Indeed, in *United States* v. *Gibert,* 25 Fed. Cas. 1287 (No. 15204) (C. C. D. Mass. 1834), Mr. Justice Story, while sitting on circuit, indicated his view that the Constitution made trial by jury the only permissible method of trial. Similar views were expressed by other federal judges. See *Ex parte McClusky,* 40 F. 71, 74–75 (C. C. D. Ark. 1889) (by implication); *United*

States v. *Taylor,* 11 F. 470, 471 (C. C. D. Kan. 1882) (dictum).[6]

Although not necessary to the holding in the case, in *Thompson* v. *Utah,* 170 U. S. 343, this Court also expressed a view that the Constitution made jury trial the exclusive method of determining guilt in all federal criminal cases. However, in *Schick* v. *United States,* 195 U. S. 65, the Court decided there was no constitutional requirement that petty offenses be tried by jury. These two decisions were construed by the lower federal courts as establishing a rule that in all but petty offenses jury trial was a constitutional imperative. See *Coates* v. *United States,* 290 F. 134 (C. A. 4th Cir. 1923); *Blair* v. *United States,* 241 F. 217, 230 (C. A. 9th Cir. 1917); *Frank* v. *United States,* 192 F. 864, 867–868 (C. A. 6th

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[6] In construing their own constitutions, which generally had clauses designed to preserve the common-law right to trial by jury, the state courts took a similarly limited view of the ability of a defendant to waive jury trial. Some state courts ruled that in the absence of a statute there could be no waiver of jury trial. See, *e. g., Wilson* v. *State,* 16 Ark. 601 (1855); *State* v. *Maine,* 27 Conn. 281 (1858); *People* v. *Smith,* 9 Mich. 193 (1861). Several other courts determined that the State could by statute prohibit waiver of jury trials. See, *e. g., Arnold* v. *Nebraska,* 38 Neb. 752, 57 N. W. 378 (1894); *In re McQuown,* 19 Okla. 347, 91 P. 689 (1907); *State* v. *Battey,* 32 R. I. 475, 80 A. 10 (1911); *State* v. *Hirsch,* 91 Vt. 330, 100 A. 877 (1917); *Mays* v. *Commonwealth,* 82 Va. 550 (1886). Some state courts interpreted their constitutions to say that under no circumstances could waiver be allowed. See, *e. g., State* v. *Holt,* 90 N. C. 749 (1884); *Williams* v. *State,* 12 Ohio St. 622 (1861). Several courts, of course, held that waiver of a jury was permissible, even in the absence of enabling legislation. See, *e. g., State ex rel. Warner* v. *Baer,* 103 Ohio St. 585, 134 N. E. 786 (1921) (overruling *Williams* v. *State, supra*); *Ex parte King,* 42 Okla. Cr. 46, 274 P. 682 (Okla. Crim. App. 1929). In *Hallinger* v. *Davis,* 146 U. S. 314, this Court held that a state statute permitting waiver of jury trial in criminal cases did not violate the Due Process Clause of the Fourteenth Amendment.

Cir. 1911) (dictum); *Low* v. *United States,* 169 F. 86 (C. A. 6th Cir. 1909); *Dickinson* v. *United States,* 159 F. 801 (C. A. 1st Cir. 1908), cert. denied, 213 U. S. 92.

The issue whether a defendant could waive a jury trial in federal criminal cases was finally presented to this Court in *Patton* v. *United States,* 281 U. S. 276. The *Patton* case came before the Court on a certified question from the Eighth Circuit. The wording of the question, *id.,* at 287, is significant:

> "After the commencement of a trial in a Federal Court before a jury of twelve men upon an indictment charging a crime, punishment for which may involve a penitentiary sentence, if one juror becomes incapacitated and unable to further proceed with his work as a juror, can defendant or defendants and the Government through its official representative in charge of the case consent to the trial proceeding to a finality with eleven jurors, and can defendant or defendants thus waive the right to a trial and verdict by a constitutional jury of twelve men?"

The question explicitly stated that the Government had agreed with the defendant that his trial should proceed with 11 jurors. The case did not involve trial before a judge alone, but the Court believed that trial before 11 jurors was as foreign to the common law as was trial before a judge alone, and therefore both forms of waiver "in substance amount[ed] to the same thing." *Id.,* at 290. The Court examined Art. III, § 2, and the Sixth Amendment and concluded that a jury trial was a right which the accused might "forego at his election." *Id.,* at 298. The Court also spoke of jury trial as a "privilege," not an "imperative requirement," *ibid.,* and remarked that jury trial was principally for the benefit of the accused, *id.,* at 312. Nevertheless, the Court was conscious of the precise question that was presented by the Eighth Circuit, and concluded its opinion, *id.,* at 312–

313, with carefully chosen language that dispelled any notion that the defendant had an absolute right to demand trial before a judge sitting alone:

> "Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity."

In *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 277–278, this Court reaffirmed the position taken in *Patton* that "one charged with a serious federal crime may dispense with his Constitutional right to jury trial, where this action is taken with his express, intelligent consent, where the Government also consents, and where such action is approved by the responsible judgment of the trial court."

II.

Thus, there is no federally recognized right to a criminal trial before a judge sitting alone, but a defendant can, as was held in *Patton,* in some instances waive his right to a trial by jury. The question remains whether the effectiveness of this waiver can be conditioned upon the consent of the prosecuting attorney and the trial judge.

The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the oppo-

site of that right. For example, although a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial, see *United States* v. *Kobli,* 172 F. 2d 919, 924 (C. A. 3d Cir. 1949) (by implication); although he can waive his right to be tried in the State and district where the crime was committed, he cannot in all cases compel transfer of the case to another district, see *Platt* v. *Minnesota Mining & Mfg. Co.,* 376 U. S. 240, 245; *Kersten* v. *United States,* 161 F. 2d 337, 339 (C. A. 10th Cir. 1947), cert. denied, 331 U. S. 851; and although he can waive his right to be confronted by the witnesses against him, it has never been seriously suggested that he can thereby compel the Government to try the case by stipulation. Moreover, it has long been accepted that the waiver of constitutional rights can be subjected to reasonable procedural regulations: Rule 7 (b) of the Federal Rules of Criminal Procedure sets forth the procedure to be followed for waiver of the right to be prosecuted by indictment; Rule 20 describes the procedure for waiver of the right to be tried in the district in which an indictment or information is pending against a defendant; and Rule 44 deals with the waiver of the right to counsel.

Trial by jury has been established by the Constitution as the "normal and . . . preferable mode of disposing of issues of fact in criminal cases." *Patton* v. *United States,* 281 U. S. 276, 312. As with any mode that might be devised to determine guilt, trial by jury has its weaknesses and the potential for misuse. However, the mode itself has been surrounded with safeguards to make it as fair as possible—for example, venue can be changed when there is a well-grounded fear of jury prejudice, Rule 21 (a) of the Federal Rules of Criminal Procedure, and prospective jurors are subject to *voir dire* examination, to challenge for cause, and to peremptory challenge, Rule 24 (a) and (b).

In light of the Constitution's emphasis on jury trial, we find it difficult to understand how the petitioner can submit the bald proposition that to compel a defendant in a criminal case to undergo a jury trial against his will is contrary to his right to a fair trial or to due process. A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him. The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result. This recognition of the Government's interest as a litigant has an analogy in Rule 24 (b) of the federal rules, which permits the Government to challenge jurors peremptorily.

We are aware that the States have adopted a variety of procedures relating to the waiver of jury trials in state criminal cases. Some have made waiver contingent on approval by the prosecutor, *e. g.*, California (Cal. Const. Art. I, § 7), Indiana (Ind. Ann. Stat. § 9–1803 (1956 Repl. vol.), *Alldredge* v. *Indiana,* 239 Ind. 256, 156 N. E. 2d 888 (1959)), and Virginia (Va. Const. § 8, Va. Code Ann. § 19.1–192 (1950 Repl. vol.), *Boaze* v. *Commonwealth,* 165 Va. 786, 183 S. E. 263 (1936)). Others, while not giving the prosecutor a voice, have made court approval a prerequisite for waiver, *e. g.,* Georgia (Ga. Code Ann. § 102–106 (1955), *Palmer* v. *State,* 195 Ga. 661, 25 S. E. 2d 295 (1943)), and Washington (Wash. Rev. Code § 10.01.060 (1963 Supp.)). Still others have provided

that the question of waiver is a matter solely for the defendant's informed decision, *e. g.,* Connecticut (Conn. Gen. Stat. Rev. § 54–82 (1958)), and Illinois (Ill. Ann. Stat. c. 38, § 103–6 (Smith-Hurd ed. 1964), *Illinois* v. *Spegal,* 5 Ill. 2d 211, 125 N. E. 2d 468 (1955)). However, the framers of the federal rules were aware of possible alternatives when they recommended the present rule to this Court, see Orfield, Trial by Jury in Federal Criminal Procedure, 1962 Duke L. J. 29, 69–72; this Court promulgated the rule as recommended; and Congress can be deemed to have adopted it, 18 U. S. C. § 3771 (1958 ed.).

In upholding the validity of Rule 23 (a), we reiterate the sentiment expressed in *Berger* v. *United States,* 295 U. S. 78, 88, that the government attorney in a criminal prosecution is not an ordinary party to a controversy, but a "servant of the law" with a "twofold aim . . . that guilt shall not escape or innocence suffer." It was in light of this concept of the role of prosecutor that Rule 23 (a) was framed, and we are confident that it is in this light that it will continue to be invoked by government attorneys. Because of this confidence in the integrity of the federal prosecutor, Rule 23 (a) does not require that the Government articulate its reasons for demanding a jury trial at the time it refuses to consent to a defendant's proffered waiver. Nor should we assume that federal prosecutors would demand a jury trial for an ignoble purpose. We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial. Petitioner argues that there might arise situations where "passion, prejudice . . . public feeling" [7] or some other

[7] Petitioner's Brief, p. 24.

factor may render impossible or unlikely an impartial trial by jury. However, since petitioner gave no reason for wanting to forgo jury trial other than to save time, this is not such a case, and petitioner does not claim that it is.

Petitioner has also raised questions involving the instructions to the jury and alleged misconduct by the prosecuting attorney. We have examined the record and find that the jury was adequately instructed. In any event, no timely objection was made as required by Rule 30 of the Federal Rules of Criminal Procedure and, in the absence of plain error, the Court of Appeals correctly affirmed the judgment of the trial court. Similarly without merit are petitioner's specifications of misconduct by the prosecuting attorney during the trial, since the record reveals that the misconduct, if any, was neither purposeful nor flagrant, and the trial court's admonitions to the jury seem to have been well designed to cure whatever prejudicial impact some of the prosecutor's remarks may have had in this case.

The judgment of the Court of Appeals is

Affirmed.

CRIDER *v.* ZURICH INSURANCE CO.

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

No. 116. Argued January 19, 1965.—Decided March 1, 1965.

Petitioner, an Alabama resident, was injured in that State while working for a Georgia corporation, against which he then secured a default judgment in an Alabama court under the Georgia Workmen's Compensation Act. Petitioner then brought this diversity action on the judgment against respondent, his employer's insurer, in the District Court, which granted a motion to dismiss on the ground that the Alabama court lacked jurisdiction to award damages under the Georgia Act providing for a remedy which could be afforded exclusively by the Georgia compensation board. The Court of Appeals affirmed. *Held:* The State where an employee resides and is injured may adopt such choice of remedy as it desires, and Alabama was free to adopt and enforce the remedy provided by Georgia without any requirement imposed by the Full Faith and Credit Clause that the special Georgia procedure be followed. Pp. 41–43.

324 F. 2d 499, reversed.

Max C. Pope, pro hac vice, by special leave of Court, argued the cause for petitioner. With him on the brief was *J. Terry Huffstutler.*

Foster Etheredge argued the cause and filed a brief for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner, a resident of Alabama and employed there by Lawler Construction Co., Inc., a Georgia corporation, was injured. Both he and Lawler were under Georgia's Workmen's Compensation Act at the time. Petitioner sued in an Alabama court under the Georgia Act and obtained a judgment by default against Lawler. Respondent, the insurer of Lawler, was sued in the Federal Dis-

trict Court by petitioner on his Alabama judgment, federal jurisdiction being based on diversity of citizenship. The District Court granted respondent's motion to dismiss (224 F. Supp. 87) and the Court of Appeals affirmed. 324 F. 2d 499. The case is here on a writ of certiorari. 377 U. S. 942.

The District Court and the Court of Appeals stood on *Green* v. *J. A. Jones Construct. Co.*, 161 F. 2d 359, which held that a Mississippi state court had no jurisdiction to award damages under the Georgia Workmen's Compensation Act and that the Federal District Court for Mississippi was under the same disability, Georgia decisions settling the point that the remedy provided by the Georgia Act is "an exclusive one which can be afforded only" by the Georgia Compensation Board. *Ibid.*

We assume that the lower courts were correct in stating what the Georgia law is. But the mere fact that petitioner, if he had sued in Georgia, would have had to follow that course does not necessarily mean that the Alabama state court was in error in taking jurisdiction of the cause.

The Alabama state court dealt with an injury occurring to an Alabama resident while working in Alabama. Under *Bradford Electric Co.* v. *Clapper,* 286 U. S. 145, a State could fix one exclusive remedy for personal injuries involving its residents wherever the accident happened and the Full Faith and Credit Clause (Art. IV, § 1) required the other States to refuse to enforce any inconsistent remedy. That case would have been on all fours with the present one had petitioner been a resident of Georgia, rather than Alabama. *Alaska Packers Assn.* v. *Commission,* 294 U. S. 532, and *Pacific Employers Ins. Co.* v. *Commission,* 306 U. S. 493, mark a break with the *Clapper* philosophy. *Alaska Packers* allowed the State of residence of the injured employee to supply a remedy different from the Compensation Act of the place of the injury, even though the employee had agreed to be

bound by the latter remedy. *Pacific Insurance* held that a person injured while working in California could recover under California's Compensation Act even though the injured person was a Massachusetts resident, regularly employed there by a Massachusetts corporation and even though the Massachusetts Compensation Act purported to give an exclusive remedy. In *Carroll* v. *Lanza,* 349 U. S. 408, Arkansas, the place where the injury occurred, was allowed to grant common-law damages even though Missouri, the home State, had a Compensation Act that purported to be exclusive. As we stated in that case:

> "Missouri can make her Compensation Act exclusive, if she chooses, and enforce it as she pleases within her borders. Once that policy is extended into other States, different considerations come into play. Arkansas can adopt Missouri's policy if she likes. Or, as the *Pacific Employers Insurance Co.* case teaches, she may supplement it or displace it with another, insofar as remedies for acts occurring within her boundaries are concerned. Were it otherwise, the State where the injury occurred would be powerless to provide any remedies or safeguards to nonresident employees working within its borders. We do not think the Full Faith and Credit Clause demands that subserviency from the State of the injury." *Id.,* pp. 413–414.

The State where the employee lives and where he was injured has a large and considerable interest in the event. As we said in *Carroll* v. *Lanza, supra,* p. 413, "The State where the tort occurs certainly has a concern in the problems following in the wake of the injury. The problems of medical care and of possible dependents are among these . . . ." The State where the employee lives has perhaps even a larger concern, for it is there that he is expected to return; and it is on his community that the impact of the injury is apt to be most keenly felt. Cer-

tainly when the injury occurs in the home State of the employee, the interest of that State is at least commensurate with the interest of the State in which an injury occurs involving a nonresident, as in *Carroll* v. *Lanza.* If Arkansas had a sufficient interest there to override Missouri's exclusive remedy, Alabama may override Georgia's here.

The Alabama policy in that regard is reflected in the judgment rendered by the Alabama court on which this federal suit was instituted. That Alabama judgment adopted and enforced the remedy provided by Georgia—a procedure we indicated in *Pacific Employers Ins. Co.* v. *Commission, supra,* p. 500, a State might follow. Here as in *Alaska Packers Assn.* v. *Commission, supra,* p. 544, ". . . the compensation acts of either jurisdiction may, consistently with due process, be applied in either . . . ." We were consistent with that view in *Carroll* v. *Lanza, supra,* when we said, in what we have already quoted, that the State of the forum may "supplement" or "displace" the remedy of the other State, consistently with constitutional requirements. 349 U. S., p. 414.

It is earnestly argued by the dissent that the *Green* decision, *supra,* which the Court of Appeals followed in the present case, "did not rest on constitutional grounds," *post,* p. 46. Rather it is said that *Green* expresses merely a state conflicts rule.* We do not so read *Green.* There the court said that its decision was controlled by

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*We stated in *Wells* v. *Simonds Abrasive Co.,* 345 U. S. 514, 516:

"The states are free to adopt such rules of conflict of laws as they choose, *Kryger* v. *Wilson,* 242 U. S. 171 (1916), subject to the Full Faith and Credit Clause and other constitutional restrictions. The Full Faith and Credit Clause does not compel a state to adopt any particular set of rules of conflict of laws; it merely sets certain minimum requirements which each state must observe when asked to apply the law of a sister state."

the principle that "where the provision for the liability claimed is coupled with a provision for a special remedy to be afforded not by a court but by a commission, that remedy and that alone must be employed . . . ." 161 F. 2d 359. This principle is almost a verbatim restatement of the rule adverted to in *Tennessee Coal Co.* v. *George,* 233 U. S. 354, 359: " 'where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed.' " And our older cases assumed that this broad rule was compelled by the Full Faith and Credit Clause. See, *e. g., ibid.,* and cases cited; *Atchison, T. & S. F. R. Co.* v. *Sowers,* 213 U. S. 55; and also the discussion in *Pearson* v. *Northeast Airlines, Inc.,* 309 F. 2d 553. But, as we have demonstrated, that rule has been eroded by the line of cases beginning with *Alaska Packers* and *Pacific Insurance.* Our holding frees the Court of Appeals on remand to reconsider its holding free from any supposed constitutional compulsion.

Reversed.

MR. JUSTICE GOLDBERG, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting.

The resolution of the issue before the Court in this case necessitates setting out the history of this litigation in more detail than does the Court. Petitioner originally brought his action against the employer in an Alabama court in a three-count complaint, the first count relying on Alabama's Workmen's Compensation Act and the other two on Alabama common law. He then voluntarily dismissed these counts and reinstituted the action in the Alabama court with sole and express reliance on the Georgia Workmen's Compensation Act. A default judgment was then entered in petitioner's favor on the basis of this new complaint. No appeal was taken from this default judgment.

Petitioner then filed a complaint in an Alabama court against respondent, the employer's insurance company, to enforce the previously obtained default judgment. Respondent asserted in defense that, since the Georgia Act upon which the action was based provides for primary jurisdiction in an administrative board and precludes original court jurisdiction, the Alabama court lacked subject matter jurisdiction to enter the default judgment. The default judgment, therefore, respondent contended, was void and could be collaterally attacked in the enforcement proceeding. Petitioner's demurrer to this defense was overruled by the Alabama court. Following this, petitioner voluntarily dismissed the action in the Alabama court and the next day filed the diversity suit here before us, identical to the previous Alabama action. Respondent again asserted the defense of lack of subject matter jurisdiction to enter the default judgment. Based on this defense, and after the submission of briefs and oral argument, Judge Grooms dismissed the complaint. In holding that there had not been subject matter jurisdiction to enter the default judgment, Judge Grooms relied on *Green* v. *J. A. Jones Construct. Co.*, 161 F. 2d 359, a decision of the Fifth Circuit. 224 F. Supp. 87, 88. He then went on to hold, relying on Alabama cases, that since there had been no subject matter jurisdiction in the original action, the default judgment was, under Alabama law, subject to collateral attack. The Court of Appeals affirmed *per curiam* on the basis of its prior decision in *Green* v. *J. A. Jones Construct. Co., supra.* 324 F. 2d 499.

This case does not present the issue of whether Alabama could have applied its own compensation act or its own common law. Respondent concedes that, on the facts of this case,[1] it could have applied either and our

[1] As the Court points out, *ante*, at 39, 40, petitioner was an Alabama resident, and was injured while working in Alabama.

decisions plainly so hold. See *Pacific Employers Ins. Co.* v. *Commission,* 306 U. S. 493; *Carroll* v. *Lanza,* 349 U. S. 408. But, as I have already noted, petitioner, who originally sued under both Alabama's Workmen's Compensation Act and common law, dismissed those counts and based his action solely on the Georgia Workmen's Compensation Act. The federal issue raised by respondent is whether, consistently with the Full Faith and Credit Clause, a State may enforce in its courts the liability claims created by another State in violation of that other State's fixed policy to have those claims enforced only by an administrative board. There is no decision of this Court which settles this federal issue and, in my view, the question is not free from difficulty. See *Tennessee Coal Co.* v. *George,* 233 U. S. 354, 359, and cases there cited; but cf. *Pearson* v. *Northeast Airlines, Inc.,* 309 F. 2d 553 (C. A. 2d Cir.); *Kilberg* v. *Northeast Airlines, Inc.,* 9 N. Y. 2d 34, 172 N. E. 2d 526.

On the record here presented it seems clear to me that the Court should not reach this constitutional question. In the case before us, if Alabama's own law independently forbids the piecemeal borrowing of Georgia statutes and denies to the Alabama courts jurisdiction to entertain petitioner's suit on the Georgia statute, the question of whether the Federal Constitution forbids such piecemeal borrowing need not be reached. The Court recognizes, *ante,* at 42–43, that this issue is in the case, but bypasses this threshold state law issue and reaches the ultimate federal constitutional problem. In so doing, the Court disregards the long-settled rule that this Court will not pass upon federal constitutional questions if there are state law grounds presented upon which the case may be disposed of. See *Siler* v. *Louisville & Nashville R. Co.,* 213 U. S. 175; *Ashwander* v. *Valley Authority,* 297 U. S. 288, 347 (Brandeis, J., concurring), and cases there cited.

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The sole basis for the Court's inversion of this long-settled rule of reaching state law issues before constitutional ones, is that it reads the decisions below as based upon "supposed constitutional compulsion," *ante,* at 43, and not upon independent state law. I believe that the lower courts did rest their decisions upon independent state law and that they determined that the default judgment was void under Alabama law.

The opinion of Judge Grooms, an experienced Alabama lawyer, makes it clear that he relied upon Alabama law in deciding that the original default judgment could be collaterally attacked.[2] The Court apparently does not dispute this. It, however, reads the opinions below as relying upon federal and not upon independent state law for the determination that the Alabama court was without subject matter jurisdiction to enter the default judgment. In reaching this conclusion, the Court relies upon the fact that both Judge Grooms and the Court of Appeals cited as controlling the Fifth Circuit's prior decision in *Green* v. *J. A. Jones Construct. Co., supra. Ante,* at 40. The Court then reads *Green* as resting upon full faith and credit compulsion. A careful reading of *Green,* however, discloses that it did not rest on constitutional grounds.

The Court of Appeals in *Green* had affirmed the dismissal by the United States District Court in Mississippi of a diversity action based upon the same Georgia statute

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[2] Judge Grooms stated, 224 F. Supp., at 88:

"Since the DeKalb County Circuit Court did not have jurisdiction of the subject matter, the issue of jurisdiction is open to inquiry and where, as here, the record discloses a lack of jurisdiction, the judgment is void. City of Birmingham v. Reed, 35 Ala. App. 31, 44 So. 2d 607; Murphy v. Louisville & N. R. Co., 258 Ala. 138, 61 So. 2d 3; Crump v. Knight, 256 Ala. 601, 56 So. 2d 625; Freeman v. McBroom, 11 Ala. 943.

"A party or his privies may assail such a judgment. Fife v. Pioneer Lumber Co., 237 Ala. 92, 185 So. 759; Cobbs v. Norville, 227 Ala. 621, 151 So. 576."

which is involved in this case. The *Green* court stated its conclusion that "it is quite clear that the case is ruled by the principle that where the provision for the liability claimed is coupled with a provision for a special remedy to be afforded not by a court but by a commission, that remedy and that alone must be employed and resort to court action may not be had for relief." *Id.*, at 359. As authority for this "principle" the court cited the Restatement of the Law, Conflict of Laws, § 618, Comment *a*, an Arkansas and a Missouri case, both resting on state law, and two federal court diversity cases, clearly applying state law.[3]

While the language of this general principle stated by the *Green* court is similar to that of *Tennessee Coal Co.* v. *George, supra,* at 359, quoted in the Court's opinion, *ante,* at 43, there is no indication whatsoever that this general state law principle was conceived to be based on federal compulsion emanating from the dictum in the *George* case. Nowhere in the *Green* opinion is there any mention of the Full Faith and Credit Clause, the *George* case, or, indeed, any federal law. Moreover, the authorities cited by the *Green* court for this general principle similarly do not rest on any concept of federal compulsion. The Restatement's position is not conceived to be based on full faith and credit grounds.[4] Neither of the federal court cases cited has any reference at all to any federal law, including the *George* case. The same is true of the Missouri case cited, and the Arkansas case cited only

[3] The cases cited at 359, n. 2, were: *Elliott* v. *De Soto Crude Oil Purchasing Corp.*, 20 F. Supp. 743; *Franzen* v. *E. I. Du Pont De Nemours & Co.*, 146 F. 2d 837; *Logan* v. *Missouri Valley Bridge & Iron Co.*, 157 Ark. 528, 249 S. W. 21; and *Oren* v. *Swift & Co.*, 330 Mo. 869, 51 S. W. 2d 59.

[4] This is clear when § 618, Comment *a*, is read in conjunction with §§ 1, 2, and 5 and the Comments thereto. In this regard, §§ 117l and 117m of Restatement Second, Conflict of Laws, Tentative Draft No. 4 (1957), should also be compared.

refers to the *George* case for a different point in the *George* case. Finally, the text writers are in accord with these authorities in not basing the general state law principle on the Full Faith and Credit Clause.[5]

The *Green* case is not a case like those in which the opinion as a whole "leaves the impression that the court probably felt constrained to rule as it did because of [decisions of this Court]," *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 554–555, or "because it felt under compulsion of federal law as enunciated by this Court so to hold," *Missouri* v. *Mayfield,* 340 U. S. 1, 5. See *Jankovich* v. *Indiana Toll Road Comm'n,* 379 U. S. 487, 492.

Thus the *Green* court clearly seems to have decided the case not on full faith and credit principles, but on the assumption that Mississippi law was in accord with the general independent state law rule.[6] When Judge Grooms and the Court of Appeals in the instant case, referred to *Green,* they were not therefore, referring to it as stating constitutional compulsion, but as stating the general state law rule to which both Mississippi and Alabama adhere. Again, as in *Green* there is nothing in either opinion below that might be taken as even a remote reference to the Full Faith and Credit Clause or any other federal rule or authority. I would not presume that the lower federal courts, particularly in a diversity case, would, in light of the settled decisions of this Court, decide a case by determining constitutional issues without first deciding threshold issues of state law. See *Alma Motor*

[5] See 2 Larson, Workmen's Compensation Law 356 (1961); Goodrich, Conflict of Laws 189 (1964); Ehrenzweig, Conflict of Laws 145, nn. 23, 32 (1962).

[6] In addition to the cases cited in note 2, *supra,* and *Singleton* v. *Hope Engineering Co.,* 223 Ala. 538, 137 So. 441, discussed *infra,* see *Mosely* v. *Empire Gas & Fuel Co.,* 313 Mo. 225, 281 S. W. 762; *Davis* v. *Swift & Co.,* 175 Tenn. 210, 133 S. W. 2d 483; *Grenier* v. *Alta Crest Farms, Inc.,* 115 Vt. 324, 58 A. 2d 884.

Co. v. *Timken Co.*, 329 U. S. 129, 136–137. It seems clear to me, therefore, that the dismissal of petitioner's action was based on independent state law and not on federal grounds.

Even if I am wrong on this point, however, and the Court is correct in assuming that the lower courts here did not rule on the question of independent state law, this would not justify the Court's ignoring the fact that the decision below is clearly supported by independent state law and, as a consequence, the constitutional issue should not be reached and decided. Cf. *Neese* v. *Southern R. Co.*, 350 U. S. 77.

In *Singleton* v. *Hope Engineering Co.*, 223 Ala. 538, 540, 137 So. 441, 442–443, the Alabama Supreme Court held that the Alabama courts do not have subject matter jurisdiction to enforce the identical Georgia Workmen's Compensation Act here in issue, on the grounds that the enforcement of the Georgia Act is vested exclusively in the Georgia Workmen's Compensation Commission. In reaching this conclusion of state law the Alabama Supreme Court did not cite the Full Faith and Credit Clause, *Tennessee Coal Co.* v. *George, supra,* or indeed any federal authority whatsoever. While *Singleton* arose on direct appeal, this fact is not significant. In the instant case, Judge Grooms expressly held that where the court that entered the default judgment lacked subject matter jurisdiction of the controversy, Alabama law permits collateral attack on the validity of the default judgment.[7] As noted above, *Singleton* is in accord with the general state rule on this point and there is no claim that its vitality as a precedent has been impaired in any

[7] See note 2, *supra*. It should be noted that the cases cited by Judge Grooms all concerned situations where the lack of subject matter jurisdiction was a matter of state law similar to the *Singleton* situation.

way.[8] Finally, while it is true that the Alabama enforcement action was dismissed without prejudice, the Alabama court in that case, in overruling the demurrer to this asserted defense, necessarily held that under Alabama law the default judgment was subject to collateral attack as it was entered by a court that lacked subject matter jurisdiction of the controversy. For these reasons I believe the decision below is clearly supported by independent Alabama law.

Certiorari was granted in this case on the assumption that it necessitated deciding the constitutional issue involving the Full Faith and Credit Clause. Since, in my view, it is unnecessary and improper to reach that issue in this case, I would dismiss the writ as improvidently granted.

But even if my analysis of the decisions below is erroneous and the Alabama law is not as clear as I conceive it to be, I would still not agree that it is appropriate to determine the ultimate constitutional issue. There is no doubt, as even the Court recognizes, that there exists here at least a lurking question of independent state law. Under such circumstances, the least that should be done is to vacate the judgment below and remand the case to the District Court for clarification of its opinion as to the status of Alabama law. Cf. *Alma Motor Co.* v. *Timken Co., supra.*

For these reasons, I respectfully dissent from the Court's disposition of this case.

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[8] It is significant in this regard that the tentative draft of the Second Restatement of the Law of Conflict of Laws reaffirms this general rule. See Restatement Second, Conflict of Laws, Tentative Draft No. 4, § 117m (1957).

FREEDMAN *v.* MARYLAND.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 69. Argued November 19, 1964.—Decided March 1, 1965.

Appellant was convicted of exhibiting a motion picture without submitting it to the Maryland State Board of Censors for prior approval, despite his contention that the motion picture censorship statute unconstitutionally impaired freedom of expression. The Maryland Court of Appeals affirmed. *Held:*

1. Where motion pictures are concerned, a requirement of prior submission to a censorship board is not necessarily unconstitutional. *Times Film Corp.* v. *City of Chicago,* 365 U. S. 43. Pp. 53–54.

2. One can challenge a licensing statute which endangers freedom of expression, whether or not his conduct could be prohibited by a properly drawn statute and whether or not he applied for a license. P. 56.

3. There is a heavy presumption against the constitutional validity of prior restraints of expression. *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 70. P. 57.

4. A noncriminal process requiring prior submission of a film to a censor avoids constitutional invalidity only with procedural safeguards designed to eliminate the dangers of censorship. Pp. 58–60.

(a) The censor must have the burden of proving that the film is expression unprotected by the Constitution. P. 58.

(b) Any restraint prior to judicial review must be limited to preservation of the status quo and for the shortest period compatible with sound judicial procedure. Pp. 58–59.

(c) A prompt final judicial determination of obscenity must be assured. P. 59.

5. The absence in the Maryland procedure of adequate safeguards against undue inhibition of protected expression renders the statutory requirement of prior submission to censorship an invalid previous restraint. Pp. 59–60.

233 Md. 498, 197 A. 2d 232, reversed.

Felix J. Bilgrey argued the cause for appellant. With him on the brief were *Richard C. Whiteford* and *Louis H. Pollak.*

Thomas B. Finan, Attorney General of Maryland, argued the cause for appellee. With him on the brief were *Robert F. Sweeney* and *Roger D. Redden,* Assistant Attorneys General.

Edward De Grazia and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union et al., as *amici curiae,* urging reversal.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellant sought to challenge the constitutionality of the Maryland motion picture censorship statute, Md. Ann. Code, 1957, Art. 66A, and exhibited the film "Revenge at Daybreak" at his Baltimore theatre without first submitting the picture to the State Board of Censors as required by § 2 thereof.[1] The State concedes that the picture does not violate the statutory standards[2] and

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[1] Md. Ann. Code, 1957, Art. 66A, § 2:

"It shall be unlawful to sell, lease, lend, exhibit or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors, hereinafter in this article called the Board."

[2] Md. Ann. Code, 1957, Art. 66A, § 6:

"(a) *Board to examine, approve or disapprove films*—The Board shall examine or supervise the examination of all films or views to be exhibited or used in the State of Maryland and shall approve and license such films or views which are moral and proper, and shall disapprove such as are obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes. All films exclusively portraying current events or pictorial news of the day, commonly called news reels, may be exhibited without examination and no license or fees shall be required therefor.

"(b) *What films considered obscene.*—For the purposes of this article, a motion picture film or view shall be considered to be obscene if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability

would have received a license if properly submitted, but the appellant was convicted of a § 2 violation despite his contention that the statute in its entirety unconstitutionally impaired freedom of expression. The Court of Appeals of Maryland affirmed, 233 Md. 498, 197 A. 2d 232, and we noted probable jurisdiction, 377 U. S. 987. We reverse.

I.

In *Times Film Corp.* v. *City of Chicago,* 365 U. S. 43, we considered and upheld a requirement of submission of motion pictures in advance of exhibition. The Court of Appeals held, on the authority of that decision, that "the Maryland censorship law must be held to be not void on its face as violative of the freedoms protected against State action by the First and Fourteenth Amendments." 233 Md., at 505, 197 A. 2d, at 235. This reliance on *Times Film* was misplaced. The only question tendered for decision in that case was "whether a prior restraint was necessarily unconstitutional *under all circumstances.*" *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 70, n. 10

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of this effect is so great as to outweigh whatever other merits the film may possess.

"(c) *What films tend to debase or corrupt morals.*—For the purposes of this article, a motion picture film or view shall be considered to be of such a character that its exhibition would tend to debase or corrupt morals if its dominant purpose or effect is erotic or pornographic; or if it portrays acts of sexual immorality, lust or lewdness, or if it expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

"(d) *What films tend to incite to crime.*—For the purposes of this article, a motion picture film or view shall be considered of such a character that its exhibition would tend to incite to crime if the theme or the manner of its presentation presents the commission of criminal acts or contempt for law as constituting profitable, desirable, acceptable, respectable or commonly accepted behavior, or if it advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs."

(emphasis in original). The exhibitor's argument that the requirement of submission without more amounted to a constitutionally prohibited prior restraint was interpreted by the Court in *Times Film* as a contention that the "constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture . . . even if this film contains the basest type of pornography, or incitement to riot, or forceful overthrow of orderly government . . . ." 365 U. S., at 46, 47. The Court held that on this "narrow" question, *id.*, at 46, the argument stated the principle against prior restraints too broadly; citing a number of our decisions, the Court quoted the statement from *Near* v. *Minnesota,* 283 U. S. 697, 716, that "the protection even as to previous restraint is not absolutely unlimited." In rejecting the proffered proposition in *Times Film* the Court emphasized, however, that "[i]t is that question alone which we decide," 365 U. S., at 46, and it would therefore be inaccurate to say that *Times Film* upheld the specific features of the Chicago censorship ordinance.

Unlike the petitioner in *Times Film,* appellant does not argue that § 2 is unconstitutional simply because it may prevent even the first showing of a film whose exhibition may legitimately be the subject of an obscenity prosecution. He presents a question quite distinct from that passed on in *Times Film;* accepting the rule in *Times Film,* he argues that § 2 constitutes an invalid prior restraint because, in the context of the remainder of the statute, it presents a danger of unduly suppressing protected expression. He focuses particularly on the procedure for an initial decision by the censorship board, which, without any judicial participation, effectively bars exhibition of any disapproved film, unless and until the exhibitor undertakes a time-consuming appeal to the Maryland courts and succeeds in having the Board's deci-

sion reversed. Under the statute, the exhibitor is required to submit the film to the Board for examination, but no time limit is imposed for completion of Board action, § 17. If the film is disapproved, or any elimination ordered, § 19 provides that

> "the person submitting such film or view for examination will receive immediate notice of such elimination or disapproval, and if appealed from, such film or view will be promptly re-examined, in the presence of such person, by two or more members of the Board, and the same finally approved or disapproved promptly after such re-examination, with the right of appeal from the decision of the Board to the Baltimore City Court of Baltimore City. There shall be a further right of appeal from the decision of the Baltimore City Court to the Court of Appeals of Maryland, subject generally to the time and manner provided for taking appeal to the Court of Appeals."

Thus there is no statutory provision for judicial participation in the procedure which bars a film, nor even assurance of prompt judicial review. Risk of delay is built into the Maryland procedure, as is borne out by experience; in the only reported case indicating the length of time required to complete an appeal, the initial judicial determination has taken four months and final vindication of the film on appellate review, six months. *United Artists Corp.* v. *Maryland State Board of Censors,* 210 Md. 586, 124 A. 2d 292.

In the light of the difference between the issues presented here and in *Times Film,* the Court of Appeals erred in saying that, since appellant's refusal to submit the film to the Board was a violation only of § 2, "he has restricted himself to an attack on that section

alone, and lacks standing to challenge any of the other provisions (or alleged shortcomings) of the statute." 233 Md., at 505, 197 A. 2d, at 236. Appellant has not challenged the submission requirement in a vacuum but in a concrete statutory context. His contention is that § 2 effects an invalid prior restraint because the structure of the other provisions of the statute contributes to the infirmity of § 2; he does not assert that the other provisions are independently invalid.

In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license. "One who might have had a license for the asking may . . . call into question the whole scheme of licensing when he is prosecuted for failure to procure it." *Thornhill* v. *Alabama,* 310 U. S. 88, 97; see *Staub* v. *City of Baxley,* 355 U. S. 313, 319; *Saia* v. *New York,* 334 U. S. 558; *Thomas* v. *Collins,* 323 U. S. 516; *Hague* v. *CIO,* 307 U. S. 496; *Lovell* v. *City of Griffin,* 303 U. S. 444, 452–453. Standing is recognized in such cases because of the ". . . danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *NAACP* v. *Button,* 371 U. S. 415, 433; see also Amsterdam, Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 75–76, 80–81, 96–104 (1960). Although we have no occasion to decide whether the vice of overbroadness infects the Maryland statute,[3] we think that appellant's assertion of a similar

[3] Appellant also challenges the constitutionality of § 6, establishing standards, as invalid for vagueness under the Due Process Clause; § 11, imposing fees for the inspection and licensing of a film, as consti-

danger in the Maryland apparatus of censorship—one always fraught with danger and viewed with suspicion—gives him standing to make that challenge. In substance his argument is that, because the apparatus operates in a statutory context in which judicial review may be too little and too late, the Maryland statute lacks sufficient safeguards for confining the censor's action to judicially determined constitutional limits, and therefore contains the same vice as a statute delegating excessive administrative discretion.

II.

Although the Court has said that motion pictures are not "necessarily subject to the precise rules governing any other particular method of expression," *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 503, it is as true here as of other forms of expression that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan, supra,* at 70. ". . . [U]nder the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Marcus* v. *Search Warrant,* 367 U. S. 717, 731. The administration of a censorship system for motion pictures presents peculiar dangers to constitutionally protected speech. Unlike a prosecution for obscenity, a censorship proceeding puts the initial burden on the exhibitor or distributor. Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the

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tuting an invalid tax upon the exercise of freedom of speech; and § 23, allowing exemptions to various classes of exhibitors, as denying him the equal protection of the laws. In view of our result, we express no views upon these claims.

constitutionally protected interests in free expression.[4] And if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final.

Applying the settled rule of our cases, we hold that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. First, the burden of proving that the film is unprotected expression must rest on the censor. As we said in *Speiser* v. *Randall,* 357 U. S. 513, 526, "Where the transcendent value of speech is involved, due process certainly requires . . . that the State bear the burden of persuasion to show that the appellants engaged in criminal speech." Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. See *Bantam Books, Inc.* v. *Sullivan, supra; A Quantity of Books* v. *Kansas,* 378 U. S. 205; *Marcus* v. *Search Warrant, supra; Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478, 518–519. To this end, the exhibitor must be assured, by

[4] See Emerson, The Doctrine of Prior Restraint, 20 Law & Contemp. Prob. 648, 656–659 (1955). This is well illustrated by the fact that the Maryland Court of Appeals has reversed the Board's disapproval in every reported case. *United Artists Corp.* v. *Maryland State Board of Censors, supra; Maryland State Board of Censors* v. *Times Film Corp.,* 212 Md. 454, 129 A. 2d 833; *Fanfare Films, Inc.* v. *Motion Picture Censor Board,* 234 Md. 10, 197 A. 2d 839.

statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. See *Bantam Books, Inc.* v. *Sullivan, supra.* Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

Without these safeguards, it may prove too burdensome to seek review of the censor's determination. Particularly in the case of motion pictures, it may take very little to deter exhibition in a given locality. The exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation. The distributor, on the other hand, may be equally unwilling to accept the burdens and delays of litigation in a particular area when, without such difficulties, he can freely exhibit his film in most of the rest of the country; for we are told that only four States and a handful of municipalities have active censorship laws.[5]

It is readily apparent that the Maryland procedural scheme does not satisfy these criteria. First, once the censor disapproves the film, the exhibitor must assume

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[5] An appendix to the brief *amici curiae* of the American Civil Liberties Union and its Maryland Branch lists New York, Virginia and Kansas as the three States having statutes similar to the Maryland statute, and the cities of Chicago, Detroit, Fort Worth and Providence as having similar ordinances. Twenty-eight of the remaining 39 municipal ordinances and codes are listed as "inactive."

the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression. Second, once the Board has acted against a film, exhibition is prohibited pending judicial review, however protracted. Under the statute, appellant could have been convicted if he had shown the film after unsuccessfully seeking a license, even though no court had ever ruled on the obscenity of the film. Third, it is abundantly clear that the Maryland statute provides no assurance of prompt judicial determination. We hold, therefore, that appellant's conviction must be reversed. The Maryland scheme fails to provide adequate safeguards against undue inhibition of protected expression, and this renders the § 2 requirement of prior submission of films to the Board an invalid previous restraint.

III.

How or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide. But a model is not lacking: In *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436, we upheld a New York injunctive procedure designed to prevent the sale of obscene books. That procedure postpones any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing. The statute provides for a hearing one day after joinder of issue; the judge must hand down his decision within two days after termination of the hearing. The New York procedure operates without prior submission to a censor, but the chilling effect of a censorship order, even one which requires judicial action for its enforcement, suggests all the more reason for expeditious determination of the question whether a particular film is constitutionally protected.

The requirement of prior submission to a censor sustained in *Times Film* is consistent with our recognition

that films differ from other forms of expression. Similarly, we think that the nature of the motion picture industry may suggest different time limits for a judicial determination. It is common knowledge that films are scheduled well before actual exhibition, and the requirement of advance submission in § 2 recognizes this. One possible scheme would be to allow the exhibitor or distributor to submit his film early enough to ensure an orderly final disposition of the case before the scheduled exhibition date—far enough in advance so that the exhibitor could safely advertise the opening on a normal basis. Failing such a scheme or sufficiently early submission under such a scheme, the statute would have to require adjudication considerably more prompt than has been the case under the Maryland statute. Otherwise, litigation might be unduly expensive and protracted, or the victorious exhibitor might find the most propitious opportunity for exhibition past. We do not mean to lay down rigid time limits or procedures, but to suggest considerations in drafting legislation to accord with local exhibition practices, and in doing so to avoid the potentially chilling effect of the Maryland statute on protected expression.

Reversed.

MR. JUSTICE DOUGLAS, whom MR. JUSTICE BLACK joins, concurring.

On several occasions I have indicated my view that movies are entitled to the same degree and kind of protection under the First Amendment as other forms of expression. *Superior Films* v. *Department of Education,* 346 U. S. 587, 588; *Kingsley Pictures Corp.* v. *Regents,* 360 U. S. 684, 697; *Times Film Corp.* v. *Chicago,* 365 U. S. 43, 78.* For the reasons there stated, I do not

*The Court today holds that a system of movie censorship must contain at least three procedural safeguards if it is not to run afoul

believe any form of censorship—no matter how speedy or prolonged it may be—is permissible. As I see it, a pictorial presentation occupies as preferred a position as any other form of expression. If censors are banned from the publishing business, from the pulpit, from the public platform—as they are—they should be banned from the theatre. I would not admit the censor even for the limited role accorded him in *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436. I adhere to my dissent in that case. *Id.,* at 446–447. Any authority to obtain a temporary injunction gives the State "the paralyzing power of a censor." *Id.,* at 446. The regime of *Kingsley Books* "substitutes punishment by contempt for punishment by jury trial." *Id.,* at 447. I would put an end to all forms and types of censorship and give full literal meaning to the command of the First Amendment.

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of the First Amendment: (1) the censor must have the burden of instituting judicial proceedings; (2) any restraint prior to judicial review can be imposed only briefly in order to preserve the status quo; and (3) a prompt judicial determination of obscenity must be assured. Thus the Chicago censorship system, upheld by the narrowest of margins in *Times Film Corp.* v. *Chicago,* 365 U. S. 43, could not survive under today's standards, for it provided not one of these safeguards, as the dissenters there expressly pointed out. *Id.,* at 73–75.

UNITED STATES *v.* GAINEY.

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

No. 13. Argued October 15, 1964.—Decided March 1, 1965.

Respondent was convicted of illegal possession of a still and carrying on the business of a distiller without a bond, in violation of 26 U. S. C. §§ 5601 (a)(1) and (4). The trial judge's instructions informed the jury of statutory provisions authorizing it to infer guilt from respondent's unexplained presence at the still site. The Court of Appeals reversed the convictions as violative of due process requirements. *Held:*

1. The statutory presumption in § 5601 (b)(2) is constitutionally permissible since there is a rational connection between a defendant's unexplained presence at a still and the comprehensive crime of the illegal distilling operation. Pp. 65–68.

2. The statute deprives the trial judge of none of his normal powers with respect to submitting the case to the jury or granting a judgment notwithstanding a verdict. P. 68.

3. The statute does not prevent the jury from being instructed on the standards for reasonable doubt and the jury here was instructed that the statutory inference was not conclusive. Pp. 68–70.

322 F. 2d 292, reversed.

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.*

Joseph H. Davis argued the cause for respondent. With him on the brief was *J. Sewell Elliott.*

MR. JUSTICE STEWART delivered the opinion of the Court.

After a jury trial in the United States District Court for the Middle District of Georgia, respondent Jackie Gainey was convicted of violating 26 U. S. C. § 5601

(a)(1) (possession, custody or control of a set up, unregistered still and distilling apparatus) and 26 U. S. C. § 5601 (a)(4) (carrying on "the business of a distiller or rectifier without having given bond as required by law").[1] In the course of his instructions the trial judge informed the jury of two statutory provisions which authorize a jury to infer guilt of the substantive offenses from the fact of a defendant's unexplained presence at the site of an illegal still.[2] The Court of Appeals for the Fifth Circuit

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[1] The evidence for the prosecution showed that an old Dodge truck with darkened headlights drove up to the site of a secluded still, hidden in a swamp in Dooly County, Georgia. The respondent, Jackie Gainey, left the truck, turned on a flashlight, and walked toward the still. There he was confronted by state and federal revenue agents. The respondent attempted to flee, but after a short chase, he and his waiting colleagues were apprehended. Since the trial, one of Gainey's co-defendants, Roy Lee Barrett, has died; the other, Cleveland Johns, elected to serve and has completed his sentence.

[2] Section 5601 (b)(1) provides:

"*(1) Unregistered stills.*

"Whenever on trial for violation of subsection (a)(1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury)."

Section 5601 (b)(2) provides:

"*(2) Failure or refusal of distiller or rectifier to give bond.*

"Whenever on trial for violation of subsection (a)(4) the defendant is shown to have been at the site or place where, and at the time when, the business of a distiller or rectifier was so engaged in or carried on, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury)."

These sections were introduced into the Code in 1958. The statutory inferences are modeled after 18 U. S. C. § 545 (1958 ed.), originally § 4 of the Smuggling Act of 1866, 14 Stat. 178, 179. Similar

reversed the convictions on the ground that these statutory inferences are unconstitutional,[3] because it thought the connection between unexplained presence at an illegal still and the substantive offenses of "possession" and "carrying on" is insufficiently rational to satisfy the due process requirements formulated by this Court in *Tot* v. *United States,* 319 U. S. 463. We granted certiorari, *sub nom. United States* v. *Barrett,* to review the exercise of the grave power of annulling an Act of Congress. 375 U. S. 962.

If either statutory inference is valid, the judgment of the Court of Appeals must be reversed, because concurrent sentences were imposed by the District Court. *Emspak* v. *United States,* 349 U. S. 190, 195; *Sinclair* v. *United States,* 279 U. S. 263, 299 (1929). We find the inference authorized by § 5601 (b)(2) constitutionally permissible, and therefore reverse the judgment without reaching the validity of § 5601 (b)(1).

The legislative record shows that Congress enacted these provisions because of "the practical impossibility of proving . . . actual participation in the illegal activities except by inference drawn from [the defendant's] presence when the illegal acts were committed . . . ."[4] The statutes were passed against a backdrop of varying formu-

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wording appears in 21 U. S. C. § 174 (1958 ed.), the Narcotic Drugs Import and Export Act of 1909, 35 Stat. 614, the constitutionality of which was sustained in *Yee Hem* v. *United States,* 268 U. S. 178.

[3] A third count charged a violation of § 5602, which prohibits carrying on the business of a distiller with intent to defraud the United States. The Court of Appeals reversed the conviction on this count also, and the Government did not seek review of this reversal. A fourth count, charging that the defendants, in violation of 26 U. S. C. § 5180 (1958 ed.), worked in a distillery on which no sign was placed showing the name of the person engaged in the distilling, resulted in a directed verdict of acquittal.

[4] Hearings before a Subcommittee of the House Committee on Ways and Means on Excise Tax Technical and Administrative Problems, Part 3, p. 95, 84th Cong., 2d Sess.

lations among the Circuits of the standards which should shape a trial judge's instructions to a jury in telling it what weight to accord the fact of a defendant's unexplained presence at an illegal still site. Long before 1958, the year the statutes were enacted, trial judges had been instructing juries that a defendant's presence at a still could be considered by them in determining whether the defendant had participated in carrying on the illegal operation. *Barton* v. *United States,* 267 F. 174, 175–176 (C. A. 4th Cir.). Compare *Wilson* v. *United States,* 162 U. S. 613. The Fourth Circuit had endorsed such a charge. *Barton* v. *United States, supra.* In the Third and Fifth Circuits the precedents were less clear. See *Graceffo* v. *United States,* 46 F. 2d 852 (C. A. 3d Cir.); *Fowler* v. *United States,* 234 F. 2d 697, 699 (C. A. 5th Cir.).

The variations among the courts of appeals concerned the reasonableness of inferring guilt of the substantive offense from the fact of unexplained presence at the site of the criminal enterprise. It is that question which Congress has now resolved in favor of the established practice of trial judges to include the inference in their charges.[5] And it is the same question of reasonableness which the petitioner asks this Court to determine in passing on the constitutionality of § 5601 (b)(2).

As the Court of Appeals correctly stated in this case, the constitutionality of the legislation depends upon the rationality of the connection "between the facts proved and the ultimate fact presumed." *Tot* v. *United States,*

[5] *Bozza* v. *United States,* 330 U. S. 160, contributed to congressional concern. See Hearings, note 4, *supra.* But that case did not deal with the problem of presence alone as insufficient evidence where the substantive offense is "carrying on" the enterprise of illegal distillation. Bozza's conviction for "carrying on" the enterprise of illegal distillation was affirmed by this Court.

319 U. S. 463, 466. The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it. As the record in the Circuits shows, courts have differed in assessing the weight to be placed upon the fact of the defendant's unexplained presence at a still. See *United States* v. *Freeman,* 286 F. 2d 262 (C. A. 4th Cir.). Yet it is precisely when courts have been unable to agree as to the exact relevance of a frequently occurring fact in an atmosphere pregnant with illegality that Congress' resolution is appropriate.

The rationality of the inference provided by § 5601 (b)(2) must be viewed in the context of the broad substantive offense it supports. Section 5601 (a)(4) proscribes "carrying on" the enterprise of illegal distillation—an offense which is one of the most comprehensive of the criminal statutes designed to stop the production and sale of untaxed liquor. See *Vukich* v. *United States,* 28 F. 2d 666, 669 (C. A. 9th Cir.). Those who aid and abet the enterpriser come within the statute's reach by virtue of 18 U. S. C. § 2 (1958 ed.). *United States* v. *Giuliano,* 263 F. 2d 582 (C. A. 3d Cir.). Suppliers, haulers, and a host of other functionaries have been convicted under the statute. See *United States* v. *Pritchard,* 55 F. Supp. 201 (D. C. W. D. S. C.), aff'd, 145 F. 2d 240 (C. A. 4th Cir.). Congress was undoubtedly aware that manufacturers of illegal liquor are notorious for the deftness with which they locate arcane spots for plying their trade. Legislative recognition of the implications of seclusion only confirms what the folklore teaches—that strangers to the illegal business rarely penetrate the curtain of

secrecy.[6] We therefore hold that § 5601 (b)(2) satisfies the test of *Tot* v. *United States, supra.*

But it is said that this statute is unconstitutional upon a different ground—that it impinges upon the trial judge's powers over the judicial proceeding. We cannot agree. Our Constitution places in the hands of the trial judge the responsibility for safeguarding the integrity of the jury trial, including the right to have a case withheld from the jury when the evidence is insufficient as a matter of law to support a conviction. The statute before us deprives the trial judge of none of his normal judicial powers. We do not interpret the provision in the statute that unexplained "presence . . . shall be deemed sufficient evidence to authorize conviction" as in any way invading the province of the judge's discretion. The language permits the judge to submit a case to the jury on the basis of the accused's presence alone, and to this extent it constitutes congressional recognition that the fact of presence does have probative worth in the determination of guilt. But where the only evidence is of presence the statute does not require the judge to submit the case to the jury, nor does it preclude the grant of a judgment notwithstanding the verdict. And the Court of Appeals may still review the trial judge's denial of motions for a directed verdict or for a judgment *n. o. v.*

The statute does not prevent the jury from being "properly instructed on the standards for reasonable

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[6] "Very few of the illicit distillers allow any one, except their most intimate friends, to approach their distilleries. Such places, as a rule, are forbidden ground, for the reason that when the violators are arrested it is a difficult matter to prove them guilty, when so few persons have ever seen them operating their distilleries." Atkinson, After the Moonshiners, By One of the Raiders, at p. 23.

"The first requisite for an illicit still is a good stream of cool water. . . .

"The next requisite is seclusion. It must be placed where no one ever travels, or even thinks of traveling." *Id.*, at p. 18.

doubt." *Holland* v. *United States,* 348 U. S. 121, 139. In this case, the trial judge instructed the jury as follows:

> "There is one other matter which I should mention. I charge you that the presence of defendants at a still, if proved, with or without flight therefrom, or attempted flight therefrom, if proved, would be a circumstance for you to consider along with all the other testimony in the case. Of course, the bare presence at a distillery and flight therefrom of an innocent man is not in and of itself enough to make him guilty. It is possible under the law for an innocent man to be present at a distillery, and it is possible for him to run when about to be apprehended, and such an innocent man ought never to be convicted, but presence at a distillery, if you think these men were present, is a circumstance to be considered along with all the other circumstances in the case in determining whether they were connected with the distillery or not. Did they have any equipment with them that was necessary at the distillery? What was the hour of day that they were there? Did the officers see them do anything? Did they make any statements?
>
> "It is your duty to explore this case, analyze the evidence pro and con fairly. Presence at a still, together with other circumstances in the case, if they are sufficient in your opinion to exclude every reasonable conclusion except that they were there connected with the distillery, in an illegal manner, . . . carrying on the business as charged . . . , if you believe those things, would authorize you in finding the defendants guilty.
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> "And under a statute enacted by Congress a few years back, when a person is on trial for . . . carrying on the business of a distiller without giving bond as required by law, as charged in this case, and the

> defendant is shown to have been at the site of the place . . . where and at the time when the business of a distiller was engaged in or carried on without bond having been given, under the law such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant by the evidence in the case and by proven facts and circumstances explains such presence to the satisfaction of the jury.
>
> *"Now this does not mean that the presence of the defendant at the site and place at the time referred to requires the jury to convict the defendant, if the defendant by the evidence in the case, facts and circumstances proved, fails to explain his presence to the satisfaction of the jury. It simply means that a jury may, if it sees fit, convict upon such evidence, as it shall be deemed in law sufficient to authorize a conviction, but does not require such a result."* (Emphasis supplied.)

The jury was thus specifically told that the statutory inference was not conclusive. "Presence" was one circumstance to be considered among many. Even if it found that the defendant had been present at the still, and that his presence remained unexplained, the jury could nonetheless acquit him if it found that the Government had not proved his guilt beyond a reasonable doubt. *Holland* v. *United States, supra.* In the absence of the statute, such an instruction to the jury would surely have been permissible. Cf. *Wilson* v. *United States, supra.* Furthermore, in the context of the instructions as a whole, we do not consider that the single phrase "unless the defendant by the evidence in the case and by proven facts and circumstances explains such presence to the satisfaction of the jury" can be fairly understood as a comment on the petitioner's failure to

testify.[7] Cf. *Bruno* v. *United States,* 308 U. S. 287. The judge's overall reference was carefully directed to the evidence as a whole, with neither allusion nor innuendo based on the defendant's decision not to take the stand.

In *McNamara* v. *Henkel,* 226 U. S. 520, 525, the Court approved a proceeding which did no more than "accord to the evidence, if unexplained, its natural probative force." That is all that Congress has done here. We cannot find that the law it enacted violates the Constitution.

Reversed.

MR. JUSTICE DOUGLAS, dissenting in part.

The statute which the Court finds constitutional provides:

> "Whenever on trial for violation of subsection (a)(4) [making it an offense to carry on the business of a distiller or rectifier without having given bond as required by law] the defendant is shown to have been at the site or place where, and at the time when, the business of a distiller or rectifier was so engaged in or carried on, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury)." 26 U. S. C. § 5601 (b)(2).

It would be possible to interpret the statute as compelling judges to give the following instruction to juries: "If you find that the defendant was present at the still, then the law requires you to assume that he was there carrying on the business of a distiller within the meaning

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[7] Indeed the better practice would be to instruct the jurors that they may draw the inference unless the evidence in the case provides a satisfactory explanation for the defendant's presence at the still, omitting any explicit reference to the statute itself in the charge.

of the statute; but you need not make this assumption if the defendant has given another explanation of his presence there and you are satisfied of the truth of that explanation." If the statute were read as compelling such an instruction, I would find it constitutionally intolerable, for the reasons so well stated by my Brother BLACK.

The Court, however, interprets the statute as merely allowing, not compelling, the jury to draw the inference of "carrying on" from the fact of "presence." The jury is left free to reject the inference if, in light of all the circumstances of the case, a reasonable doubt remains as to the defendant's guilt. That is the way the jury would normally function, apart from the statute. So, I have concluded that the statute, as construed, merely provides a rule of evidence and no more.

There are, to be sure, dangers inherent in any statutory presumption. Perhaps the jury will be overawed if it is told that some particular factual inference has been enshrined in an Act of Congress. Therefore the Court quite rightly suggests that the better practice would be to omit "any explicit reference to the statute itself in the charge." *Ante,* p. 71, n. 7. Or perhaps the judge may feel that the statute restricts his power to withhold an insufficient case from the jury or to grant a judgment notwithstanding the verdict. The Court reassures the trial judge that the statute does not thus invade the province of his discretion. Nor is the function of the appellate courts in any way circumscribed.

In my view, the acute danger in the statute as construed and applied lurks in its provision that the jury may draw the inference in question "unless *the defendant explains* such presence to the satisfaction of the jury . . . ." (Emphasis supplied.) If this meant that the judge should instruct that the inference may be drawn unless the defendant himself becomes a witness and personally

explains his presence at the still, then, as my Brother BLACK says, the statute would clearly subject the defendant to an impermissible compulsion to testify. But more subtly compelling instructions than that are outlawed by the same policy. It has long been the rule in the federal courts that the defendant's failure to testify ought not to be even the subject of unfavorable comment:

> "It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. . . . [C]ounsel is forbidden by the statute [now 18 U. S. C. § 3481]* to make any comment which would create or tend to create a presumption against the defendant from his failure to testify." *Wilson* v. *United States,* 149 U. S. 60, 66–67.

Just as it is improper for counsel to argue from the defendant's silence, so is it improper for the trial judge to call attention to the fact of defendant's silence. Indeed, under 18 U. S. C. § 3481 the defendant is entitled as a matter of right to have the trial judge expressly tell the jury that it must not attach any importance to the defendant's failure to testify; or, if the defendant sees fit, he may choose to have no mention made of his silence by anyone. *Bruno* v. *United States,* 308 U. S. 287.

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*"In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

I have previously expressed my view that this rule against comment on the defendant's silence is mandated by the Fifth Amendment, because "[u]sing a defendant's silence as evidence against him is one way of having him testify against himself." *Scott* v. *California*, 364 U. S. 471, 472 (dissenting opinion).

The charge in the present case does not, in my view, satisfy the requirements of the Fifth Amendment. The judge told the jury that the inference could be drawn "unless the defendant by the evidence in the case and by proven facts and circumstances explains such presence to the satisfaction of the jury." I believe the charge in that form runs counter to the federal policy that forbids conviction on compelled testimony, not only because, as my Brother BLACK points out, it puts direct pressure on the defendant to come forward and testify, but also because it amounts in practical effect to an improper comment on the defendant's silence where, as here, he resists the pressure and does not take the stand in his own behalf. Unlike the Court, therefore, I would not interpret the statute before us as attempting a *pro tanto* repeal of 18 U. S. C. § 3481 by authorizing such an instruction.

MR. JUSTICE BLACK, dissenting.

Respondent Gainey was tried and convicted of possession of an unregistered still [1] and of carrying on the

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[1] 26 U. S. C. § 5601 (a)(1) (1958 ed.) provides:

"Offenses.

"Any person who—

"(1) Unregistered stills.

"Has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179 (a) . . .

. . . . . .

"shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense."

business of a distiller without having given bond [2] in violation of a federal statute. Other provisions of the statute,[3] entitled "Presumptions," declare that presence at the site of such a distillery "shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury . . . ." At the trial federal and state officers testified, among other things, that they had seen Gainey at a still site. Gainey did not testify. The trial court, quite appropriately if the foregoing provisions are valid, instructed the jury

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[2] 26 U. S. C. § 5601 (a)(4) (1958 ed.) provides:

"Offenses.

"Any person who—

. . . . . .

"(*4*) *Failure or refusal of distiller or rectifier to give bond.*

"Carries on the business of a distiller or rectifier without having given bond as required by law . . .

. . . . . .

"shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense."

[3] Section 5601 (b)(1) provides:

"(*b*) *Presumptions.*

"(*1*) *Unregistered stills.*

"Whenever on trial for violation of subsection (a)(1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury)."

Section 5601 (b)(2) provides:

"(*2*) *Failure or refusal of distiller or rectifier to give bond.*

"Whenever on trial for violation of subsection (a)(4) the defendant is shown to have been at the site or place where, and at the time when, the business of a distiller or rectifier was so engaged in or carried on, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury)."

that Gainey's unexplained presence at the still was "deemed in law sufficient" to convict. I think that the statutory provisions which authorize such a charge deprived Gainey (1) of his constitutional right to trial by jury, guaranteed him both in Art. III, § 2, and in the Sixth Amendment; (2) of due process of law guaranteed by the Fifth Amendment, which includes the right to be tried for a crime in a court according to the law of the land, without any interference with that court's judicial functions by the Congress; and (3) of his right guaranteed by the Fifth Amendment not to be compelled to be a witness against himself.

First of all, let me say that I am at a loss to understand the Court's puzzling statement that "where the only evidence is of presence the statute does not require the judge to submit the case to the jury, nor does it preclude the grant of a judgment notwithstanding the verdict." The provisions in question both say unqualifiedly that "presence of the defendant shall be deemed sufficient evidence to authorize conviction" unless the defendant explains his presence. The Court holds that this statutory command in § 5601 (b)(2) is valid,[4] but then for some reason adds that judges are free to ignore it or, after telling juries that they may rely on it, are free to set aside the verdicts of those juries which do. In other words, under the Court's holding the judge is left free to take the extraordinary course of following a valid statute or not, as he chooses. Judges are not usually given such unlimited discretion to disregard valid statutes. And as the Court indicates elsewhere in its opinion, it was to prevent judges from setting aside jury verdicts based on presence alone that Congress passed this statute in the first place. Besides being almost self-contradictory, it amounts to an emasculation of

[4] Although the Court does not consider the validity of § 5601 (b)(1), its reasoning surely would seem to apply to that section as well.

these statutory provisions, I think, to say that the judge was not required to tell the jury about them. But whether or not he was bound to do so, the fact is that here he did, and so this jury deliberated with the judge's solemn instruction that Congress had decided that proof of mere unexplained presence at a still was sufficient to convict Gainey of having illegally possessed it or carried on its business. Few jurors could have failed to believe that it was their duty to convict under this charge if presence was proved, and few judges could have failed to believe it was their duty to uphold such a conviction, even though all of them in a particular case might have felt that mere presence alone was not enough to show guilt.

It has always been recognized that the guaranty of trial by jury in criminal cases means that the jury is to be the factfinder. This is the only way in which a jury can perform its basic constitutional function of determining the guilt or innocence of a defendant. See, *e. g.*, *United States ex rel. Toth* v. *Quarles,* 350 U. S. 11, 15–19; *Reid* v. *Covert,* 354 U. S. 1, 5–10 (opinion announcing judgment). And of course this constitutionally established power of a jury to determine guilt or innocence of a defendant charged with crime cannot be taken away by Congress, directly or indirectly, in whole or in part. Obviously, a necessary part of this power, vested by the Constitution in juries (or in judges when juries are waived), is the exclusive right to decide whether evidence presented at trial is sufficient to convict. I think it flaunts the constitutional power of courts and juries for Congress to tell them what "shall be deemed sufficient evidence to authorize conviction." And if Congress could not thus directly encroach upon the judge's or jury's exclusive right to declare what evidence is sufficient to prove the facts necessary for conviction, it should not be allowed to do so merely by labeling its encroachment a "presumption." Neither *Tot* v. *United States,* 319 U. S. 463, relied

on by the Court as supporting this presumption, nor any case cited in *Tot* approved such an encroachment on the power of judges or juries. In fact, so far as I can tell, the problem of whether Congress can so restrict the power of court and jury in a criminal case in a federal court has never been squarely presented to or considered by this Court, perhaps because challenges to presumptions have arisen in many crucially different contexts but nevertheless have generally failed to distinguish between presumptions used in different ways, treating them as if they are either all valid or all invalid, regardless of the rights on which their use may impinge. Because the Court also fails to differentiate among the different circumstances in which presumptions may be utilized and the different consequences which will follow, I feel it necessary to say a few words on that subject before considering specifically the validity of the use of these presumptions in the light of the circumstances and consequences of their use.

In its simplest form a presumption is an inference permitted or required by law of the existence of one fact, which is unknown or which cannot be proved, from another fact which has been proved. The fact presumed may be based on a very strong probability, a weak supposition or an arbitrary assumption. The burden on the party seeking to prove the fact may be slight, as in a civil suit, or very heavy—proof beyond a reasonable doubt—as in a criminal prosecution. This points up the fact that statutes creating presumptions cannot be treated as fungible, that is, as interchangeable for all uses and all purposes. The validity of each presumption must be determined in the light of the particular consequences that flow from its use. When matters of trifling moment are involved, presumptions may be more freely accepted, but when consequences of vital importance to litigants and to the administration of justice are at stake, a more careful scrutiny is necessary.

In judging the constitutionality of legislatively created presumptions this Court has evolved an initial criterion which applies alike to all kinds of presumptions: that before a presumption may be relied on, there must be a rational connection between the facts inferred and the facts which have been proved by competent evidence, that is, the facts proved must be evidence which is relevant, tending to prove (though not necessarily conclusively) the existence of the fact presumed. And courts have undoubtedly shown an inclination to be less strict about the logical strength of presumptive inferences they will permit in civil cases than about those which affect the trial of crimes. The stricter scrutiny in the latter situation follows from the fact that the burden of proof in a civil lawsuit is ordinarily merely a preponderance of the evidence, while in a criminal case where a man's life, liberty, or property is at stake, the prosecution must prove his guilt beyond a reasonable doubt. See *Morrison* v. *California,* 291 U. S. 82, 96–97. The case of *Bailey* v. *Alabama,* 219 U. S. 219, is a good illustration of this principle. There Bailey was accused of violating an Alabama statute which made it a crime to fail to perform personal services after obtaining money by contracting to perform them, with an intent to defraud the employer. The statute also provided that refusal or failure to perform the services, or to refund money paid for them, without just cause, constituted "prima facie evidence" (*i. e.,* gave rise to a presumption) of the intent to injure or defraud. This Court, after calling attention to prior cases dealing with the requirement of rationality, passed over the test of rationality and held the statute invalid on another ground. Looking beyond the rational-relationship doctrine the Court held that the use of this presumption by Alabama against a man accused of crime would amount to a violation of the Thirteenth Amendment to the Constitution, which forbids "involuntary

servitude, except as a punishment for crime." In so deciding the Court made it crystal clear that rationality is only the first hurdle which a legislatively created presumption must clear—that a presumption, even if rational, cannot be used to convict a man of crime if the effect of using the presumption is to deprive the accused of a constitutional right. In *Bailey* the constitutional right was given by the Thirteenth Amendment. In the case before us the accused, in my judgment, has been denied his right to the kind of trial by jury guaranteed by Art. III, § 2, and the Sixth Amendment, as well as to due process of law and freedom from self-incrimination guaranteed by the Fifth Amendment. And of course the principle announced in the *Bailey* case was not limited to rights guaranteed by the Thirteenth Amendment. The Court said in *Bailey:*

> "It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions." 219 U. S., at 239.

Thus the Court held that presumptions, while often valid (and some of which, I think, like the presumption of death based on long unexplained absence, may perhaps be even salutary in effect), must not be allowed to stand where they abridge or deny a specific constitutional guarantee. It is one thing to rely on a presumption to justify conditional administration of the estate of a person absent without explanation for seven years, see *Cunnius* v. *Reading School District,* 198 U. S. 458; compare *Scott* v. *McNeal,* 154 U. S. 34; it would be quite another to use the presumption of death from seven years' absence to convict a man of murder. I do not think it can be denied that use of the statutory presumptions in the case before

us at the very least seriously impaired Gainey's constitutional right to have a jury weigh the facts of his case without any congressional interference through predetermination of what evidence would be sufficient to prove the facts necessary to convict in a particular case.

The *Bailey* case also emphatically answers the Court's insistence that this encroachment on Gainey's constitutional rights was justified or neutralized by the trial court's instruction that while evidence of unexplained presence was sufficient under the statute to convict, the jury nonetheless was not compelled to convict. This same kind of contention was made to this Court and rejected in *Bailey,* where the Alabama Supreme Court had upheld that State's presumption on the ground that "with such evidence before them, the jury are still left free to find the accused guilty or not guilty, according as they may be satisfied of his guilt or not, by the whole evidence." *Bailey* v. *State,* 161 Ala. 75, 78, 49 So. 886, 887. This Court answered that contention then, as I think it should now, saying:

> "The point is that, in such a case, the statute *authorizes* the jury to convict. It is not enough to say that the jury may not accept that evidence as alone sufficient; for the jury may accept it, and they have the express warrant of the statute to accept [it] as a basis for their verdict." 219 U. S., at 235. (Emphasis in original.)

And the Court added that "The normal assumption is that the jury will follow the statute and, acting in accordance with the authority it confers, will accept as sufficient what the statute expressly so describes." *Id.,* at 237.

Even if I could accept the doctrine that Congress after declaring that certain conduct shall be a crime has further power to tell judges and juries that certain evidence shall be sufficient to prove that conduct and convict

a defendant, I could not agree that these statutory presumptions are constitutional. They declare mere presence at a still site without more to be sufficient evidence to convict of the crimes of carrying on a distillery business and possessing a still.[5] While presence at a still is unquestionably a relevant circumstance to add to others to prove possession or operation of a still, I could not possibly agree that mere presence is sufficient in and of itself, without any supporting evidence, to permit a finding that, beyond a reasonable doubt, the person present carried on a distillery business or possessed a still or even aided and abetted in committing those crimes. Indeed, with respect to the crime of possession, as the Court concedes, we held squarely to the contrary in *Bozza* v. *United States,* 330 U. S. 160, quite properly, I think. In setting aside the *Bozza* conviction for possession of a still, which had been based on mere presence at a still, this Court was acting in accordance with the historic principle that "independent trial judges and independent appellate judges have a most important place under our constitutional plan since they have power to set aside convictions." *United States ex rel. Toth* v. *Quarles,* 350 U. S. 11, 19. This judicial responsibility to pass on the sufficiency of the evidence must be exercised in each case, no more to be controlled by a general congressional enactment than it could be by a special act directed to one case only.[6] This protective function of the court is amply demonstrated in the case before us: while Gainey was originally indicted on four counts,

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[5] I agree with the Court's holding that the language of § 5601 (b) (2) "permits the judge to submit a case to the jury on the basis of the accused's presence alone." The Court does not suggest any reason why it would interpret the identical language in § 5601 (b) (1) any differently.

[6] Such an act obviously would be proscribed as a bill of attainder, forbidden by Art. I, § 9. See *United States* v. *Lovett,* 328 U. S. 303; *Cummings* v. *Missouri,* 4 Wall. 277; *Ex parte Garland,* 4 Wall. 333.

the trial judge directed a verdict of acquittal on one [7] and the Court of Appeals ordered acquittal on another.[8]

It indeed is true, as the Court suggests, that it was to make convictions possible on no more evidence than presence that the presumption statute here under consideration was passed. Undoubtedly a presumption which can be used to produce convictions without the necessity of proving a crucial element of the crime charged—and a sometimes difficult-to-prove element at that [9]—is a boon to prosecutors and an incongruous snare for defendants in a country that claims to require proof of guilt beyond a reasonable doubt. Quite accurately such a use of a presumption has been described as "First Aid to the District Attorney." [10] Instead of supporting the constitutionality of such a use of statutory presumptions, however, I think this argument based on necessity and convenience points out its fatal defects. I suppose no one would deny that the Government's burden would also be made lighter if the defendant was not represented by counsel, compare *Gideon* v. *Wainwright*, 372 U. S. 335,

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[7] The trial judge directed a verdict of acquittal on a count charging Gainey with working in a distillery which did not bear a sign showing the name of the person engaged in the distilling and denoting the business in which he was engaged, an offense made punishable by 26 U. S. C. §§ 5180 (a), 5681 (c) (1958 ed.).

[8] Count three of the indictment charged Gainey with carrying on the business of a distiller with intent to defraud the United States of taxes, a violation of 26 U. S. C. § 5602 (1958 ed.). The Court of Appeals, holding that the record showed "no evidence whatever of intent to defraud," set aside the jury's verdict of conviction on that count. 322 F. 2d 292, 300.

[9] In this case, however, the record shows that there unquestionably was enough other evidence to submit the case to the jury without need for any artificial presumption. But the Court does not suggest that the use here of this presumption either should be or could be called harmless error.

[10] Chamberlain, Presumptions as First Aid to the District Attorney, 14 A. B. A. J. 287.

or if the jury could receive and consider confessions extorted by torture, compare *Brown* v. *Mississippi*, 297 U. S. 278, or if evidence obtained from defendants through illegal searches and seizures could be used against them, compare *Mapp* v. *Ohio*, 367 U. S. 643, but this Court has not hesitated to strike down such encroachments on those constitutional rights. Yet here the Court sanctions a method less crude, but just as effective, to deny Gainey his constitutional right to a trial by jury.[11]

I cannot subscribe to the idea that any one of the constitutional grants of power to Congress enumerated in Art. I, § 8, including the Necessary and Proper Clause, contains either an express or an implied power of Congress to instruct juries as to what evidence is sufficient to convict defendants in particular cases.[12] Congress can

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[11] "Once the thumbscrew and the following confession made conviction easy; but that method was crude and, I suppose, now would be declared unlawful upon some ground. Hereafter, presumption is to lighten the burden of the prosecutor. The victim will be spared the trouble of confessing and will go to his cell without mutilation or disquieting outcry." *Casey* v. *United States*, 276 U. S. 413, 420 (dissenting opinion).

[12] It might be argued, although the Court does not so argue or hold, that Congress if it wished could make presence at a still a crime in itself, and so Congress should be free to create crimes which are called "possession" and "carrying on an illegal distillery business" but which are defined in such a way that unexplained presence is sufficient and indisputable evidence in all cases to support conviction for those offenses. See *Ferry* v. *Ramsey*, 277 U. S. 88. Assuming for the sake of argument that Congress could make unexplained presence a criminal act, and ignoring also the refusal of this Court in other cases to uphold a statutory presumption on such a theory, see *Heiner* v. *Donnan*, 285 U. S. 312, there is no indication here that Congress intended to adopt such a misleading method of draftsmanship, nor in my judgment could the statutory provisions if so construed escape condemnation for vagueness, under the principles applied in *Lanzetta* v. *New Jersey*, 306 U. S. 451, and many other cases.

undoubtedly create crimes, but it cannot constitutionally try them. The Constitution specifically prohibits bills of attainder. Congress can declare certain conduct a crime, unless barred by some constitutional provision, but it must, if true to our Constitution of divided powers and the Fifth Amendment's command that cases be tried according to due process of law, leave the trial of those crimes to the courts, in which judges or juries can decide the facts on their own judgment without legislative constraint and judges can set aside convictions which they believe are not justified by the evidence. See *Tot* v. *United States,* 319 U. S. 463, 473 (concurring opinion). "[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." *McFarland* v. *American Sugar Refining Co.,* 241 U. S. 79, 86. See *Manley* v. *Georgia,* 279 U. S. 1. Yet, viewed realistically, that is what the presumption which the Court today approves does in this case. I think that the presumption which should govern instead in criminal trials in the courts of this country is the time-honored presumption of innocence accorded to all criminal defendants until they are proved guilty by competent evidence.

Nor can a power of Congress to detract from the constitutional power of juries and judges to decide what facts are enough to convict be implied because of the power of Congress to make procedural rules or rules of evidence. See *Ex parte Fisk,* 113 U. S. 713, 720. It is not disputed that Congress has power to prescribe rules governing admissibility of evidence and purely procedural matters. The Congress unquestionably could declare the fact of presence to be admissible evidence, for certainly it is relevant when considered along with other circumstances. Yet this power to say what shall or shall not be admissible in no way empowers Congress to determine what facts, once admitted, suffice to prove guilt beyond a rea-

sonable doubt.[13] And I certainly cannot join the Court when it says:

> "The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it."

The implication of this statement is that somehow Congress is better qualified to decide what facts are sufficient to convict defendants than are courts and juries. I accept the proposition that Congress is the proper branch of our Government to decide legislative policies and enact general laws and that in so doing it must of necessity deal with facts to some extent. This is as the Constitution provides. But Congress is not authorized nor has it any special "expertise" with which I am familiar which entitles it to direct juries as to what conclusions they may or must draw from the unique facts of specific criminal cases tried in federal courts. Moreover, even were I to assume that Congress does have an expertise to assess facts in lawsuits which is superior to that of juries and judges, I still could not join the Court's opinion, for I think that the Founders of our Government decided for us that these are matters "within specialized"—and exclusive—"judicial

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[13] "While it is within the province of the legislature to determine the sources of evidence, the modes of verification, who may or may not be competent witnesses, I am not prepared to say they may weigh and determine the quantity of evidence, which shall suffice to produce conviction in the mind of the judge or juror who tries a cause." Thomas, J., dissenting in *Commonwealth* v. *Williams*, 6 Gray (72 Mass.) 1, 10, cited with approval in *State* v. *Beswick*, 13 R. I. 211, 219.

competence." As this Court has said with reference to jury trial of facts:

> "whether right or wrong, the premise underlying the constitutional method for determining guilt or innocence in federal courts is that laymen are better than specialists to perform this task." *United States ex rel. Toth* v. *Quarles,* 350 U. S. 11, 18.

Besides impairing Gainey's right to trial by jury according to due process safeguards, the statutes in this case I think violated Gainey's constitutional rights in still another way. These statutory presumptions must tend, when incorporated into an instruction, as they were here, to influence the jury to reach an inference which the trier of fact might not otherwise have thought justified, to push some jurors to convict who might not otherwise have done so. Cf. *Pollock* v. *Williams,* 322 U. S. 4, 15. The undoubted practical effect of letting guilt rest on unexplained presence alone is to force a defendant to come forward and testify, however much he may think doing so may jeopardize his chances of acquittal, since if he does not he almost certainly destroys those chances. This is compulsion, which I think runs counter to the Fifth Amendment's purpose to forbid convictions on compelled testimony. The compulsion here is of course more subtle and less cruel physically than compulsion by torture, but it is nonetheless compulsion and it is nonetheless effective. I am aware that this Court in *Yee Hem* v. *United States,* 268 U. S. 178, 185, held that use of a presumptive squeeze like this one did not amount to a form of compulsion forbidden by the Fifth Amendment. The Court's reasoning was contained in a single paragraph, the central argument of which was that despite a presumption like this a defendant is left "entirely free to testify or not as he chooses." That argument, it seems to me, would also justify admitting in evidence a confession

extorted by a policeman's pointing a gun at the head of an accused, on the theory that the man being threatened was entirely free to confess or not, as he chose. I think the holding in *Yee Hem* is completely out of harmony with the Fifth Amendment's prohibition against compulsory self-incrimination, and I would overrule it. See *Feldman* v. *United States,* 322 U. S. 487, 494 (dissenting opinion); compare *Leyra* v. *Denno,* 347 U. S. 556. See also *State* v. *Lapointe,* 81 N. H. 227, 123 A. 692, quoted with approval in the opinion of the court below, 322 F. 2d 292, 296 (C. A. 5th Cir.).

For all the foregoing reasons, I think that these two statutory presumptions by which Congress has tried to relieve the Government of its burden of proving a man guilty and to take away from courts and juries the function and duty of deciding guilt or innocence according to the evidence before them, unconstitutionally encroach on the functions of courts and deny persons accused of crime rights which our Constitution guarantees them. The most important and most crucial action the courts take in trying people for crime is to resolve facts. This is a judicial, not a legislative, function. I think that in passing these two sections Congress stepped over its constitutionally limited bounds and encroached on the constitutional power of courts to try cases. I would therefore affirm the judgment of the court below and grant Gainey a new trial by judge and jury with all the protections accorded by the law of the land.

CARRINGTON *v.* RASH ET AL.

CERTIORARI TO THE SUPREME COURT OF TEXAS.

No. 82. Argued January 28, 1965.—Decided March 1, 1965.

Petitioner, a member of the armed services who moved to Texas in 1962 and is concededly domiciled and intends to make his permanent home there, was refused the right to vote because of a provision of the Texas Constitution permitting a serviceman to vote only in the county where he resided at the time of entry into service. *Held:* A State can impose reasonable residence requirements for voting but it cannot, under the Equal Protection Clause, deny the ballot to a bona fide resident merely because he is a member of the armed services. Pp. 89–97.

378 S. W. 2d 304, reversed.

Wayne Windle argued the cause for petitioner. With him on the briefs was *W. C. Peticolas.*

Hawthorne Phillips, First Assistant Attorney General of Texas, and *Mary K. Wall,* Assistant Attorney General, argued the cause for respondents. With them on the brief was *Waggoner Carr,* Attorney General of Texas.

MR. JUSTICE STEWART delivered the opinion of the Court.

A provision of the Texas Constitution prohibits "[a]ny member of the Armed Forces of the United States" who moves his home to Texas during the course of his military duty from ever voting in any election in that State "so long as he or she is a member of the Armed Forces." [1]

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[1] Texas Constitution, Art. VI, § 2:

"Any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which he or she resided at the time

The question presented is whether this provision, as construed by the Supreme Court of Texas in the present case,[2] deprives the petitioner of a right secured by the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court of Texas decided that it does not and refused to issue a writ of mandamus ordering petitioner's local election officials to permit him to vote, two Justices dissenting. 378 S. W. 2d 304. We granted certiorari, 379 U. S. 812.

The petitioner, a sergeant in the United States Army, entered the service from Alabama in 1946 at the age of 18.

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of entering such service so long as he or she is a member of the Armed Forces."

The constitutional provision has been implemented by Article 5.02 of the Election Code of Texas which provides, in part:

"Notwithstanding any other provision of this section, any member of the Armed Forces of the United States or component branches thereof who is on active duty in the military service of the United States may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces. This restriction applies only to members of the Armed Forces who are on active duty, and the phrase 'time of entering such service' means the time of commencing the current active duty. A re-enlistment after a temporary separation from service upon termination of a prior enlistment shall not be construed to be the commencement of a new period of service, and in such case the county in which the person resided at the time of commencing active service under the prior enlistment shall be construed to be the county of residence at the time of entering service."

In *Mabry* v. *Davis,* 232 F. Supp. 930 (D. C. W. D. Texas 1964), a three-judge court recently declared this same provision unconstitutional as violating the Equal Protection Clause of the Fourteenth Amendment.

[2] "The self-evident purpose of the amendment to the Constitution was to prevent a person entering military service as a resident citizen of a county in Texas from acquiring a different voting residence in Texas during the period of his military service, *and to prevent a person entering military service as a resident citizen of another state from acquiring a voting residence in Texas during the period of military service.*" 378 S. W. 2d 304, 305. (Emphasis supplied.)

The State concedes that he has been domiciled in Texas since 1962, and that he intends to make his home there permanently. He has purchased a house in El Paso where he lives with his wife and two children. He is also the proprietor of a small business there. The petitioner's post of military duty is not in Texas, but at White Sands, New Mexico. He regularly commutes from his home in El Paso to his Army job at White Sands. He pays property taxes in Texas and has his automobile registered there. But for his uniform, the State concedes that the petitioner would be eligible to vote in El Paso County, Texas.

Texas has unquestioned power to impose reasonable residence restrictions on the availability of the ballot. *Pope* v. *Williams,* 193 U. S. 621. There can be no doubt either of the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise. Indeed, "[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised." *Lassiter* v. *Northampton Election Bd.,* 360 U. S. 45, 50. Compare *United States* v. *Classic,* 313 U. S. 299; *Ex parte Yarbrough,* 110 U. S. 651. "In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution." *Pope* v. *Williams, supra,* at 632.

This Texas constitutional provision, however, is unique.[3] Texas has said that no serviceman may ever

[3] While many States have rules which prescribe special tests for qualifying military personnel for the vote, none goes so far as com-

acquire a voting residence in the State so long as he remains in service. It is true that the State has treated all members of the military with an equal hand. And mere classification, as this Court has often said, does not of itself deprive a group of equal protection. *Williamson*

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pletely to foreclose from the franchise all servicemen who were nonresidents before induction.

One other State, Nevada, has a provision which on its face seems as prohibitory as Art. VI, § 2, of the Texas Constitution. The Nevada Constitution provides that:

"The right of suffrage shall be enjoyed by all persons, otherwise entitled to the same, who may be in the military or naval service of the United States; *provided, the votes so cast shall be made to apply to the county and township of which said voters were bona fide residents at the time of their entry into such service . . . .*" Nev. Const., Art. 2, § 3. (Emphasis supplied.)

But the Attorney General of Nevada has recently interpreted this provision to mean that servicemen such as petitioner can establish a voting residence in the State if they show their intent to remain by "clear and unequivocal evidence." Op. Atty. Gen. Nev. 194, 197 (1961–1962).

Under the Federal Voting Assistance Act of 1955, 69 Stat. 584, the Department of Defense collects and distributes to military personnel an analysis of state voter qualifications as applied to servicemen. The 1964 report states:

"For voting purposes the legal residence of members of the Armed Forces is generally the State from which they entered military service. This home State remains as the only State in which a person in the Armed Forces has the legal right to vote unless certain conditions are met. Almost all States except Texas will permit persons in the Armed Forces to acquire a new voting residence within their jurisdiction. When this is accomplished, voting rights in the old State of residence are lost." Voting Information 1964, Department of Defense, p. x.

Constitutional and statutory provisions of other States which treat the military specially, do not absolutely prohibit any opportunity to prove residence. The Georgia Constitution, for example, provides that no member of the Armed Forces "shall acquire the rights of an elector by reason of being stationed on duty in this State." Georgia Const., § 2–702; see Indiana Const., Art. 2, § 3; Oregon Const., Art.

v. *Lee Optical Co.*, 348 U. S. 483. But the fact that a State is dealing with a distinct class and treats the members of that class equally does not end the judicial inquiry. "The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose. . . ." *McLaughlin* v. *Florida*, 379 U. S. 184, 191.

It is argued that this absolute denial of the vote to servicemen like the petitioner fulfills two purposes. First, the State says it has a legitimate interest in immunizing its elections from the concentrated balloting of military personnel, whose collective voice may overwhelm a small local civilian community. Secondly, the State says it has a valid interest in protecting the franchise from infiltration by transients, and it can reasonably assume that those servicemen who fall within the constitutional exclusion will be within the State for only a short period of time.

The theory underlying the State's first contention is that the Texas constitutional provision is necessary to prevent the danger of a "takeover" of the civilian community resulting from concentrated voting by large numbers of military personnel in bases placed near Texas towns and cities. A base commander, Texas suggests, who opposes local police administration or teaching policies in local schools, might influence his men to vote in conformity with his predilections. Local bond issues may fail, and property taxes stagnate at low levels because military personnel are unwilling to invest in the future of the area. We stress—and this a theme to be reiterated—that Texas has the right to require that all mili-

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II, § 5; Alabama Code, Tit. 17, § 17. Other States distinguish between servicemen who live on the base, and those who have acquired homes in the community. Cf. Restatement, Conflict of Laws § 21, Comment *c*.

tary personnel enrolled to vote be bona fide residents of the community. But if they are in fact residents, with the intention of making Texas their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation. Cf. *Gray* v. *Sanders,* 372 U. S. 368. "Fencing out" from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. "[T]he exercise of rights so vital to the maintenance of democratic institutions," *Schneider* v. *State,* 308 U. S. 147, 161, cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents. Yet, that is what Texas claims to have done here.

The State's second argument is that its voting ban is justified because of the transient nature of service in the Armed Forces.[4] As the Supreme Court of Texas stated: "Persons in military service are subject at all times to reassignment, and hence to a change in their actual residence . . . they do not elect to be where they are. Their reasons for being where they are . . . cannot be the same as [those of] the permanent residents." 378 S. W. 2d, at 306. The Texas Constitution provides that a United States citizen can become a qualified elector if he has "resided in this State one (1) year next preceding an election and the last six (6) months within the district or county

[4] The constitutional provision at issue in this case seems designed more as a rule prohibiting a serviceman from ever acquiring a voting residence than a disqualification from the franchise. Prior to 1954, Art. VI, § 1, of the Texas Constitution included among the "classes of persons . . . not . . . allowed to vote in this State": "5. All soldiers, marines and seamen employed in the service of the Army or Navy of the United States." This clause was eliminated, according to the annotator's notes, to "confer the privilege to vote upon members of the regular establishment of the Armed Forces." 9 Vernon's Texas Civ. Stat. 19 (1964 Supp.). The 1954 constitutional amendment, involved in this case, was added to the section which establishes residence qualifications for voters.

in which such person offers to vote." Article VI, § 2, Texas Constitution. It is the integrity of this qualification of residence which Texas contends is protected by the voting ban on members of the Armed Forces.

But only where military personnel are involved has Texas been unwilling to develop more precise tests to determine the bona fides of an individual claiming to have actually made his home in the State long enough to vote. The State's law reports disclose that there have been many cases where the local election officials have determined the issue of bona fide residence. These officials and the courts reviewing their actions have required a "freely exercised intention" of remaining within the State, *Harrison* v. *Chesshir,* 316 S. W. 2d 909, 915. The declarations of voters concerning their intent to reside in the State and in a particular county is often not conclusive; the election officials may look to the actual facts and circumstances. *Stratton* v. *Hall,* 90 S. W. 2d 865, 866. By statute,[5] Texas deals with particular categories of citizens who, like soldiers, present specialized problems in determining residence. Students at colleges and universities in Texas, patients in hospitals and other institutions within the State, and civilian employees of the United States Government may be as transient as military personnel. But all of them are given at least an opportunity to show the election officials that they are bona fide residents.

Indeed, Texas has been able, in other areas, to winnow successfully from the ranks of the military those whose residence in the State is bona fide. In divorce cases, for example, the residence requirement for jurisdictional purposes, like the requirement for the vote, is one year in the State and six months in the forum county. The Texas courts have held that merely being stationed within the

[5] 9 Vernon's Tex. Civ. Stat. (Election Code) Art. 5.08.

State may be insufficient to show residence, even though the statutory period is fulfilled. Even a declared intention to establish a residence may be not enough. "However, the fact that one is a soldier or sailor does not deprive him of the right to change his residence or domicile and acquire a new one." *Robinson* v. *Robinson,* 235 S. W. 2d 228, 230.

We deal here with matters close to the core of our constitutional system. "The right . . . to choose," *United States* v. *Classic,* 313 U. S. 299, 314, that this Court has been so zealous to protect, means, at the least, that States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State. *Oyama* v. *California,* 332 U. S. 633. By forbidding a soldier ever to controvert the presumption of nonresidence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment. "[T]here is no indication in the Constitution that . . . occupation affords a permissible basis for distinguishing between qualified voters within the State." *Gray* v. *Sanders,* 372 U. S. 368, 380.

We recognize that special problems may be involved in determining whether servicemen have actually acquired a new domicile in a State for franchise purposes. We emphasize that Texas is free to take reasonable and adequate steps, as have other States,[6] to see that all applicants for the vote actually fulfill the requirements of bona fide residence. But this constitutional provision goes beyond such rules. "[T]he presumption here created is . . . definitely conclusive—incapable of being overcome by proof of the most positive character." *Heiner* v. *Donnan,* 285 U. S. 312, 324. All servicemen not residents of Texas before induction come within the provision's sweep. Not one of them can ever vote in Texas, no matter how

[6] See note 3, *supra.*

long Texas may have been his true home. "[T]he uniform of our country . . . [must not] be the badge of disfranchisement for the man or woman who wears it." [7]

Reversed.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, dissenting.

I.

Anyone not familiar with the provisions of the Fourteenth Amendment, the history of that Amendment, and the decisions of the Court in this constitutional area, would gather from today's opinion that it is an established constitutional tenet that state laws governing the qualifications of voters are subject to the limitations of the Equal Protection Clause. Yet any dispassionate survey of the past will reveal that the present decision is the first to so hold.

In making this holding the Court totally ignores, as it did in last Term's reapportionment cases, *Reynolds* v. *Sims*, 377 U. S. 533 (and companion cases), all the history of the Fourteenth Amendment and the course of judicial decisions which together plainly show that the Equal Protection Clause was not intended to touch state electoral matters. See my dissenting opinion in *Reynolds* v. *Sims*, at 589. If that history does not prove what I think it does, we are at least entitled to be told why. While I cannot express surprise over today's decision after the reapportionment cases, which though bound to follow I continue to believe are constitutionally indefensible, I can and do respectfully, but earnestly, record my protest

[7] Message of Governor Ellis Arnall to General Assembly of Georgia, p. 5 (January 3, 1944).

against this further extension of federal judicial power into the political affairs of the States. The reapportionment cases do not require this extension. They were concerned with methods of constituting state legislatures; this case involves state voter qualifications. The Court is quite right in not even citing them.[1]

I deplore the added impetus which this decision gives to the current tendency of judging constitutional ques-

[1] None of the cases on which the Court does rely lends any support to its decision.

In *Pope* v. *Williams,* 193 U. S. 621, the Court upheld a Maryland statute which required voters to have been registered in the State for at least a year. The Court said of the right to vote:

"It is not a privilege springing from citizenship of the United States. . . . It may not be refused on account of race, color or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution [obviously referring to the Fifteenth and not the Fourteenth Amendment]. . . . The question whether the conditions prescribed by the State might be regarded by others as reasonable or unreasonable is not a Federal one." 193 U. S., at 632–633.

Lassiter v. *Northampton Election Bd.,* 360 U. S. 45, upheld the literacy test applied in North Carolina against an attack made on its face. The Court noted that:

"Of course a literacy test, fair on its face, may be employed to perpetuate that discrimination which the *Fifteenth Amendment* was designed to uproot." 360 U. S., at 53. (Emphasis added.)

Gray v. *Sanders,* 372 U. S. 368, struck down Georgia's county-unit system for counting votes in a party primary election for the nomination of a United States Senator. It did not deal with voter qualifications.

United States v. *Classic,* 313 U. S. 299, dealt with stuffing ballot boxes, and *Ex parte Yarbrough,* 110 U. S. 651, with intimidation of Negroes attempting to vote. Neither dealt with voter qualifications.

None of the other federal cases cited by the Court was concerned in any way with voting.

tions on the basis of abstract "justice" unleashed from the limiting principles that go with our constitutional system. Constitutionally principled adjudication, high in the process of which is due recognition of the just demands of federalism, leaves ample room for the protection of individual rights. A constitutional democracy which in order to cope with seeming needs of the moment is willing to temporize with its basic distribution and limitation of governmental powers will sooner or later find itself in trouble.

For reasons set forth at length in my dissent in *Reynolds,* I would dismiss the complaint in this case for failure to state a claim of federal right.

II.

I also think this decision wrong even on the Court's premise that it is free to extend the Equal Protection Clause so as to reach state-established voter qualifications. The question here is simply whether the differentiation in voting eligibility requirements which Texas has made is founded on a rational classification. In judging this question I think that the dictates of history, even though the Court has seen fit to disregard them for the purpose of determining whether it should get into the matter at all, should cause the Court to take a hard look before striking down a traditional state policy in this area as rationally indefensible.

Essentially the Texas statute establishes a rule that servicemen from other States stationed at Texas bases are to be treated as transients for voting purposes. No one disputes that in the vast majority of cases Texas' view of things accords with fact. Although it is doubtless true that this rule may operate in some instances contrary to the actual facts, I do not think that the Federal Constitution prevents the State from ignoring that possibility in the overall picture. In my opinion Texas

could rationally conclude that such instances would likely be too minimal to justify the administrative expenditure involved in coping with the "special problems" (*ante*, p. 96) entailed in winnowing out the bona fide permanent residents from among the transient servicemen living off base and sending their children to local schools.

Beyond this, I think a legitimate distinction may be drawn between those who come voluntarily into Texas in connection with private occupations and those ordered into Texas by military authority. Residences established by the latter are subject to the doubt, not present to the same degree with the former, that when the military compulsion ends, so also may the desire to remain in Texas.

And finally, I think that Texas, given the traditional American notion that control of the military should always be kept in civilian hands, emphasized in the case of Texas by its own special historical experience,[2] could

[2] The 1837 election law of the Republic of Texas, § 9, provided "That regular enlisted soldiers, and volunteers for during the war, shall not be eligible to vote for civil officers." 2 Laws of Republic of Texas, p. 8, in 1 Gammel, Laws of Texas, p. 1350. "This provision was no doubt inspired by the mutinous conduct of the nonresident volunteers who had been recruited in the United States after the Battle of San Jacinto. They had defied the provisional government and on one occasion in July, 1836, had sent an officer to arrest President David G. Burnett and his cabinet to bring them to trial before the army. They had continued their rebellious conduct after Sam Houston became the first president under the Constitution of 1836. It was not until May, 1837, that Houston was able to dissolve the army and eliminate this threat to civil authority. This provision disfranchising soldiers in the regular army was placed in the 1845 Constitution of the State of Texas and has remained in each succeeding constitution. It was modified in 1932 to exempt the National Guard and reserve and retired officers and men." McCall, History of Texas Election Laws, 9 Vernon's Ann. Tex. Civ. Stat., pp. XVII–XVIII (1952).

Other States which had similar provisions in their early constitutions included Alabama, Const. of 1819, Art. III, § 5; Arkansas, Const. of 1836, Art. IV, § 2; Indiana, Const. of 1816, Art. VI, § 1; Louisiana,

rationally decide to protect state and local politics against the influences of military voting strength by, in effect, postponing the privilege of voting otherwise attaching to a service-acquired domicile until the serviceman becomes a civilian and by limiting Texan servicemen to voting in the counties of their original domicile.[3] Such a policy on Texas' part may seem to many unduly provincial in light of modern conditions, but it cannot, in my view, be said to be unconstitutional.

Thus, whether or not this Court has subject matter jurisdiction in this case, the judgment of the Supreme Court of Texas should not be disturbed.

Const. of 1845, Art. 12; Missouri, Const. of 1820, Art. III, § 10; South Carolina, Const. of 1790 (as amended in 1810), Art. I, § 4; Virginia, Const. of 1830, Art. III, § 14.

The 1932 amendment to the Texas Constitution was replaced in 1954 by the present provision.

[3] Tex. Const., Art. VI, § 2, quoted in Court's opinion, *ante*, n. 1.

UNITED STATES *v.* VENTRESCA.

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

No. 28. Argued January 18–19, 1965.—Decided March 1, 1965.

An Alcohol and Tobacco Tax Division Investigator made an affidavit stating his belief, on the basis of his own observations and the observations and investigation of other Investigators, that there was an illegal distillery operation in respondent's house. The affidavit described different occasions when a car was driven to the rear of respondent's house with loads of sugar or empty tins; the loading at the house of apparently full five-gallon cans; the smelling by Investigators as they walked in front of the house of fermenting mash; and their hearing the sound of a motor pump and metallic noises from the direction of the house. A Commissioner issued a search warrant on the basis of the affidavit, pursuant to which a still was found for the illegal possession and operation of which respondent was convicted. The Court of Appeals reversed the conviction, holding the warrant insufficient to establish probable cause. *Held:* The affidavit amply showed facts to establish probable cause to support the Commissioner's issuance of the search warrant. Pp. 105–111.

(a) In a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall. Pp. 106–107.

(b) An affidavit for a search warrant may be based on hearsay information so long as the magistrate is informed of some of the underlying circumstances supporting the affiant's conclusions and his belief that any informant involved, whose identity need not be disclosed, was credible or his information reliable. *Aguilar* v. *Texas*, 378 U. S. 108, followed. P. 108.

(c) Though in order for a magistrate to perform his detached function of determining probable cause an affidavit must recite the underlying circumstances and not mere conclusions as to probable cause, the affidavit must be tested in a commonsense way. Pp. 108–109.

(d) Since a fair reading of the whole affidavit, which is detailed and specific, setting forth many of the underlying circumstances, reveals that its conclusions are substantially based upon observa-

tions of government officers, probable cause for the issuance of a warrant was shown. Pp. 110–111.

324 F. 2d 864, reversed.

Frank I. Goodman argued the cause for the United States. On the brief were *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer.*

Matthew R. McCann argued the cause for respondent. With him on the brief was *Edward C. Maher.*

Mr. Justice Goldberg delivered the opinion of the Court.

Respondent, Ventresca, was convicted in the United States District Court for the District of Massachusetts of possessing and operating an illegal distillery. The conviction was reversed by the Court of Appeals (one judge dissenting) on the ground that the affidavit for a search warrant pursuant to which the still was found was insufficient to establish probable cause. 324 F. 2d 864.

The affidavit upon which the warrant was issued was made and submitted to a United States Commissioner on August 31, 1961, by Walter Mazaka, an Investigator for the Alcohol and Tobacco Tax Division of the Internal Revenue Service. He stated that he had reason to believe that an illegal distillery was in operation in respondent, Ventresca's, house at 148½ Coburn Avenue in Worcester, Massachusetts. The grounds for this belief were set forth in detail in the affidavit, prefaced with the following statement:

> "Based upon observations made by me, and based upon information received officially from other Investigators attached to the Alcohol and Tobacco Tax Division assigned to this investigation, and reports orally made to me describing the results of their

observations and investigation, this request for the issuance of a search warrant is made."

The affidavit then described seven different occasions between July 28 and August 30, 1961, when a Pontiac car was driven into the yard to the rear of Ventresca's house. On four occasions the car carried loads of sugar in 60-pound bags; it made two trips loaded with empty tin cans; and once it was merely observed as being heavily laden. Garry, the car's owner, and Incardone, a passenger, were seen on several occasions loading the car at Ventresca's house and later unloading apparently full five-gallon cans at Garry's house late in the evening. On August 28, after a delivery of empty tin cans to Ventresca's house, Garry and Incardone were observed carrying from the house cans which appeared to be filled and placing them in the trunk of Garry's car. The affidavit went on to state that at about 4 a. m. on August 18, and at about 4 a. m. on August 30, "Investigators" smelled the odor of fermenting mash as they walked along the sidewalk in front of Ventresca's house. On August 18 they heard, "[a]t or about the same time, . . . certain metallic noises." On August 30, the day before the warrant was applied for, they heard (as they smelled the mash) "sounds similar to that of a motor or a pump coming from the direction of" Ventresca's house. The affidavit concluded: "The foregoing information is based upon personal knowledge and information which has been obtained from Investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, who have been assigned to this investigation."

The District Court upheld the validity of the warrant on a motion to suppress. The divided Court of Appeals held the warrant insufficient because it read the affidavit as not specifically stating in so many words that the information it contained was based upon the personal knowledge of Mazaka or other reliable investigators. The

Court of Appeals reasoned that all of the information recited in the affidavit might conceivably have been obtained by investigators other than Mazaka, and it could not be certain that the information of these other investigators was not in turn based upon hearsay received from unreliable informants rather than their own personal observations. For this reason the court found that probable cause had not been established. 324 F. 2d, at 868–870. We granted certiorari to consider the standards by which a reviewing court should approach the interpretation of affidavits supporting warrants which have been duly issued by examining magistrates. 377 U. S. 989. For the reasons stated below, we reverse the judgment of the Court of Appeals.

I.

The Fourth Amendment states:

> "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." [1]

We begin our analysis of this constitutional rule mindful of the fact that in this case a search was made pursuant to a search warrant. In discussing the Fourth Amendment policy against unnecessary invasions of privacy, we stated in *Aguilar* v. *Texas,* 378 U. S. 108:

> "An evaluation of the constitutionality of a search warrant should begin with the rule that 'the informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be pre-

[1] The Fourth Amendment's policy against unreasonable searches and seizures finds expression in Rule 41 of the Federal Rules of Criminal Procedure.

> ferred over the hurried action of officers . . . who may happen to make arrests.' *United States* v. *Lefkowitz,* 285 U. S. 452, 464. The reasons for this rule go to the foundations of the Fourth Amendment." 378 U. S., at 110–111.

In *Jones* v. *United States,* 362 U. S. 257, 270, this Court, strongly supporting the preference to be accorded searches under a warrant, indicated that in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall. In *Johnson* v. *United States,* 333 U. S. 10, and *Chapman* v. *United States,* 365 U. S. 610, the Court, in condemning searches by officers who invaded premises without a warrant, plainly intimated that had the proper course of obtaining a warrant from a magistrate been followed and had the magistrate on the same evidence available to the police made a finding of probable cause, the search under the warrant would have been sustained. Mr. Justice Jackson stated for the Court in *Johnson:*

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *Johnson* v. *United States, supra,* at 13–14.

The fact that exceptions to the requirement that searches and seizures be undertaken only after obtaining a warrant

are limited [2] underscores the preference accorded police action taken under a warrant as against searches and seizures without one.

While a warrant may issue only upon a finding of "probable cause," this Court has long held that "the term 'probable cause' . . . means less than evidence which would justify condemnation," *Locke* v. *United States,* 7 Cranch 339, 348, and that a finding of "probable cause" may rest upon evidence which is not legally competent in a criminal trial. *Draper* v. *United States,* 358 U. S. 307, 311.

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[2] The exceptions are illustrated by cases in which "seizure is impossible except without warrant," *Carroll* v. *United States,* 267 U. S. 132, 156, such as a search of a moving object where "it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought," *Carroll* v. *United States, supra,* at 153, and those in which search is incident to a lawful arrest. This latter exception is itself a limited one. We stated in *Preston* v. *United States,* 376 U. S. 364:

"Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. *Weeks* v. *United States,* 232 U. S. 383, 392 (1914); *Agnello* v. *United States,* 269 U. S. 20, 30 (1925). This right to search and seize without a search warrant extends to things under the accused's immediate control, *Carroll* v. *United States, supra,* 267 U. S., at 158, and, to an extent depending on the circumstances of the case, to the place where he is arrested, *Agnello* v. *United States, supra,* 269 U. S., at 30; *Marron* v. *United States,* 275 U. S. 192, 199 (1927); *United States* v. *Rabinowitz,* 339 U. S. 56, 61–62 (1950). The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." 376 U. S., at 367.

As the Court stated in *Brinegar* v. *United States,* 338 U. S. 160, 173, "There is a large difference between the two things to be proved [guilt and probable cause], as well as between the tribunals which determine them, and therefore a like difference in the *quanta* and modes of proof required to establish them." Thus hearsay may be the basis for issuance of the warrant "so long as there [is] a substantial basis for crediting the hearsay." *Jones* v. *United States, supra,* at 272. And, in *Aguilar* we recognized that "an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant," so long as the magistrate is "informed of some of the underlying circumstances" supporting the affiant's conclusions and his belief that any informant involved "whose identity need not be disclosed . . . was 'credible' or his information 'reliable.' " *Aguilar* v. *Texas, supra,* at 114.

These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the "underlying circum-

stances" upon which that belief is based. See *Aguilar* v. *Texas, supra.* Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. However, where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. *Jones* v. *United States, supra,* at 270.

II.

The application of the principles stated above leads us to reverse the Court of Appeals. The affidavit in this case, if read in a commonsense way rather than technically, shows ample facts to establish probable cause and allow the Commissioner to issue the search warrant. The affidavit at issue here, unlike the affidavit held insufficient in *Aguilar,* is detailed and specific. It sets forth not merely "some of the underlying circumstances" supporting the officer's belief, but a good many of them. This is apparent from the summary of the affidavit already recited and from its text which is reproduced in the Appendix.

The Court of Appeals did not question the specificity of the affidavit. It rested its holding that the affidavit was insufficient on the ground that "[t]he affidavit failed to clearly indicate which of the facts alleged therein were hearsay or which were within the affiant's own knowledge," and therefore "[t]he Commissioner could only conclude that the entire affidavit was based on hearsay."

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324 F. 2d, at 868. While the Court of Appeals recognized that an affidavit based on hearsay will be sufficient, "so long as a substantial basis for crediting the hearsay is presented," *Jones* v. *United States, supra,* at 269, it felt that no such basis existed here because the hearsay consisted of reports by "Investigators," and the affidavit did not recite how the Investigators obtained their information. The Court of Appeals conceded that the affidavit stated that the Investigators themselves smelled the odor of fermenting mash, but argued that the rest of their information might itself have been based upon hearsay thus raising "the distinct possibility of hearsay-upon-hearsay." 324 F. 2d, at 869. For this reason, it held that the affidavit did not establish probable cause.

We disagree with the conclusion of the Court of Appeals. Its determination that the affidavit might have been based wholly upon hearsay cannot be supported in light of the fact that Mazaka, a Government Investigator, swore under oath that the relevant information was in part based "upon observations made by me" and "upon personal knowledge" as well as upon "information which has been obtained from Investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, who have been assigned to this investigation." It also seems to us that the assumption of the Court of Appeals that all of the information in Mazaka's affidavit may in fact have come from unreliable anonymous informers, passed on to Government Investigators, who in turn related this information to Mazaka is without foundation. Mazaka swore that, insofar as the affidavit was not based upon his own observations, it was "based upon information received officially from other Investigators attached to the Alcohol and Tobacco Tax Division assigned to this investigation, and reports orally made to me describing the results of their *observations* and investigation." (Empha-

sis added.) The Court of Appeals itself recognized that the affidavit stated that " 'Investigators' [employees of the Service] smelled the odor of fermenting mash in the vicinity of the suspected dwelling." 324 F. 2d, at 869. A qualified officer's detection of the smell of mash has often been held a very strong factor in determining that probable cause exists so as to allow issuance of a warrant.[3] Moreover, upon reading the affidavit as a whole, it becomes clear that the detailed observations recounted in the affidavit cannot fairly be regarded as having been made in any significant part by persons other than full-time Investigators of the Alcohol and Tobacco Tax Division of the Internal Revenue Service. Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number.[4] We conclude that the affidavit showed probable cause and that the Court of Appeals misapprehended its judicial function in reviewing this affidavit by giving it an unduly technical and restrictive reading.

This Court is alert to invalidate unconstitutional searches and seizures whether with or without a warrant. See *Aguilar* v. *Texas, supra; Stanford* v. *Texas,* 379 U. S. 476; *Preston* v. *United States,* 376 U. S. 364; *Beck* v. *Ohio,* 379 U. S. 89. By doing so, it vindicates individual liberties and strengthens the administration of justice by promoting respect for law and order. This Court is equally concerned to uphold the actions of law

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[3] See, *e. g., Monnette* v. *United States,* 299 F. 2d 847, 850 (C. A. 5th Cir.). Cf. *Chapman* v. *United States,* 365 U. S. 610; *Steeber* v. *United States,* 198 F. 2d 615, 616, 618 (C. A. 10th Cir.); *United States* v. *Kaplan,* 89 F. 2d 869 (C. A. 2d Cir.).

[4] See, *e. g., Rugendorf* v. *United States,* 376 U. S. 528; *Chin Kay* v. *United States,* 311 F. 2d 317, 320 (C. A. 9th Cir.); *United States* v. *McCormick,* 309 F. 2d 367, 372 (C. A. 7th Cir.); *Weise* v. *United States,* 251 F. 2d 867, 868 (C. A. 9th Cir.).

enforcement officers consistently following the proper constitutional course. This is no less important to the administration of justice than the invalidation of convictions because of disregard of individual rights or official overreaching. In our view the officers in this case did what the Constitution requires. They obtained a warrant from a judicial officer "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the . . . things to be seized." It is vital that having done so their actions should be sustained under a system of justice responsive both to the needs of individual liberty and to the rights of the community.

Reversed.

APPENDIX TO OPINION OF THE COURT.

Affidavit for Search Warrant

Before W. Arthur Garrity, Worcester, Massachusetts
The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as a one-family light green wooden frame dwelling house located at 148½ Coburn Avenue, Worcester, occupied by Giacomo Ventresca and his family, together with all approaches and appurtenances thereto, in the District of Massachusetts, there is now being concealed certain property, namely an unknown quantity of material and certain apparatus, articles and devices, including a still and distilling apparatus setup with all attachments thereto, together with an unknown quantity of mash, an unknown quantity of distilled spirits, and other material used in the manufacture of non-tax-paid liquors; which are being held and possessed, and which have been used and are intended for use, in the distillation, manufacture, possession, and distribution of non-tax-paid liquors, in violation of the provisions of 26 USC 5171 (a), 5173, 5178, 5179 (a), 5222 (a), 5602, and 5686.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

See Attached Sheet

/s/ Walter A. Mazaka
Investigator, Alcohol and Tobacco Tax Div., Internal Revenue Service

Sworn to before me, and subscribed in my presence, August 31st, 1961

/s/ W. Arthur Garrity
United States Commissioner

Based upon observations made by me, and based upon information received officially from other Investigators attached to the Alcohol and Tobacco Tax Division assigned to this investigation, and reports orally made to me describing the results of their observations and investigation, this request for the issuance of a search warrant is made.

On or about July 28, 1961, about 6:45 P.M., an observation was made covering a Pontiac automobile owned by one Joseph Garry. Garry and one Joseph Incardone put thirteen bags of sugar into the car. These bags of sugar weighed sixty pounds each. Ten such bags were put into the trunk, and three were placed in the rear seat. Those in the rear seat were marked "Domino." The others appeared to have similar markings. After the sugar was loaded into the car, Garry together with Incardone drove it to the vicinity of 148 Coburn Avenue, Worcester, Massachusetts, where the car was parked. Sometime later, the car with its contents was driven into the yard to the rear of 148 and between the premises 148 and 148½ Coburn Avenue. After remaining there about twenty-five minutes, the same two men drove in the direction of Boston.

On August 2, 1961 a Pontiac car owned by Garry, and driven by Garry with Incardone as a passenger, was followed from Boston to Worcester. The car appeared heavily laden. The car was again driven into the driveway at 148 and 148½ Coburn Avenue to the rear of the yard and between the above-numbered houses.

On August 7, 1961 at least six sixty-pound bags of Domino Sugar were loaded into the Pontiac owned by Garry. The loading was done by Garry and Incardone. The car traveled from Boston to Worcester, then to Holden, and returned with its contents and entered the driveway at 148 and 148½ Coburn Avenue, where the car was parked at the rear between the two houses.

On August 11, 1961 new empty metal or tin cans were transferred from a car owned by Incardone to the Pontiac owned by Garry on Highland Street in Hyde Park. The Pontiac was driven by Garry with Incardone as a passenger to Worcester, and into the yard at 148 and 148½ Coburn Avenue to the rear and between the two numbered premises.

On August 16, 1961 the Pontiac was observed. In the back seat bags of sugar were observed covered with a cloth or tarpaulin. A sixty-pound bag of sugar was on the front seat. Garry was observed after loading the above-described sugar into the car placing a carton with various five-pound bags of sugar on the top of the tarpaulin. The car was then driven by Garry with Incardone as a passenger to Worcester together with its contents into the yard at 148 and 148½ Coburn Avenue to the rear of and between the two houses. About Midnight on the same night, the Pontiac driven by Garry with Incardone as a passenger was seen pulling up to the premises at 59 Highland Street, Hyde Park, where Garry lives. Garry opened the trunk of his car, and removed ten five-gallon cans therefrom, and placed them on the sidewalk. He then entered the house, and opened a door on the side.

Incardone made five trips from the sidewalk to the side of the house carrying two five-gallon cans on each such trip. It appeared that the cans were filled. On each of these trips, Incardone passed the two cans to someone standing in the doorway. Immediately after the fifth such trip, Garry came out of the door and joined Incardone. They walked to the sidewalk, and talked for a few moments. Incardone then drove away, and Garry went into his home.

On August 18, 1961 Investigators smelled an odor of fermenting mash on two occasions between 4:00 A.M. and 5:00 A.M. The first such odor was detected as they walked along the sidewalk in front of 148 Coburn Avenue, and the second such odor was detected from the side of 148 Coburn Avenue. At or about the same time, the Investigators heard certain metallic noises which cannot be further identified by source or sound.

On August 24, 1961 the Pontiac was observed parked at a bowling alley and coffee shop off Route 9. The back of the car contained what appeared to be boxes covered by a cloth or tarpaulin, but which cannot be more specifically identified. On the front seat of the car was observed a sixty-pound bag of Revere Sugar. Garry and Incardone were observed in the restaurant or coffee shop eating. Later the car was seen driven to the rear of 148 between 148 and 148½ Coburn Avenue, Worcester.

About Midnight the Pontiac was observed pulling up in front of Garry's house at 59 Highland Street, Hyde Park. Garry was driving, and Incardone was a passenger. They both got out of the car. Garry opened the trunk, and then entered his house. From the trunk of the car there was removed eleven five-gallon cans which appeared to be filled. Incardone made six trips to a door on the side of the house. He carried two five-gallon cans on each trip, except the sixth trip. On that trip he carried one can, having passed the others to somebody in the door-

way, and on the last trip he entered the house. He remained there at least forty-five minutes, and was not observed to leave.

On August 28, 1961 Garry drove Incardone in his car to Worcester. On Lake Ave. they met Giacomo Ventresca, who lives at 148½ Coburn Avenue, Worcester. Ventresca entered the car driven by Garry. The car was then driven into the yard to the rear of 148 and between 148 and 148½ Coburn Avenue. An observation was made that empty metal cans, five-gallon size, were being taken from the car owned by Garry, and brought into the premises at 148½ Coburn Avenue, which was occupied by Ventresca. Later, new cans similar in size, shape and appearance were observed being placed into the trunk of Garry's car while parked at the rear of 148 and in front of 148½ Coburn Avenue. The manner in which the cans were handled, and the sound[s] which were heard during the handling of these cans, were consistent with that of cans containing liquid.

On August 30, 1961, at about 4:00 A.M., an odor of fermenting mash was detected while Investigators were walking on the sidewalk in front of 148 Coburn Avenue. At the same time, they heard sounds similar to that of a motor or a pump coming from the direction of 148½ Coburn Avenue.

The foregoing information is based upon personal knowledge and information which has been obtained from Investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, who have been assigned to this investigation.

/s/ WALTER A. MAZAKA

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE concurs, dissenting.

With all deference, the present affidavit seems hopelessly inadequate to me as a basis for a magistrate's

informed determination that a search warrant should issue.

We deal with the constitutional right of privacy that can be invaded only on a showing of "probable cause" as provided by the Fourth Amendment. That is a strict standard; what the police say does not necessarily carry the day; "probable cause" is in the keeping of the magistrate. *Giordenello* v. *United States,* 357 U. S. 480, 486–487; *Johnson* v. *United States,* 333 U. S. 10, 14. Yet anything he says does not necessarily go either. He too is bound by the Constitution. His discretion is reviewable. *Aguilar* v. *Texas,* 378 U. S. 108, 111. But unless the constitutional standard of "probable cause" is defined in meticulous ways, the discretion of police and of magistrates alike will become absolute. The present case, illustrates how the mere weight of lengthy and vague recitals takes the place of reasonably probative evidence of the existence of crime.

I.

Investigator Mazaka sought a warrant for the purpose of searching the premises at 148½ Coburn Avenue, occupied by respondent and his family, because, he averred, he had reason to believe that there was concealed on the premises an illegal still and other material connected with the manufacture of nontax-paid liquors. The grounds for this belief were recited in 12 paragraphs on an attached sheet, as reproduced in the Appendix to the Court's opinion, *ante,* p. 112.

The factual recitals comprise 10 paragraphs, each paragraph setting forth the alleged events of a single day, except that August 24, 1961, is dealt with in two paragraphs. Of these factual recitals more will be said in a moment. The first and last paragraphs of the 12 describe the sources from which the affiant has gained the information set forth in the factual paragraphs. These sources are, according to the first paragraph, three in

number: (1) "observations made by me"; (2) "information received officially from other Investigators"; and (3) "reports orally made to me [by other investigators] describing the results of their observations and investigation." In the last paragraph the affiant describes the sources of his information slightly differently: "The foregoing information is based upon personal knowledge and information which has been obtained from Investigators . . . ."

Of the 10 factual paragraphs eight describe trips said to have been made to and from the vicinity of 148½ Coburn Avenue by one Garry and one Incardone. On these trips, it is said, there were delivered to the vicinity of 148½ Coburn Avenue large quantities of sugar (four deliveries) and empty metal cans (two deliveries, on one of which respondent himself is said to have been a passenger in the car); on one occasion it was observed only that the car was "heavily laden." It is said that on two occasions Garry and Incardone were seen taking apparently filled cans into Garry's house, 59 Highland Street, from the Pontiac; on one such occasion the Pontiac, it is said, had been at Coburn Avenue earlier in the day, apparently making a sugar delivery. And, finally, it is averred that on one occasion seemingly filled cans were loaded into the Pontiac near 148½ Coburn Avenue, shortly after a delivery of empties to that address.

The "facts" recited in these eight paragraphs, it is said, permit the inference that a still was being operated on respondent's premises. But are these "facts" really facts? A statement of "fact" is only as credible as its source. Investigator Mazaka evidently believes these statements to be correct; but the magistrate must, of course, know something of the basis of that belief. *Nathanson* v. *United States,* 290 U. S. 41. Is the belief of this affiant based on personal observation, or on hearsay, or on hearsay on hearsay? Nowhere in the affidavit is the source

of these eight paragraphs of information revealed. In each paragraph the alleged events are simply described directly, or else it is said that certain events "were observed." Scarcely a clue is given as to who the observer might have been. It might have been the affiant, though one would not expect that he would so studiously refrain from revealing that he himself witnessed these events. The observers might have been some other investigators, though the affiant does not say so; yet in the two paragraphs next to be discussed the observers are prominently identified as investigators. Perhaps the ultimate source of most of these statements was one or more private citizens, who were interviewed by investigators, whose reports on these interviews came in due course to Investigator Mazaka, who then composed the affidavit. Perhaps many of the "facts" recited in the affidavit were supplied by an unknown informant over the telephone.

In most instances the language of the affidavit suggests that some investigator witnessed the alleged events. For example, the second paragraph begins: "On or about July 28, 1961, about 6:45 P. M., an observation was made covering a Pontiac automobile owned by one Joseph Garry." But the presumed investigator who may have been "covering" this automobile is in no way identified. There is no way of knowing whether the report of this alleged observation was made directly to the affiant or whether it went through one or more intermediaries.

Turning now to the remaining two "factual" paragraphs, we find it averred that "Investigators" smelled fermenting mash and heard metallic and other noises in the vicinity of 148½ Coburn Avenue. On August 18, it is said, investigators twice smelled mash between 4 and 5 a. m. as they walked on the sidewalk in front of and beside the house at 148 Coburn Avenue, which is apparently the house next to respondent's. The "Investigators" are not further identified. On August 30 at about 4 a. m., it

is averred, unidentified investigators detected the odor of fermenting mash while they were "walking on the sidewalk in front of 148 Coburn Avenue." The source of the odor is again not specified; but sounds heard at the same time, similar to the sounds made by "a motor or a pump," are stated to have come "from the direction of 148½ Coburn Avenue."

Such is the substance of the affidavit. No particular item of information is identified as within the first-hand knowledge of the affiant. Certain smells and sounds are explicitly described as having been directly perceived by unnamed investigators. The sources of all the other information are left to speculation.

The Court's unconcern over the failure of the affidavit to identify the sources of the information recited seems based in part on the detailed, lengthy nature of the factual recitals. The Court seems to say that even if we assume that only some small part of the information is trustworthy, still enough remains to establish probable cause. But I would direct attention to the fact that only *one* of the 12 paragraphs in this affidavit definitely points the finger of suspicion at 148½ Coburn Avenue: that is the paragraph describing the alleged events of August 28, 1961. In every other paragraph the recitals point no more to *148½* Coburn Avenue than they do to *148* Coburn Avenue. The August 28 paragraph is critical to the finding of the existence of probable cause for the search of 148½ Coburn Avenue. Yet the source of the information contained in that paragraph is in no way identified and it is therefore impossible to determine the trustworthiness of that crucial information.

II.

A discussion of the legal principles governing the sufficiency of this affidavit must, unhappily, begin with *Draper* v. *United States*, 358 U. S. 307. There an officer

had been told by an informer, known to the officer to be reliable, that a man of a certain description would get off a certain train with heroin in his possession. The officer met the train, observed a man of that description getting off, and arrested him. The Court held that there was probable cause for the arrest. In *Jones* v. *United States,* 362 U. S. 257, the Court applied the holding in *Draper* to find an affidavit sufficient to establish probable cause for the issuance of a search warrant, even though the facts stated in the affidavit did not rest on the affiant's personal observations but rather on the observations of another. The Court held that an affidavit could rest on hearsay, *"so long as a substantial basis for crediting the hearsay is presented." Id.,* at 269. (Emphasis supplied.) In *Jones* the basis for crediting the informant's hearsay was: (1) the affiant swore that the informant had previously given information to him which was correct; (2) the affiant had been given corroborating information by other informants; and (3) the affiant was independently familiar with the persons claimed by the informants to be concealing narcotics in their apartment, and he knew them to have admitted to the use of narcotics.

I dissented from the decisions of the Court in these two cases, for the reasons which I set forth most fully in *Draper, supra,* at 314 *et seq.* But though I regard these decisions* as taking a view destructive of the guarantees of the Fourth Amendment, they are in any event clearly not dispositive of the present case. As I have already shown, the affidavit here does not set forth a single corroborating

*In these cases we might have drawn a clear, unmistakable line and held that hearsay evidence could not support a search warrant. But we did not so hold; instead we held that hearsay was competent for this purpose if there was "a substantial basis" for crediting it, thereby muddying the waters with considerations of corroboration and informer's reliability. Thus, by forsaking precise standards, the discretion of police and magistrates became less subject to judicial control.

fact that is sworn to be within the personal knowledge of the affiant. Moreover, there is not a single statement in the affidavit that could not well be hearsay on hearsay or some other multiple form of hearsay.

We are told, however, that it is at least clear that "Investigators" detected the smell of mash in the vicinity of 148½ Coburn Avenue. And the Court says: "Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number," *ante,* p. 111. But I would make *Taylor* v. *United States,* 286 U. S. 1, 6, my starting point, where the Court stated: "Prohibition officers may rely on a distinctive odor as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees against unreasonable search." In *Johnson* v. *United States,* 333 U. S. 10, 13, the Court explained what the decision in *Taylor* meant: "That decision held only that odors alone do not authorize a search without warrant. If the presence of odors is testified to before a magistrate *and he finds the affiant qualified to know the odor,* and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant." (Emphasis supplied.) It is hardly necessary to point out that a magistrate cannot begin to assess the odor-identifying qualifications of persons whose identity is unknown to him. Nor is it necessary to belabor the point that these odors of mash are not ever stated in the affidavit to have emanated from 148½ Coburn Avenue.

III.

The Court of Appeals was surely correct when it observed that "the affidavit leaves as a complete mystery the manner in which the Investigators discovered their information." 324 F. 2d 864, 869. Such being the case,

I see no way to avoid the conclusion of the majority below: "If hearsay evidence is to be relied upon in the preparation of an affidavit for a search warrant, the officer or attorney preparing such an affidavit should keep in mind that hearsay statements are only as credible as their source and only as strong as their corroboration. And where the source of the information is in doubt and the corroboration by the affiant is unclear, the affidavit is insufficient." *Id.*, at 869–870. That conclusion states a relatively clear standard of probable cause and is in sharp contrast to the amorphous one upon which today's decision rests.

In *Jones* v. *United States, supra,* this Court forgot, as it forgets again today, that the duty of the magistrate is not delegable to the police. *Nathanson* v. *United States,* 290 U. S. 41. It is for the magistrate, not the police, to decide whether there is probable cause for the issuance of the warrant. That function cannot be discharged by the magistrate unless the police first discharge their own, different responsibility: "to evidence what is reliable and why, and not to introduce a hodge-podge under some general formalistic coverall." 324 F. 2d, at 870. And see *Masiello* v. *United States,* 304 F. 2d 399, 401–402. *That* is the duty of the police—the rest is not for them.

I would affirm the decision below.

IN RE RYAN.

APPEAL FROM THE SUPREME COURT OF HAWAII.

No. 748. Decided March 1, 1965.

Appeal dismissed for want of a substantial federal question.

Joseph A. Ryan, pro se.

PER CURIAM.

The motion to dispense with printing the jurisdictional statement is granted. The appeal is dismissed for want of a substantial federal question.

MASON ET UX. *v.* MIDWESTERN GAS TRANSMISSION CO.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 759. Decided March 1, 1965.

Appeal dismissed and certiorari denied.
Reported below: 31 Ill. 2d 340, 201 N. E. 2d 379.

Stanley B. Balbach for appellants.

Charles A. Bane, Justin A. Stanley and *James E. Knox, Jr.*, for appellee.

PER CURIAM.

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

CITY OF CORONADO ET AL. *v.* SAN DIEGO UNIFIED PORT DISTRICT ET AL.

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

No. 763. Decided March 1, 1965.

Appeal dismissed for want of a substantial federal question. Reported below: 227 Cal. App. 2d 455, 38 Cal. Rptr. 834.

George A. Blackstone for appellants.

Aaron W. Reese and *Burnham Enersen* for San Diego Unified Port District et al., and *Thomas C. Lynch,* Attorney General, and *Ariel C. Hilton,* Deputy Attorney General, for the State of California, appellees.

PER CURIAM.

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

DRUEDING ET AL. *v.* DEVLIN ET AL.

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

No. 772. Decided March 1, 1965.

234 F. Supp. 721, affirmed.

Lawrence Speiser, Allison W. Brown, Jr., and *Edward L. Genn* for appellants.

PER CURIAM.

The judgment is affirmed.

773-301 O-65-13

MADDOX *v.* BIRZGALIS, STATE HOSPITAL SUPERINTENDENT.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 653, Misc. Decided March 1, 1965.

Appeal dismissed and certiorari denied.

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 a writ of certiorari, certiorari is denied.

BONANNO *v.* LOUISIANA.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 728, Misc. Decided March 1, 1965.

Appeal dismissed for want of a substantial federal question.
Reported below: 245 La. 1117, 163 So. 2d 72.

Herbert J. Garon for appellant.

PER CURIAM.

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

BLAAUW ET AL. *v.* GRAND TRUNK WESTERN RAILROAD CO.

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

No. 740. Decided March 1, 1965.

Certiorari granted, judgment vacated and case remanded.

Reported below: 333 F. 2d 540.

Richard G. Finn for petitioners.

Edward L. Foote for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Seventh Circuit for reconsideration in light of the opinion of the Appellate Court of Illinois, First District, in *American National Bank & Trust Co.* v. *Pennsylvania R. Co.*, 52 Ill. App. 2d 406, 202 N. E. 2d 79.

UNITED STATES *v.* MISSISSIPPI ET AL.

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

No. 73. Argued January 26, 1965.—Decided March 8, 1965.

Charging that appellees, the State of Mississippi, the Election Commissioners, and six voting registrars of that State were destroying the right of Mississippi Negroes to vote, the United States brought this action for relief under 42 U. S. C. § 1971 (d) and other provisions. The complaint alleged a long-standing, carefully executed plan to keep Negroes in Mississippi from voting. It stated that in 1890, in order to restrict the Negro franchise, a new constitution was adopted, § 244 of which established as a voting prerequisite reading, understanding, or giving a reasonable interpretation of a section of the state constitution; that this provision, when coupled with Negro ineligibility until about 1952 to vote in the decisive Democratic primary election, within nine years reduced the percentage of qualified voters who were Negroes from over 50% to about 9% and by 1954 only about 5% of Negroes of voting age were registered; that in 1954, § 244 was amended to make all of its previously alternative requirements apply and to make an applicant additionally demonstrate "a reasonable understanding of the duties and obligations of citizenship," a requirement which registrars allegedly have applied in a racially discriminatory manner; that in 1960 two discriminatory voting statutes were adopted, one imposing a "good moral character" qualification, and the other (contrary to federal law) permitting destruction of some voting records; and that in 1962 a "package" of legislation was enacted further to impede Negro voting registration. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted, held that the Election Commissioners were not proper parties, that the registrars could not be sued jointly, and that venue was improper as to some. *Held:*

1. Section 1971 (a) of Title 42 U. S. C. guarantees the right of citizens "who are otherwise qualified by law" to vote at any election without racial distinction, and subsection (c) authorizes the Attorney General to sue for preventive relief to protect that right regardless of whether it is threatened by invalid laws or valid laws discriminatorily applied. Pp. 136–138.

2. Section 1971 (c) authorizes the Attorney General to make the State a defendant whether or not the office of registrar is vacant. Pp. 138–141.

3. Since under state law the Election Commissioners have the duty to help administer the voter registration laws by formulating rules for tests applied to applicants, the Commissioners were properly named as defendants. Pp. 141–142.

4. The registrars, who were charged with taking part in a statewide scheme to keep Negroes from voting for racial reasons, were properly joined as defendants in one suit, Rule 20 (a) of the Federal Rules of Civil Procedure providing for joinder where there is asserted a right to relief arising out of the same transaction or series of transactions and where any question of law or fact common to all will arise in the action; and therefore the venue as to those outside the district and division where the District Court sat was properly laid under 28 U. S. C. §§ 1392 (a) and 1393 (b). Pp. 142–143.

5. The complaint charging that the State of Mississippi and its officials for over three quarters of a century had enacted and enforced constitutional provisions, statutes, rules and regulations, and engaged in discriminatory practices, to keep the number of white voters as high and the number of Negro voters as low as possible, stated a cause of action and it was error to dismiss the complaint without trial. Pp. 143–144.

229 F. Supp. 925, reversed and remanded.

Solicitor General Cox argued the cause for the United States. With him on the brief were *Assistant Attorney General Marshall, Louis F. Claiborne, Harold H. Greene, David Rubin, Howard A. Glickstein* and *J. Harold Flannery.*

Charles Clark, Special Assistant Attorney General of Mississippi, argued the cause for appellees. With him on the briefs were *Joe T. Patterson,* Attorney General of Mississippi, *Dugas Shands,* Assistant Attorney General, *P. M. Stockett,* Special Assistant Attorney General, and *Aubrey Bell.*

Francis Biddle, Norman Dorsen and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

The United States by the Attorney General brought this action in the United States District Court for the Southern District of Mississippi, Jackson Division, against the State of Mississippi, the three members of the Mississippi State Board of Election Commissioners, and six county Registrars of Voters. The complaint charged that the defendants and their agents had engaged and, unless restrained, would continue to engage in acts and practices hampering and destroying the right of Negro citizens of Mississippi to vote, in violation of 42 U. S. C. § 1971 (a) (1958 ed.), and of the Fourteenth [1] and Fifteenth [2] Amendments and Article I of the United States Constitution. Jurisdiction of the Court was invoked under 42 U. S. C. § 1971 (d) (1958 ed.) and 28 U. S. C. § 1345 (1958 ed.), and because the complaint charged that provisions of the state constitution and statutes pertaining to voter registration violated the United States Con-

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[1] United States Constitution, Amendment XIV, provides in part:

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[2] United States Constitution, Amendment XV, provides:

"SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"SECTION 2. The Congress shall have power to enforce this article by appropriate legislation."

stitution, the case was heard by three judges, pursuant to 28 U. S. C. § 2281 (1958 ed.). All the defendants moved to dismiss on the ground that the complaint failed to state a claim on which relief could be granted. In addition the State moved separately to dismiss on the ground that the United States had no power to make it a defendant in such a suit, and the three Election Commissioners answered that the complaint failed to show that they had enforced or that they had a duty to enforce the provisions of state law alleged to be unconstitutional. Five of the registrars moved for a severance and separate trials, and the four who were not residents of the Southern District of Mississippi, Jackson Division, moved for changes of venue to the respective districts and divisions where they lived. The District Court in an opinion by the late Circuit Judge Cameron, in which District Judge Cox joined,[3] dismissed the complaint on all the grounds which the defendants had assigned and also ruled that the registrars could not be sued jointly and that venue was improper as to the registrars who did not live in the district and division in which the court was sitting. 229 F. Supp. 925. Circuit Judge Brown dissented. We noted probable jurisdiction, 377 U. S. 988, and set the case down for argument immediately preceding *Louisiana* v. *United States, post,* p. 145.

The basic issue before us in this case is whether the dismissal for failure to state a claim upon which relief could be granted was proper. The United States alleges that in 1890 a majority of the qualified voters in Mississippi were Negroes, but that in that year a constitutional convention adopted a new state constitution, one of the chief purposes of which was, in the words of the complaint, to "restrict the Negro franchise and to establish and perpetuate white political supremacy and racial segregation

[3] Judge Cox also wrote a separate concurring opinion.

in Mississippi." Section 244 of that constitution established a new prerequisite for voting: that a person otherwise qualified be able to read any section of the Mississippi Constitution, *or* understand the same when read to him, *or* give a reasonable interpretation thereof.[4] This new requirement, coupled with the fact that until about 1952 Negroes were not eligible to vote in the primary election of the Democratic Party, victory in which was "tantamount to election," worked so well in keeping Negroes from voting, the complaint charges, that by 1899 the percentage of qualified voters in the State who were Negroes had declined from over 50% to about 9%, and by 1954 only about 5% of the Negroes of voting age in Mississippi were registered.

By the 1950's a much higher proportion of Negroes of voting age in Mississippi was literate than had been the case in 1890, and since a decision of the Fifth Circuit in 1951 [5] had pointed out that the 1890 requirement allowed persons to vote if they met any one of the three alternative requirements, the State took steps to multiply the barriers keeping its Negro citizens from voting. In 1954 the state constitution was amended to provide that thereafter an applicant for registration had to be able to read and copy in writing any section of the Mississippi Constitution, *and* give a reasonable interpretation of that section to the county registrar, *and*, in addition, demonstrate to the registrar "a reasonable understand-

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[4] Section 244 of the Mississippi Constitution of 1890 provided:

"On and after the first day of January, A. D., 1892, every elector shall, in addition to the foregoing qualifications, be able to read any section of the constitution of this State; or he shall be able to understand the same when read to him, or give a reasonable interpretation thereof. A new registration shall be made before the next ensuing election after January the first, A. D., 1892."

[5] *Peay* v. *Cox*, 190 F. 2d 123, 126 (C. A. 5th Cir.), cert. denied, 342 U. S. 896.

ing of the duties and obligations of citizenship under a constitutional form of government." [6] The complaint charges that these provisions lend themselves to misuse and to discriminatory administration because they leave the registrars completely at large, free to be as demanding or as lenient as they choose in judging an applicant's understanding of the state constitution and of the "duties and obligations of citizenship," and that since the adoption of this amendment the registrars have in fact applied standards which varied in difficulty according to whether an applicant was white or colored.

In 1960 the state constitution was amended to add a new voting qualification of "good moral character," [7] an addition which it is charged was to serve as yet another device to give a registrar power to permit an applicant to vote or not, depending solely on the registrar's own whim or caprice, ungoverned by any legal standard. A statute also passed in 1960 [8] repealed a prior Mississippi statute which had provided that application forms be retained as permanent public records, and adopted a new rule that unless appeal is taken from an adverse ruling and no new application is made prior to final judgment on that

[6] As amended § 244 of the Mississippi Constitution reads in part:

"Every elector shall, in addition to the foregoing qualifications be able to read and write any section of the Constitution of this State and give a reasonable interpretation thereof to the county registrar. He shall demonstrate to the county registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government. . . ."

[7] Section 241–A of the Mississippi Constitution provides:

"In addition to all other qualifications required of a person to be entitled to register for the purpose of becoming a qualified elector, such person shall be of good moral character.

"The Legislature shall have the power to enforce the provisions of this section by appropriate legislation."

[8] Miss. Laws 1960, c. 449, Miss. Code Ann. § 3209.6 (1962 Cum. Supp.).

appeal, registrars no longer need keep any record made in connection with the application of anyone to register to vote. This law is alleged to be in direct violation of Title III of the Civil Rights Act of 1960, which requires that records of voting registration be kept.[9] The complaint alleged further that the defendants had destroyed and unless restrained by the court would continue to destroy these records. Finally, it was alleged that in 1962 the Mississippi Legislature adopted a package of legislation [10] affecting registration, the purpose and effect of which was to "deter, hinder, prevent, delay and harass Negroes and to make it more difficult for Negroes in their efforts to become registered voters, to facilitate discrimination against Negroes, and to make it more difficult for the United States to protect the right of all its citizens to vote without distinction of race or color." These 1962 laws provide, among other things, that application forms must be filled out "properly and responsively" by the applicant without any assistance, and that a registrar may not tell an applicant why he failed the test because

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[9] 74 Stat. 88, 42 U. S. C. §§ 1974–1974e (1958 ed., Supp. V).

[10] Miss. Laws 1962, c. 569, § 1, Miss. Code Ann. § 3209.6 (1962 Cum. Supp.) (requiring that application forms provide that applicants demonstrate "good moral character" and that registrars observe this requirement); Miss. Laws 1962, c. 570, Miss. Code Ann. § 3213 (1962 Cum. Supp.) (requiring applicants to fill in all blanks on the application form "properly and responsively" without any assistance); Miss. Laws 1962, c. 571, Miss. Code Ann. § 3212.5 (1962 Cum. Supp.) (prohibiting registrars from telling an applicant why he was rejected, "as so to do may constitute assistance to the applicant on another application"); Miss. Laws 1962, c. 572, Miss. Code Ann. § 3212.7 (1962 Cum. Supp.) (requiring newspaper publication of applicants' names); Miss. Laws 1962, c. 573, Miss. Code Ann. §§ 3217–01—3217–15 (1962 Cum. Supp.) (providing for challenge by any voter of an applicant's qualifications to vote); Miss. Laws 1962, c. 574, Miss. Code Ann. § 3232 (1962 Cum. Supp.) (eliminating designation of race in county poll books).

to do so might constitute assistance, and they allegedly give registrars even greater discretion to deny Negroes the right to register on formal, technical, inconsequential errors.[11]

By way of relief the court was asked (1) to declare the challenged state laws unconstitutional as violations of federal constitutional provisions and statutes; (2) to find that by these laws Negroes had been denied the right to vote pursuant to a "pattern and practice" of racial discrimination; [12] (3) to enjoin the defendants from enforcing any of these state laws or in any other way acting to "delay, prevent, hinder, discourage, or harass Negro citizens, on account of their race or color, from applying for registration and becoming registered voters in the State of Mississippi," or using any other interpretation or understanding test which "bears a direct relationship to the quality of public education afforded Negro applicants"; and (4) to order the defendants to register any Negro applicant who is over age 21, able to read, a resident for the period of time prescribed by state law, and not disqualified by state laws disfranchising the insane and certain convicted criminals.

It is apparent that the complaint which the majority of the District Court dismissed charged a long-standing, carefully prepared, and faithfully observed plan to bar Negroes from voting in the State of Mississippi, a plan which the registration statistics included in the complaint

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[11] Miss. Laws 1962, c. 570, Miss. Code Ann. § 3213 (1962 Cum. Supp.), is claimed by the Government to have had the latter effect. In its brief in this Court the Government argues that this provision is invalid on its face as contrary to § 101 (a) of the Civil Rights Act of 1964, 78 Stat. 241, amending § 131 of the Civil Rights Act of 1957, 71 Stat. 637, 42 U. S. C. § 1971 (a) (1958 ed.).

[12] Such a finding would by force of 42 U. S. C. § 1971 (e) (1958 ed., Supp. V) authorize a court to make an order declaring that a person denied the right to vote because of color is entitled to vote.

would seem to show had been remarkably successful. This brings us to a consideration of the specific grounds assigned by the District Court for its dismissal.

I.

One ground upon which the majority of the District Court dismissed the Government's complaint was that the United States is without authority, absent the clearest possible congressional authorization, to bring an action like this one which challenges the validity of state laws allegedly used as devices to keep Negroes from voting on account of their race. We need not discuss the power of the United States to bring such an action without authorization by Congress, for in 42 U. S. C. § 1971 (1958 ed.) there is express congressional authorization for the United States to file a suit precisely of this kind. Section 1971 (a) guarantees the right of citizens "who are otherwise qualified by law to vote at any election" to be allowed to vote "without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding." [13] And subsection (c) of § 1971 specifically authorizes the Attorney General to file proper proceedings for preventive relief to protect this right to vote without discrimination on account of color whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would

[13] "All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding." Act of May 31, 1870, 16 Stat. 140, 42 U. S. C. § 1971 (a) (1958 ed.).

deprive any other person of that right.[14] The District Court's holding that despite the clear language quoted above the United States still was not authorized to file this suit seems to rest on the emphasis it places on the phrase "otherwise qualified by law" in § 1971 (a). By stressing these words the majority below reached the conclusion that if Negroes were kept from voting by state laws, even though those laws were unconstitutional, instead of being barred by unlawful discriminatory application of laws otherwise valid, then they were not "otherwise qualified" and so § 1971 did not apply to them. In other words, while private persons might file suits under § 1971 against individual registrars who discriminated in applying otherwise valid laws, and while such suits might even be filed by the Government, see *United States* v. *Raines*, 362 U. S. 17, the statute did not authorize the United States to bring suits challenging the validity of the State's voting laws as such, however discriminatory they might be. We can find no possible justification for

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[14] 74 Stat. 90, 42 U. S. C. § 1971 (c) (1958 ed., Supp. V), provides:

"Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person.

"Whenever, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a) of this section, the act or practice shall also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State."

such a construction of § 1971 (a) and § 1971 (c). Subsection (a) explicitly stated the legislative purpose of protecting the rights of colored citizens to vote notwithstanding "any constitution, law, custom, usage, or regulation of any State." The phrase "otherwise qualified by law to vote" obviously meant that Negroes must possess the qualifications required of all voters by *valid* state or federal laws. It is difficult to take seriously the argument that Congress intended to dilute its guarantee of the right to vote regardless of race by saying at the same time that a State was free to disqualify its Negro citizens by laws which violated the United States Constitution. Cf. *Neal* v. *Delaware,* 103 U. S. 370. The Fifteenth Amendment protects the right to vote regardless of race against any denial or abridgment by the United States or by any State. Section 1971 was passed by Congress under the authority of the Fifteenth Amendment to enforce that Amendment's guarantee, which protects against any discrimination by a State, its laws, its customs, or its officials in any way. We reject the argument that the Attorney General was without power to institute these proceedings in order to protect the federally guaranteed right to vote without discrimination on account of color.

II.

The District Court held, and it is contended here, that even if the Attorney General did have power to file this suit on behalf of the United States, as we have held he did, nevertheless he was without power to make the State a party defendant. The District Court gave great weight to Mississippi's argument that the Fifteenth Amendment "is directed to persons through whom a state may act and not to the sovereign entity of the state itself." 229 F. Supp., at 933. Largely to avoid what it called this "substantial constitutional claim," the District Court proceeded to construe the language of § 1971 as not granting

the Attorney General authority to make the State a defendant. We do not agree with that construction.

Section 1971 (c) says that whenever the Attorney General institutes a suit under this section against a state official who has deprived a citizen of his right to vote because of race or color,

> "the act or practice shall also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State."

The District Court accepted the State's argument that this meant that a State can be made a defendant in such a case only when the office of registrar is vacant, so that there is no registrar against whom to file suit. This argument relies on the fact that in a case pending in this Court when the statutory language was changed, registrars had resigned their offices in order to keep from being sued under § 1971. *United States* v. *Alabama,* 267 F. 2d 808 (C. A. 5th Cir.), vacated and remanded, 362 U. S. 602. Congress, the State says, passed the provision authorizing suit against a State solely to provide a party defendant when registrars resigned, as they had in the *Alabama* case. But whatever the reasons Congress had for amending § 1971 (c), and without our now deciding whether it was necessary to do so to permit the United States to sue a State under that section, the language Congress adopted leaves no room for the construction which the District Court put on these provisions. Indeed, on remand in the *Alabama* case the Fifth Circuit affirmed the District Court's refusal to dismiss the State as a defendant even though new registrars had qualified, and this Court affirmed that judgment. *Alabama* v. *United States,* 371 U. S. 37, affirming 304 F. 2d 583 (C. A. 5th Cir.).

The State argues also that even if Congress has authorized making the State a defendant here, as we hold it has, Congress had no constitutional power to do so. The Fifteenth Amendment in plain, unambiguous language provides that no "State" shall deny or abridge the right of citizens to vote because of their color. In authorizing the United States to make a State a defendant in a suit under § 1971, Congress was acting under its power given in § 2 of the Fifteenth Amendment to enforce that Amendment by appropriate legislation. The State's argument that Congress acted here beyond its constitutional power is based on a number of cases that have allowed private individuals to enjoin state officials from denying constitutional rights, while recognizing that without its consent a State could not be sued by private persons in such circumstances, because of the immunity given the State in the Eleventh Amendment. See, *e. g., Ex parte Young,* 209 U. S. 123. But none of these cases decided or even suggested that Congress could not authorize the United States to institute legal proceedings against States to protect constitutional rights of citizens. The Eleventh Amendment in terms forbids suits against States only when "commenced or prosecuted . . . by Citizens of another State, or by Citizens or Subjects of any Foreign State." While this has been read to bar a suit by a State's own citizen as well, *Hans* v. *Louisiana,* 134 U. S. 1, nothing in this or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States. The United States in the past has in many cases been allowed to file suits in this and other courts against States, see, *e. g., United States* v. *Texas,* 143 U. S. 621; *United States* v. *California,* 297 U. S. 175, with or without specific authorization from Congress, see *United States* v. *California,* 332 U. S. 19, 26–28. See also *Parden* v. *Terminal R. Co.,* 377 U. S. 184. In light of this history, it seems rather sur-

prising that the District Court entertained seriously the argument that the United States could not constitutionally sue a State. The reading of the Constitution urged by Mississippi is not supported by precedent, is not required by any language of the Constitution, and would without justification in reason diminish the power of courts to protect the people of this country against deprivation and destruction by States of their federally guaranteed rights. We hold that the State was properly made a defendant in this case.

III.

The District Court held with respect to the three members of the Mississippi Board of Election Commissioners that the complaint failed to show that they had a sufficient interest in administering or enforcing the laws under attack to permit making them parties defendant. We do not agree. Under state law the Election Commissioners have power, authority, and responsibility to help administer the voter registration laws by formulating rules for the various tests applied to applicants for registration. Section 3209.6 of the Mississippi Code directs that the forms and the questions on the forms shall be prepared and maintained under the supervision of the Election Board and that these application forms shall be

> "designed to test the ability of applicants for registration to vote to read and write any section of the Constitution of this state and give a reasonable interpretation thereof, and demonstrate to the county registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government; and to demonstrate to the county registrar that applicant is a person of good moral character as required by Section 241–A of the Constitution of Mississippi."

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These "interpretation" and "duties and obligations of citizenship" tests, as has been pointed out, are vitally important elements of the Mississippi laws challenged as unconstitutional in this suit. Should the Government prove its case and obtain an injunction, it would be natural to assume that such an order should run against the Board of Election Commissioners with reference to these two tests. Therefore the Election Commissioners should not have been stricken as defendants.

IV.

The District Court said that the complaint improperly attempted to hold the six county registrars jointly liable for what amounted to nothing more than individual torts committed by them separately with reference to separate applicants. For this reason apparently it would have held the venue improper as to the three registrars who lived outside the Southern District of Mississippi and a fourth who lived in a different division of the Southern District, and it would have ordered that each of the other two registrars be sued alone. But the complaint charged that the registrars had acted and were continuing to act as part of a state-wide system designed to enforce the registration laws in a way that would inevitably deprive colored people of the right to vote solely because of their color. On such an allegation the joinder of all the registrars as defendants in a single suit is authorized by Rule 20 (a) of the Federal Rules of Civil Procedure, which provides:

> ". . . All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action."

These registrars were alleged to be carrying on activities which were part of a series of transactions or occurrences the validity of which depended to a large extent upon "question[s] of law or fact common to all of them." Since joinder of the registrars in one suit was proper, the argument that venue as to some of them was not properly laid is also without merit. 28 U. S. C. §§ 1392 (a), 1393 (b) (1958 ed.).

V.

As a general ground for dismissal, the District Court held that the complaint failed to state a claim upon which relief could be granted. In considering the correctness of this ruling the allegations of the complaint are to be taken as true, and indeed the record contains answers to pretrial interrogatories which indicate that the United States stands ready to produce much evidence tending to prove the truthfulness of all the allegations in the complaint. While the Government has argued that several provisions of the Mississippi laws challenged here might or should be held unconstitutional on their face without introduction of evidence or further hearings, with respect to all the others the Solicitor General in this Court specifically has declined to "urge that the constitutionality of these provisions be decided prior to trial." In this situation we have decided that it is the more appropriate course to pass only upon the sufficiency of the complaint's allegations to justify relief if proved.

We have no doubt whatsoever that it was error to dismiss the complaint without a trial. The complaint charged that the State of Mississippi and its officials for the past three quarters of a century have been writing and adopting constitutional provisions, statutes, rules, and regulations, and have been engaging in discriminatory practices, all designed to keep the number of white voters at the highest possible figure and the number of colored voters at the lowest. It alleged that the common pur-

pose running through the State's legal and administrative history during that time has been to adopt whatever expedient seemed necessary to establish white political supremacy in a completely segregated society. This purpose, indeed, was recognized by the Mississippi Supreme Court in 1896 when it said, speaking of the convention which adopted the 1890 constitution:

> "Within the field of permissible action under the limitations imposed by the federal constitution, the convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race." [15]

The success of the expedients adopted in 1890 and in later years to accomplish this purpose appears from statistics in the complaint. For example, the complaint states that at the time the suit was filed Amite County, Mississippi, the registrar of which was one of the defendants here, had a white voting age population of 4,449 with white registration of 3,295, while it had 2,560 colored persons of voting age, of whom only one was a registered voter. There is no need to multiply examples. The allegations of this complaint were too serious, the right to vote in this country is too precious, and the necessity of settling grievances peacefully in the courts is too important for this complaint to have been dismissed. Compare *Davis* v. *Schnell*, 81 F. Supp. 872 (D. C. S. D. Ala.), aff'd, 336 U. S. 933; *Louisiana* v. *United States*, *post*, p. 145, this day decided. The case should have been tried. It should now be tried without delay.

Reversed and remanded.

Mr. Justice Harlan considers that the constitutional conclusions reached in this opinion can properly be based only on the provisions of the Fifteenth Amendment. In all other respects, he fully subscribes to this opinion.

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[15] *Ratliff* v. *Beale*, 74 Miss. 247, 266, 20 So. 865, 868.

LOUISIANA ET AL. *v.* UNITED STATES.

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

No. 67. Argued January 26–27, 1965.—Decided March 8, 1965.

Pursuant to 42 U. S. C. § 1971 (c) the Attorney General brought this action against appellants, the State of Louisiana, the three members of the State Registration Board, and the Board's Director-Secretary, charging a long-standing plan to deprive Louisiana Negroes of voting rights in violation of § 1971 (a) and the Fourteenth and Fifteenth Amendments. The complaint alleged and the District Court held that the discriminatory scheme began with the adoption of a "grandfather clause" in the Louisiana Constitution of 1898, when about 44% of the State's registered voters were Negroes. Upon this Court's invalidation of a similar clause, Louisiana in 1921 substituted a new "interpretation test," which required an applicant to interpret a section of the State or Federal Constitution to the satisfaction of the registrar. From that time to 1944 the proportion of registered voters who were Negroes did not exceed 1%, mainly because the white primary system kept Negroes from participating in the Democratic primary, the only politically significant election in the State. When after this Court in 1944 invalidated racial discrimination in primary elections and many registrars still failed to apply the interpretation test, the percentage of voters who were Negroes increased to 15%, a situation which, along with increased segregationist sentiment following this Court's school desegregation decision, led the legislature to create a "Segregation Committee." That committee cooperated with Citizens Councils to instruct registrars to promote white political control and to begin wholesale purges of Negroes from the voting rolls. At least 21 parishes in the mid-1950's began applying the interpretation test, to which was added in 1960 a comprehension requirement, applicable to all persons, which the State Registration Board ordered rigidly enforced. The District Court, in view of the virtually unlimited discretion given voting registrars by the Louisiana laws and because the 21 parish registrars had used the interpretation test to keep Negroes from voting, held that test on its face and as applied invalid under the Fourteenth and Fifteenth Amendments and 42 U. S. C. § 1971 (a) and enjoined its future use in the State; with respect to the 21 parishes where the test was

found to have been applied, it also enjoined use of a new "citizenship" test absent a reregistration of voters so that the new test will apply to all or none, and required monthly registration reports to be made for those parishes. *Held:*

1. The Attorney General has power to sue a State and its officials to protect Negroes' voting rights guaranteed by 42 U. S. C. § 1971 (a) and the Fourteenth and Fifteenth Amendments. *United States* v. *Mississippi, ante,* p. 128, followed. P. 151.

2. The evidence amply supported the District Court's finding that Louisiana's interpretation test, as written and applied so as to give registrars unbridled discretion without any objective standards to determine voting qualifications, was part of a successful plan unlawfully to deprive Louisiana Negroes of their voting rights. *Schnell* v. *Davis,* 336 U. S. 933, affirming 81 F. Supp. 872 (D. C S. D. Ala.), followed. Pp. 151–153.

3. The decree was well within the District Court's discretion to eliminate past voting discrimination against Negroes in Louisiana and to bar like discrimination in the future. Pp. 154–156.

(a) The decree properly enjoined further use of the interpretation test. P. 154.

(b) Since a large proportion of Negroes in the 21 parishes had been kept from registering by the discriminatory interpretation test, under which virtually all white applicants were allowed to register, the decree properly barred application of the new "citizenship" test, which the State claims is objective, absent a complete reregistration of all voters in those parishes. Pp. 154–155.

(c) The requirement for monthly registration reports for the 21 parishes was proper to inform the court as to whether the old discriminatory practices had been eliminated. Pp. 155–156.

225 F. Supp. 353, affirmed.

Harry J. Kron, Jr., Assistant Attorney General of Louisiana, argued the cause for appellants. With him on the brief were *Jack P. F. Gremillion,* Attorney General of Louisiana, and *Carroll Buck,* First Assistant Attorney General.

Louis F. Claiborne argued the cause for the United States. With him on the brief were *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *David Rubin.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Pursuant to authority granted in 42 U. S. C. § 1971 (c) (1958 ed., Supp. V), the Attorney General brought this action on behalf of the United States in the United States District Court for the Eastern District of Louisiana against the State of Louisiana, the three members of the State Board of Registration, and the Director-Secretary of the Board. The complaint charged that the defendants by following and enforcing unconstitutional state laws had been denying and unless restrained by the court would continue to deny Negro citizens of Louisiana the right to vote, in violation of 42 U. S. C. § 1971 (a) (1958 ed.) [1] and the Fourteenth and Fifteenth Amendments to the United States Constitution. The case was tried and after submission of evidence,[2] the three-judge District Court, convened pursuant to 28 U. S. C. § 2281 (1958 ed.), gave judgment for the United States. 225 F. Supp. 353. The State and the other defendants appealed, and we noted probable jurisdiction. 377 U. S. 987.

The complaint alleged, and the District Court found, that beginning with the adoption of the Louisiana Constitution of 1898, when approximately 44% of all the registered voters in the State were Negroes, the State had put into effect a successful policy of denying Negro citizens the right to vote because of their race. The 1898

[1] "All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding." 16 Stat. 140, 42 U. S. C. § 1971 (a) (1958 ed.).

[2] The appellants did not present any evidence. By stipulation all the Government's evidence was presented in written form.

constitution adopted what was known as a "grandfather clause," which imposed burdensome requirements for registration thereafter but exempted from these future requirements any person who had been entitled to vote before January 1, 1867, or who was the son or grandson of such a person.[3] Such a transparent expedient for disfranchising Negroes, whose ancestors had been slaves until 1863 and not entitled to vote in Louisiana before 1867,[4] was held unconstitutional in 1915 as a violation of the Fifteenth Amendment, in a case involving a similar Oklahoma constitutional provision. *Guinn* v. *United States,* 238 U. S. 347. Soon after that decision Louisiana, in 1921, adopted a new constitution replacing the repudiated "grandfather clause" with what the complaint calls an "interpretation test," which required that an applicant for registration be able to "give a reasonable interpretation" of any clause in the Louisiana Constitution or the Constitution of the United States.[5] From the adoption of the 1921 interpretation test until 1944, the District Court's opinion stated, the percentage of registered voters in Louisiana who were Negroes never exceeded one percent. Prior to 1944 Negro interest in voting in Louisiana had been slight, largely because the State's white primary law kept Negroes from voting in the Democratic Party primary election, the only election that mattered in the political climate of that State. In 1944, however, this Court invalidated the substantially identical white primary law of Texas,[6] and with the explicit statutory bar to their voting in the primary removed and because of a generally heightened political interest, Negroes in increasing

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[3] La. Const. 1898, Art. 197, § 5. See generally Eaton, The Suffrage Clause in the New Constitution of Louisiana, 13 Harv. L. Rev. 279.

[4] The Louisiana Constitution of 1868 for the first time permitted Negroes to vote. La. Const. 1868, Art. 98.

[5] La. Const. 1921, Art. VIII, §§ 1 (c), 1 (d).

[6] *Smith* v. *Allwright,* 321 U. S. 649.

numbers began to register in Louisiana. The white primary system had been so effective in barring Negroes from voting that the "interpretation test" as a disfranchising device had been ignored over the years. Many registrars continued to ignore it after 1944, and in the next dozen years the proportion of registered voters who were Negroes rose from two-tenths of one percent to approximately 15% by March 1956. This fact, coupled with this Court's 1954 invalidation of laws requiring school segregation,[7] prompted the State to try new devices to keep the white citizens in control. The Louisiana Legislature created a committee which became known as the "Segregation Committee" to seek means of accomplishing this goal. The chairman of this committee also helped to organize a semiprivate group called the Association of Citizens Councils, which thereafter acted in close cooperation with the legislative committee to preserve white supremacy. The legislative committee and the Citizens Councils set up programs, which parish voting registrars were required to attend, to instruct the registrars on how to promote white political control. The committee and the Citizens Councils also began a wholesale challenging of Negro names already on the voting rolls, with the result that thousands of Negroes, but virtually no whites, were purged from the rolls of voters. Beginning in the middle 1950's registrars of at least 21 parishes began to apply the interpretation test. In 1960 the State Constitution was amended to require every applicant thereafter to "be able to understand" as well as "give a reasonable interpretation" of any section of the State or Federal Constitution "when read to him by the registrar."[8] The State Board

[7] *Brown* v. *Board of Education*, 347 U. S. 483.

[8] La. Acts 1960, No. 613, amending La. Const. Art. VIII, § 1 (d), previously implemented in La. Rev. Stat. § 18:36. Under the 1921 constitution the requirement that an applicant be able "to understand" a section "read to him by the registrar" applied only to illiterates. La. Const. 1921, Art. VIII, § 1 (d); compare *id.*, § 1 (c).

of Registration in cooperation with the Segregation Committee issued orders that all parish registrars must strictly comply with the new provisions.

The interpretation test, the court found, vested in the voting registrars a virtually uncontrolled discretion as to who should vote and who should not. Under the State's statutes and constitutional provisions the registrars, without any objective standard to guide them, determine the manner in which the interpretation test is to be given, whether it is to be oral or written, the length and complexity of the sections of the State or Federal Constitution to be understood and interpreted, and what interpretation is to be considered correct. There was ample evidence to support the District Court's finding that registrars in the 21 parishes where the test was found to have been used had exercised their broad powers to deprive otherwise qualified Negro citizens of their right to vote; and that the existence of the test as a hurdle to voter qualification has in itself deterred and will continue to deter Negroes from attempting to register in Louisiana.

Because of the virtually unlimited discretion vested by the Louisiana laws in the registrars of voters, and because in the 21 parishes where the interpretation test was applied that discretion had been exercised to keep Negroes from voting because of their race, the District Court held the interpretation test invalid on its face and as applied, as a violation of the Fourteenth and Fifteenth Amendments to the United States Constitution and of 42 U. S. C. § 1971 (a).[9] The District Court enjoined future use of the test in the State, and with respect to the 21 parishes where the invalid interpretation test was found to have

[9] "Although the vote-abridging purpose and effect of the [interpretation] test render it *per se* invalid under the Fifteenth Amendment, it is also *per se* invalid under the Fourteenth Amendment. The vices cannot be cured by an injunction enjoining its unfair application." 225 F. Supp., at 391–392.

been applied, the District Court also enjoined use of a newly enacted "citizenship" test, which did not repeal the interpretation test and the validity of which was not challenged in this suit, unless a reregistration of all voters in those parishes is ordered, so that there would be no voters in those parishes who had not passed the same test.

I.

We have held this day in *United States* v. *Mississippi, ante,* p. 128, that the Attorney General has power to bring suit against a State and its officials to protect the voting rights of Negroes guaranteed by 42 U. S. C. § 1971 (a) and the Fourteenth and Fifteenth Amendments.[10] There can be no doubt from the evidence in this case that the District Court was amply justified in finding that Louisiana's interpretation test, as written and as applied, was part of a successful plan to deprive Louisiana Negroes of their right to vote. This device for accomplishing unconstitutional discrimination has been little if any less successful than was the "grandfather clause" invalidated by this Court's decision in *Guinn* v. *United States, supra,* 50

[10] It is argued that the members of the State Board of Registration were not properly made defendants because they were "mere conduits," without authority to enforce state registration requirements. The Board has the power and duty to supervise administration of the interpretation test and prescribe rules and regulations for the registrars to follow in applying it. La. Rev. Stat. § 18:191A; La. Const. Art. VIII, § 18. The Board also is by statute directed to fashion and administer the new "citizenship" test. La. Rev. Stat. § 18:191A; La. Const. Art. VIII, § 18. And the Board has power to remove any registrar from office "at will." La. Const. Art. VIII, § 18. In these circumstances the Board members were properly made defendants. Compare *United States* v. *Mississippi, ante,* at 141–142.

There is also no merit in the argument that the registrars, who were not defendants in this suit, were indispensable parties. The registrars have no personal interest in the outcome of this case and are bound to follow the directions of the State Board of Registration.

years ago, which when that clause was adopted in 1898 had seemed to the leaders of Louisiana a much preferable way of assuring white political supremacy. The Governor of Louisiana stated in 1898 that he believed that the "grandfather clause" solved the problem of keeping Negroes from voting "in a much more upright and manly fashion" [11] than the method adopted previously by the States of Mississippi and South Carolina, which left the qualification of applicants to vote "largely to the arbitrary discretion of the officers administering the law." [12] A delegate to the 1898 Louisiana Constitutional Convention also criticized an interpretation test because the "arbitrary power, lodged with the registration officer, practically places his decision beyond the pale of judicial review; and he can enfranchise or disfranchise voters at his own sweet will and pleasure without let or hindrance." [13]

But Louisianans of a later generation did place just such arbitrary power in the hands of election officers who have used it with phenomenal success to keep Negroes from voting in the State. The State admits that the statutes and provisions of the state constitution establishing the interpretation test "vest discretion in the registrars of voters to determine the qualifications of applicants for registration" while imposing "no definite and objective standards upon registrars of voters for the administration of the interpretation test." And the District Court found that "Louisiana . . . provides no effective method whereby arbitrary and capricious action by registrars of voters may be prevented or redressed." [14] The applicant facing a

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[11] Louisiana Senate Journal, 1898, p. 33.

[12] *Ibid.*

[13] Kernan, The Constitutional Convention of 1898 and its Work, Proceedings of the Louisiana Bar Association for 1898–1899, pp. 59–60.

[14] 225 F. Supp., at 384.

registrar in Louisiana thus has been compelled to leave his voting fate to that official's uncontrolled power to determine whether the applicant's understanding of the Federal or State Constitution is satisfactory. As the evidence showed, colored people, even some with the most advanced education and scholarship, were declared by voting registrars with less education to have an unsatisfactory understanding of the Constitution of Louisiana or of the United States. This is not a test but a trap, sufficient to stop even the most brilliant man on his way to the voting booth. The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar. Many of our cases have pointed out the invalidity of laws so completely devoid of standards and restraints. See, *e. g., United States* v. *L. Cohen Grocery Co.,* 255 U. S. 81. Squarely in point is *Schnell* v. *Davis,* 336 U. S. 933, affirming 81 F. Supp. 872 (D. C. S. D. Ala.), in which we affirmed a district court judgment striking down as a violation of the Fourteenth and Fifteenth Amendments an Alabama constitutional provision restricting the right to vote in that State to persons who could "understand and explain any article of the Constitution of the United States" to the satisfaction of voting registrars. We likewise affirm here the District Court's holding that the provisions of the Louisiana Constitution and statutes which require voters to satisfy registrars of their ability to "understand and give a reasonable interpretation of any section" of the Federal or Louisiana Constitution violate the Constitution. And we agree with the District Court that it specifically conflicts with the prohibitions against discrimination in voting because of race found both in the Fifteenth Amendment and 42 U. S. C. § 1971 (a) to subject citizens to such an arbitrary power as Louisiana has given its registrars under these laws.

II.

This leaves for consideration the District Court's decree. We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. Little if any objection is raised to the propriety of the injunction against further use of the interpretation test as it stood at the time this action was begun, and without further discussion we affirm that part of the decree.

Appellants' chief argument against the decree concerns the effect which should be given the new voter-qualification test adopted by the Board of Registration in August 1962, pursuant to statute [15] and subsequent constitutional amendment [16] after this suit had been filed. The new test, says the State, is a uniform, objective, standardized "citizenship" test administered to all prospective voters alike. Under it, according to the State, an applicant is "required to indiscriminately draw one of ten cards. Each card has six multiple choice questions, four of which the applicant must answer correctly." Confining itself to the allegations of the complaint, the District Court did not pass upon the validity of the new test, but did take it into consideration in formulating the decree.[17] The court found that past discrimination against Negro

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[15] La. Acts 1962, No. 62, amending La. Rev. Stat. 18:191A.

[16] La. Acts 1962, No. 539, amending La. Const. Art. VIII, § 18.

[17] Like the District Court, we express no opinion as to the constitutionality of the new "citizenship" test. Any question as to that point is specifically reserved. That test was never challenged in the complaint or any other pleading. The District Court said "we repeat that this decision does not touch upon the constitutionality of the citizenship test as a state qualification for voting." 225 F. Supp., at 397. The Solicitor General did not challenge the validity of the new test in this Court either in briefs or in oral argument, but instead

applicants in the 21 parishes where the interpretation test had been applied had greatly reduced the proportion of potential Negro voters who were registered as compared with the proportion of whites. Most if not all of those white voters had been permitted to register on far less rigorous terms than colored applicants whose applications were rejected. Since the new "citizenship" test does not provide for a reregistration of voters already accepted by the registrars, it would affect only applicants not already registered, and would not disturb the eligibility of the white voters who had been allowed to register while discriminatory practices kept Negroes from doing so. In these 21 parishes, while the registration of white persons was increasing, the number of Negroes registered decreased from 25,361 to 10,351. Under these circumstances we think that the court was quite right to decree that, as to persons who met age and residence requirements during the years in which the interpretation test was used, use of the new "citizenship" test should be postponed in those 21 parishes where registrars used the old interpretation test until those parishes have ordered a complete reregistration of voters, so that the new test will apply alike to all or to none. Cf. *United States* v. *Duke*, 332 F. 2d 759, 769–770 (C. A. 5th Cir.).

It also was certainly an appropriate exercise of the District Court's discretion to order reports to be made every month concerning the registration of voters in these 21

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recognized specifically that that issue was not before us in this case. And at oral argument in this Court the attorney for the United States stated that the Government has pending in a lower court a new suit challenging registration procedures in Louisiana "under the new regime," *i. e.*, employed subsequent to the invalidation of the interpretation test in this case. The new "citizenship" test, he said, "is simply not an issue in this proceeding and was not invalidated in the lower court and we are not here challenging it."

parishes, in order that the court might be informed as to whether the old discriminatory practices really had been abandoned in good faith. The need to eradicate past evil effects and to prevent the continuation or repetition in the future of the discriminatory practices shown to be so deeply engrained in the laws, policies, and traditions of the State of Louisiana, completely justified the District Court in entering the decree it did and in retaining jurisdiction of the entire case to hear any evidence of discrimination in other parishes and to enter such orders as justice from time to time might require.

Affirmed.

Mr. Justice Harlan considers that the constitutional conclusions reached in this opinion can properly be based only on the provisions of the Fifteenth Amendment. In all other respects, he fully subscribes to this opinion.

UNITED STATES *v.* BOSTON & MAINE RAILROAD ET AL.

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

No. 232. Argued January 21, 1965.—Decided March 8, 1965.

Appellees, a railroad and three of its officers, were indicted under § 10 of the Clayton Act for participating in the noncompetitive sale of equipment to another corporation in which the officers had a "substantial interest," described in a bill of particulars as an agreement for substantial payment to the individual appellees for effecting the sale. Holding that § 10 applies to a "then present legal interest," and not one dependent on the outcome of an illegal plan, the District Court dismissed the indictment *Held:*

1. Under the strict construction applicable to a criminal statute, the words "substantial interest" in § 10 presuppose, not bribery (which the indictment here in effect charges) under a conflict of interest law, but either an existing investment in the purchaser, the creation of the purchaser for the use of those acting for the seller, or a joint venture or continued course of dealings for profit sharing with the purchaser, each of which would be within the concept of this antitrust statute. Pp. 160–162.

2. Since an amended bill of particulars may be filed under Rule 7 (f) of the Federal Rules of Criminal Procedure, the case is vacated and remanded. P. 162.

225 F. Supp. 577, vacated and remanded.

Robert B. Hummel argued the cause for the United States. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Orrick* and *John H. Dougherty.*

Edward O. Proctor, Sr., argued the cause for appellees. On the brief for appellee Boston & Maine Railroad was *Edward B. Hanify.* With *Mr. Proctor* on the brief for appellees McGinnis et al. were *William T. Griffin, Lothrop Withington* and *John M. Reed.*

773-301 O-65-15

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a direct appeal under the Criminal Appeals Act, 18 U. S. C. § 3731, from the District Court's order dismissing Count I of an indictment (225 F. Supp. 577) for failure to state an offense under § 10 of the Clayton Act, 38 Stat. 734, 15 U. S. C. § 20. That section provides in relevant part:

> "No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or *who has any substantial interest in, such other corporation,* firm, partnership, or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. . . ." (Italics added.)

Count I charged that appellee railroad and the three other appellees, officers of the railroad, violated § 10 by the road's sale on August 14, 1958, of 10 coaches valued in excess of $50,000 to the International Railway Equipment Corp. in which the three officers had "a substantial interest," competitive bidding not having been used. That count charged that appellee McGinnis knowingly voted

for the sale and that all three appellee officers knowingly directed the act. A bill of particulars [1] described the "substantial interest" of those officers in the purchasing corporation as follows:

> "The substantial interest of defendants McGinnis and Glacy in defendant International consisted of an understanding, agreement, relationship, arrangement and concert of action among the said defendants McGinnis, Glacy, and International, and others, for, among other things, the purpose of producing profits for International from dealings by it in property acquired from the B&M through the intervention, direction or assistance of defendants McGinnis, Glacy, and Benson, and pursuant to which defendants McGinnis, Glacy, and Benson were to and did receive substantial monies."

The District Court held:

> "The statute is limited to one who has a then present legal interest in the buying corporation and does not include one whose only interest is in the outcome of what may have been an illegal and illicit plan to siphon off for his personal benefit property of the Boston and Maine Railroad through the medium of International." 225 F. Supp., at 578.

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[1] This case was decided below and argued here on the assumption that, although the indictment itself was sufficient against a motion to dismiss, it became insufficient for that purpose by reason of the bill of particulars. We have held, however, that "the bill of particulars . . . forms no part of the record *for the purposes of the demurrer.*" *United States* v. *Comyns,* 248 U. S. 349, 353 (emphasis supplied); *Dunlop* v. *United States,* 165 U. S. 486. Since the parties have made no attempt to invoke this rule at any stage in this proceeding, we are not required to express any view as to whether this rule for demurrers is applicable on motions to dismiss under Rule 12, Fed. Rules Crim. Proc.

A criminal statute is to be construed strictly, not loosely. Such are the teachings of our cases from *United States* v. *Wiltberger,* 5 Wheat. 76, down to this day. Chief Justice Marshall said in that case:

> "The rule that penal laws are to be construed strictly, is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *Id.,* p. 95.

The fact that a particular activity may be within the same general classification and policy of those covered does not necessarily bring it within the ambit of the criminal prohibition. *United States* v. *Weitzel,* 246 U. S. 533.

What is the reach of § 10? It is not strictly a conflict of interest statute such as we dealt with in *United States* v. *Mississippi Valley Co.,* 364 U. S. 520. In *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U. S. 173, 190, we described § 10 as "an antitrust law."

Section 10, indeed, has its roots in President Wilson's message to Congress of January 20, 1914, on the subject of "trusts," in which he denounced the abuses of "interlockings of the *personnel* of the directorates of great corporations." 51 Cong. Rec. 1962–1964; H. R. Rep. No. 627, 63d Cong., 2d Sess., pp. 17–18. Section 10 started as part of § 9 of the House bill and forbade certain types of interlocking office-holding. See S. Doc. No. 584, 63d Cong., 2d Sess., p. 10. The Senate made two main changes. First, it did not prohibit interlocking office-holding but seized rather on competitive bidding as the control. S. Rep. No. 698, 63d Cong., 2d Sess., pp. 47–48. Second, the Senate required competitive bidding not only when a director or other officer or agent of a common carrier was also a director or other officer of any firm with which the carrier had dealings to the amount of more than

$50,000 in any one year, but also when the director or other officer of a common carrier had "any direct or indirect interest in" the other firm. S. Doc. No. 584, 63d Cong., 2d Sess., p. 13. The Conference changed the phrase "any direct or indirect interest in" to the present wording "any substantial interest in." *Id.*, pp. 13–14. As Senator Chilton, one of the Conferees, reported:

> ". . . It not only prevents corporations which are interlocked by officers and directors, but it says: 'Or who has any substantial interest in such of them.'
>
> "The Senator will recall all we had before us, the ease by which interlocking directorates could be gotten around; in other words, you could have your son, or your cousin, or your lawyer, or your agent upon the corporation and accomplish the same thing as if you were on the board yourself. . . .
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> . . . . . .
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> ". . . They can not dodge it by having a supply company, and even though they have discarded the form of interlocking directors, if there be the interest of the railroad or the common carrier in the supply company, as the Senator chooses to call it, then it is prohibited." 51 Cong. Rec. 15943.

As we have seen, Count I charges a "transaction" to sell 10 coaches to International, and the bill of particulars suggests that it was agreed that the three individual appellees would receive "substantial monies" for their part in effecting the sale. It is earnestly urged that since those appellees stood to profit from the deal with International, they had a "substantial interest in" International within the meaning of § 10. It is pointed out that the railroad scandals of that age were not limited to interlocking directorates and multiple shareholding, but that suppliers of railroad materials had made substantial gifts to the railroad officials with whom they dealt. See *In re Financial Transactions of the New York,*

N. H. & H. R. Co., 31 I. C. C. 32.[2] But we are confined by the words that Congress used in § 10. If the rule of strict construction is to be followed, the words "substantial interest in," as used in § 10, presuppose either an existing investment of some kind in International, or the creation of International by the three individual appellees for their use, or a joint venture or continued course of dealings, licit or illicit, with International for profit sharing. But it is doubtful that this indictment, as illuminated by the bill of particulars, alleges anything more in substance than a bribe. Bribery might well be in the family of offenses covered under a conflict of interest statute. But it is more remote from an antitrust frame of reference. While history shows a rather wide pattern of railroad misconduct leading to § 10, that section is a rather narrow prohibition applicable to activity that is conceptually within the antitrust philosophy. We cannot broaden it to include the present case, unless we attribute to Congress a purpose to make it a more general panacea for conflict of interest activities; but neither do we take the same narrow view of the statute as the District Court.

Since the Government may choose to file, and the District Court may choose to allow, an amended bill of particulars,[3] we vacate and remand the case, leaving open all questions except our construction of the statute.

Vacated and remanded.

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[2] The Commission reported: "Purchases of cars and coal are two large expenditures that railroads make. The New Haven purchased cars almost exclusively from James B. Brady without competition and to the extent of some $37,000,000. Mr. Brady, as a witness, made no secret of his generosity to the officials with whom he had business. His methods were justified by him on the ground that the officers of the New Haven were old friends." 31 I. C. C., at 61.

[3] Rule 7 (f) of the Rules of Criminal Procedure provides, "A bill of particulars may be amended at any time subject to such conditions as justice requires."

UNITED STATES *v.* SEEGER.

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

No. 50. Argued November 16–17, 1964.—Decided March 8, 1965.*

These three cases involve the exemption claims under § 6 (j) of the Universal Military Training and Service Act of conscientious objectors who did not belong to an orthodox religious sect. Section 6 (j) excepts from combatant service in the armed forces those who are conscientiously opposed to participation in war by reason of their "religious training and belief," *i. e.*, belief in an individual's relation to a Supreme Being involving duties beyond a human relationship but not essentially political, sociological, or philosophical views or a merely personal moral code. In all the cases convictions were obtained in the District Courts for refusal to submit to induction in the armed forces; in Nos. 50 and 51 the Court of Appeals reversed and in No. 29 the conviction was affirmed. *Held:*

1. The test of religious belief within the meaning of the exemption in § 6 (j) is whether it is a sincere and meaningful belief occupying in the life of its possessor a place parallel to that filled by the God of those admittedly qualified for the exemption. Pp. 173–180.

(a) The exemption does not cover those who oppose war from a merely personal moral code nor those who decide that war is wrong on the basis of essentially political, sociological or economic considerations rather than religious belief. P. 173.

(b) There is no issue here of atheistic beliefs and accordingly the decision does not deal with that question. Pp. 173–174.

(c) This test accords with long-established legislative policy of equal treatment for those whose objection to military service is based on religious beliefs. Pp. 177–180.

2. Local boards and courts are to decide whether the objector's beliefs are sincerely held and whether they are, in his own scheme of things, religious; they are not to require proof of the reli-

*Together with No. 51, *United States* v. *Jakobson*, on certiorari to the same court, and No. 29, *Peter* v. *United States*, on certiorari to the United States Court of Appeals for the Ninth Circuit.

gious doctrines nor are they to reject beliefs because they are not comprehensible. Pp. 184–185.

3. Under the broad construction applicable to § 6 (j) the applications involved in these cases, none of which was based on merely personal moral codes, qualified for exemption. Pp. 185–188.

326 F. 2d 846 and 325 F. 2d 409, affirmed; 324 F. 2d 173, reversed.

Solicitor General Cox argued the cause for the United States in all cases. *Assistant Attorney General Miller* was with him on the briefs in all cases. *Ralph S. Spritzer* was with him on the briefs in Nos. 50 and 51, and *Marshall Tamor Golding* was with him on the briefs in No. 50.

Duane B. Beeson argued the cause and filed a brief for petitioner in No. 29.

Kenneth W. Greenawalt argued the cause and filed a brief for respondent in No. 50.

Herman Adlerstein argued the cause and filed a brief for respondent in No. 51.

Briefs of *amici curiae,* urging affirmance in Nos. 50 and 51 and reversal in No. 29, were filed by *Alfred Lawrence Toombs* and *Melvin L. Wulf* for the American Civil Liberties Union, and by *Leo Pfeffer, Shad Polier, Will Maslow* and *Joseph B. Robison* for the American Jewish Congress. Briefs of *amici curiae,* urging affirmance in No. 50, were filed by *Herbert A. Wolff, Leo Rosen, Nanette Dembitz* and *Nancy F. Wechsler* for the American Ethical Union, and by *Tolbert H. McCarroll, Lester Forest* and *Paul Blanshard* for the American Humanist Association.

Mr. Justice Clark delivered the opinion of the Court.

These cases involve claims of conscientious objectors under § 6 (j) of the Universal Military Training and Service Act, 50 U. S. C. App. § 456 (j) (1958 ed.), which exempts from combatant training and service in the armed forces of the United States those persons who by

reason of their religious training and belief are conscientiously opposed to participation in war in any form. The cases were consolidated for argument and we consider them together although each involves different facts and circumstances. The parties raise the basic question of the constitutionality of the section which defines the term "religious training and belief," as used in the Act, as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code." The constitutional attack is launched under the First Amendment's Establishment and Free Exercise Clauses and is twofold: (1) The section does not exempt nonreligious conscientious objectors; and (2) it discriminates between different forms of religious expression in violation of the Due Process Clause of the Fifth Amendment. Jakobson (No. 51) and Peter (No. 29) also claim that their beliefs come within the meaning of the section. Jakobson claims that he meets the standards of § 6 (j) because his opposition to war is based on belief in a Supreme Reality and is therefore an obligation superior to one resulting from man's relationship to his fellow man. Peter contends that his opposition to war derives from his acceptance of the existence of a universal power beyond that of man and that this acceptance in fact constitutes belief in a Supreme Being, qualifying him for exemption. We granted certiorari in each of the cases because of their importance in the administration of the Act. 377 U. S. 922.

We have concluded that Congress, in using the expression "Supreme Being" rather than the designation "God," was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that under this construction, the test of belief

"in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is "in a relation to a Supreme Being" and the other is not. We have concluded that the beliefs of the objectors in these cases meet these criteria, and, accordingly, we affirm the judgments in Nos. 50 and 51 and reverse the judgment in No. 29.

The Facts in the Cases.

No. 50: Seeger was convicted in the District Court for the Southern District of New York of having refused to submit to induction in the armed forces. He was originally classified 1–A in 1953 by his local board, but this classification was changed in 1955 to 2–S (student) and he remained in this status until 1958 when he was reclassified 1–A. He first claimed exemption as a conscientious objector in 1957 after successive annual renewals of his student classification. Although he did not adopt verbatim the printed Selective Service System form, he declared that he was conscientiously opposed to participation in war in any form by reason of his "religious" belief; that he preferred to leave the question as to his belief in a Supreme Being open, "rather than answer 'yes' or 'no' "; that his "skepticism or disbelief in the existence of God" did "not necessarily mean lack of faith in anything whatsoever"; that his was a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed." R. 69–70, 73. He cited such personages as Plato, Aristotle and Spinoza for support of his ethical belief in intellectual and moral integrity "without belief in God, except in the remotest sense." R. 73. His belief was found to be sincere, hon-

est, and made in good faith; and his conscientious objection to be based upon individual training and belief, both of which included research in religious and cultural fields. Seeger's claim, however, was denied solely because it was not based upon a "belief in a relation to a Supreme Being" as required by § 6 (j) of the Act. At trial Seeger's counsel admitted that Seeger's belief was not in relation to a Supreme Being as commonly understood, but contended that he was entitled to the exemption because "under the present law Mr. Seeger's position would also include definitions of religion which have been stated more recently," R. 49, and could be "accommodated" under the definition of religious training and belief in the Act, R. 53. He was convicted and the Court of Appeals reversed, holding that the Supreme Being requirement of the section distinguished "between internally derived and externally compelled beliefs" and was, therefore, an "impermissible classification" under the Due Process Clause of the Fifth Amendment. 326 F. 2d 846.

No. 51: Jakobson was also convicted in the Southern District of New York on a charge of refusing to submit to induction. On his appeal the Court of Appeals reversed on the ground that rejection of his claim may have rested on the factual finding, erroneously made, that he did not believe in a Supreme Being as required by § 6 (j). 325 F. 2d 409.

Jakobson was originally classified 1–A in 1953 and intermittently enjoyed a student classification until 1956. It was not until April 1958 that he made claim to noncombatant classification (1–A–O) as a conscientious objector. He stated on the Selective Service System form that he believed in a "Supreme Being" who was "Creator of Man" in the sense of being "ultimately responsible for the existence of" man and who was "the Supreme Reality" of which "the existence of man is the *result*." R. 44. (Emphasis in the original.) He explained that his reli-

gious and social thinking had developed after much meditation and thought. He had concluded that man must be "partly spiritual" and, therefore, "partly akin to the Supreme Reality"; and that his "most important religious law" was that "no man ought ever to wilfully sacrifice another man's life as a means to any other end . . . ." R. 45–46. In December 1958 he requested a 1–O classification since he felt that participation in any form of military service would involve him in "too many situations and relationships that would be a strain on [his] conscience that [he felt he] must avoid." R. 70. He submitted a long memorandum of "notes on religion" in which he defined religion as the "*sum and essence of one's basic attitudes to the fundamental problems of human existence,*" R. 72 (emphasis in the original); he said that he believed in "Godness" which was "the Ultimate Cause for the fact of the Being of the Universe"; that to deny its existence would but deny the existence of the universe because "anything that Is, has an Ultimate Cause for its Being." R. 73. There was a relationship to Godness, he stated, in two directions, *i. e.*, "vertically, towards Godness directly," and "horizontally, towards Godness through Mankind and the World." R. 74. He accepted the latter one. The Board classified him 1–A–O and Jakobson appealed. The hearing officer found that the claim was based upon a personal moral code and that he was not sincere in his claim. The Appeal Board classified him 1–A. It did not indicate upon what ground it based its decision, *i. e.*, insincerity or a conclusion that his belief was only a personal moral code. The Court of Appeals reversed, finding that his claim came within the requirements of § 6 (j). Because it could not determine whether the Appeal Board had found that Jakobson's beliefs failed to come within the statutory definition, or whether it had concluded that he lacked sincerity, it directed dismissal of the indictment.

No. 29: Forest Britt Peter was convicted in the Northern District of California on a charge of refusing to submit to induction. In his Selective Service System form he stated that he was not a member of a religious sect or organization; he failed to execute section VII of the questionnaire but attached to it a quotation expressing opposition to war, in which he stated that he concurred. In a later form he hedged the question as to his belief in a Supreme Being by saying that it depended on the definition and he appended a statement that he felt it a violation of his moral code to take human life and that he considered this belief superior to his obligation to the state. As to whether his conviction was religious, he quoted with approval Reverend John Haynes Holmes' definition of religion as "the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands . . . [; it] is the supreme expression of human nature; it is man thinking his highest, feeling his deepest, and living his best." R. 27. The source of his conviction he attributed to reading and meditation "in our democratic American culture, with its values derived from the western religious and philosophical tradition." *Ibid.* As to his belief in a Supreme Being, Peter stated that he supposed "you could call that a belief in the Supreme Being or God. These just do not happen to be the words I use." R. 11. In 1959 he was classified 1–A, although there was no evidence in the record that he was not sincere in his beliefs. After his conviction for failure to report for induction the Court of Appeals, assuming *arguendo* that he was sincere, affirmed, 324 F. 2d 173.

Background of § 6 (j).

Chief Justice Hughes, in his opinion in *United States* v. *Macintosh,* 283 U. S. 605 (1931), enunciated the rationale behind the long recognition of conscientious objec-

tion to participation in war accorded by Congress in our various conscription laws when he declared that "in the forum of conscience, duty to a moral power higher than the State has always been maintained." At 633 (dissenting opinion). In a similar vein Harlan Fiske Stone, later Chief Justice, drew from the Nation's past when he declared that

> "both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process." Stone, The Conscientious Objector, 21 Col. Univ. Q. 253, 269 (1919).

Governmental recognition of the moral dilemma posed for persons of certain religious faiths by the call to arms came early in the history of this country. Various methods of ameliorating their difficulty were adopted by the Colonies, and were later perpetuated in state statutes and constitutions. Thus by the time of the Civil War there existed a state pattern of exempting conscientious objectors on religious grounds. In the Federal Militia Act of 1862 control of conscription was left primarily in the States. However, General Order No. 99, issued by the Adjutant General pursuant to that Act, provided for striking from the conscription list those who were exempted by the States; it also established a commutation or substitution system fashioned from earlier state enactments. With the Federal Conscription Act of 1863,

which enacted the commutation and substitution provisions of General Order No. 99, the Federal Government occupied the field entirely, and in the 1864 Draft Act, 13 Stat. 9, it extended exemptions to those conscientious objectors who were members of religious denominations opposed to the bearing of arms and who were prohibited from doing so by the articles of faith of their denominations. Selective Service System Monograph No. 11, Conscientious Objection 40–41 (1950). In that same year the Confederacy exempted certain pacifist sects from military duty. *Id.*, at 46.

The need for conscription did not again arise until World War I. The Draft Act of 1917, 40 Stat. 76, 78, afforded exemptions to conscientious objectors who were affiliated with a "well-recognized religious sect or organization [then] organized and existing and whose existing creed or principles [forbade] its members to participate in war in any form . . . ." The Act required that all persons be inducted into the armed services, but allowed the conscientious objectors to perform noncombatant service in capacities designated by the President of the United States. Although the 1917 Act excused religious objectors only, in December 1917, the Secretary of War instructed that "personal scruples against war" be considered as constituting "conscientious objection." Selective Service System Monograph No. 11, Conscientious Objection 54–55 (1950). This Act, including its conscientious objector provisions, was upheld against constitutional attack in the *Selective Draft Law Cases*, 245 U. S. 366, 389–390 (1918).

In adopting the 1940 Selective Training and Service Act Congress broadened the exemption afforded in the 1917 Act by making it unnecessary to belong to a pacifist religious sect if the claimant's own opposition to war was based on "religious training and belief." 54 Stat. 889. Those found to be within the exemption were

not inducted into the armed services but were assigned to noncombatant service under the supervision of the Selective Service System. The Congress recognized that one might be religious without belonging to an organized church just as surely as minority members of a faith not opposed to war might through religious reading reach a conviction against participation in war. Congress Looks at the Conscientious Objector (National Service Board for Religious Objectors, 1943) 71, 79, 83, 87, 88, 89. Indeed, the consensus of the witnesses appearing before the congressional committees was that individual belief—rather than membership in a church or sect—determined the duties that God imposed upon a person in his everyday conduct; and that "there is a higher loyalty than loyalty to this country, loyalty to God." *Id.*, at 29–31. See also the proposals which were made to the House Military Affairs Committee but rejected. *Id.*, at 21–23, 82–83, 85. Thus, while shifting the test from membership in such a church to one's individual belief the Congress nevertheless continued its historic practice of excusing from armed service those who believed that they owed an obligation, superior to that due the state, of not participating in war in any form.

Between 1940 and 1948 two courts of appeals [1] held that the phrase "religious training and belief" did not include philosophical, social or political policy. Then in 1948 the Congress amended the language of the statute and declared that "religious training and belief" was to be defined as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code." The only significant mention of

[1] See *United States* v. *Kauten,* 133 F. 2d 703 (C. A. 2d Cir. 1943); *Berman* v. *United States,* 156 F. 2d 377 (C. A. 9th Cir. 1946).

this change in the provision appears in the report of the Senate Armed Services Committee recommending adoption. It said simply this: "This section reenacts substantially the same provisions as were found in subsection 5 (g) of the 1940 act. Exemption extends to anyone who, because of religious training and belief in his relation to a Supreme Being, is conscientiously opposed to combatant military service or to both combatant and noncombatant military service. (See *United States* v. *Berman* [*sic*], 156 F. (2d) 377, certiorari denied, 329 U. S. 795.)" S. Rep. No. 1268, 80th Cong., 2d Sess., 14.

INTERPRETATION OF § 6 (j).

1. The crux of the problem lies in the phrase "religious training and belief" which Congress has defined as "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation." In assigning meaning to this statutory language we may narrow the inquiry by noting briefly those scruples expressly excepted from the definition. The section excludes those persons who, disavowing religious belief, decide on the basis of essentially political, sociological or economic considerations that war is wrong and that they will have no part of it. These judgments have historically been reserved for the Government, and in matters which can be said to fall within these areas the conviction of the individual has never been permitted to override that of the state. *United States* v. *Macintosh, supra* (dissenting opinion). The statute further excludes those whose opposition to war stems from a "merely personal moral code," a phrase to which we shall have occasion to turn later in discussing the application of § 6 (j) to these cases. We also pause to take note of what is not involved in this litigation. No party claims to be an atheist or attacks the statute on this ground. The question is not, therefore, one between theistic and atheistic beliefs. We do not deal with

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or intimate any decision on that situation in these cases. Nor do the parties claim the monotheistic belief that there is but one God; what they claim (with the possible exception of Seeger who bases his position here not on factual but on purely constitutional grounds) is that they adhere to theism, which is the "Belief in the existence of a god or gods; . . . Belief in superhuman powers or spiritual agencies in one or many gods," as opposed to atheism.[2] Our question, therefore, is the narrow one: Does the term "Supreme Being" as used in § 6 (j) mean the orthodox God or the broader concept of a power or being, or a faith, "to which all else is subordinate or upon which all else is ultimately dependent"? Webster's New International Dictionary (Second Edition). In considering this question we resolve it solely in relation to the language of § 6 (j) and not otherwise.

2. Few would quarrel, we think, with the proposition that in no field of human endeavor has the tool of language proved so inadequate in the communication of ideas as it has in dealing with the fundamental questions of man's predicament in life, in death or in final judgment and retribution. This fact makes the task of discerning the intent of Congress in using the phrase "Supreme Being" a complex one. Nor is it made the easier by the richness and variety of spiritual life in our country. Over 250 sects inhabit our land. Some believe in a purely personal God, some in a supernatural deity; others think of religion as a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace. There are those who think of God as the depth of our being; others, such as the Buddhists, strive for a state of lasting rest through self-denial and inner purification; in Hindu philosophy, the Supreme Being is

[2] See Webster's New International Dictionary (Second Edition); Webster's New Collegiate Dictionary (1949).

the transcendental reality which is truth, knowledge and bliss. Even those religious groups which have traditionally opposed war in every form have splintered into various denominations: from 1940 to 1947 there were four denominations using the name "Friends," Selective Service System Monograph No. 11, Conscientious Objection 13 (1950); the "Church of the Brethren" was the official name of the oldest and largest church body of four denominations composed of those commonly called Brethren, *id.*, at 11; and the "Mennonite Church" was the largest of 17 denominations, including the Amish and Hutterites, grouped as "Mennonite bodies" in the 1936 report on the Census of Religious Bodies, *id.*, at 9. This vast panoply of beliefs reveals the magnitude of the problem which faced the Congress when it set about providing an exemption from armed service. It also emphasizes the care that Congress realized was necessary in the fashioning of an exemption which would be in keeping with its long-established policy of not picking and choosing among religious beliefs.

In spite of the elusive nature of the inquiry, we are not without certain guidelines. In amending the 1940 Act, Congress adopted almost intact the language of Chief Justice Hughes in *United States* v. *Macintosh, supra:*

> "The essence of religion is belief in a relation to *God* involving duties superior to those arising from any human relation." At 633–634. (Emphasis supplied.)

By comparing the statutory definition with those words, however, it becomes readily apparent that the Congress deliberately broadened them by substituting the phrase "Supreme Being" for the appellation "God." And in so doing it is also significant that Congress did not elaborate on the form or nature of this higher authority which it chose to designate as "Supreme Being." By so refraining it must have had in mind the admonitions of the Chief

Justice when he said in the same opinion that even the word "God" had myriad meanings for men of faith:

> "[P]utting aside dogmas with their particular conceptions of deity, freedom of conscience itself implies respect for an innate conviction of paramount duty. The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field." At 634.

Moreover, the Senate Report on the bill specifically states that § 6 (j) was intended to re-enact "substantially the same provisions as were found" in the 1940 Act. That statute, of course, refers to "religious training and belief" without more. Admittedly, all of the parties here purport to base their objection on religious belief. It appears, therefore, that we need only look to this clear statement of congressional intent as set out in the report. Under the 1940 Act it was necessary only to have a conviction based upon religious training and belief; we believe that is all that is required here. Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets.

3. The Government takes the position that since *Berman* v. *United States, supra,* was cited in the Senate Report on the 1948 Act, Congress must have desired to adopt the *Berman* interpretation of what constitutes "religious belief." Such a claim, however, will not bear scrutiny. First, we think it clear that an explicit statement of congressional intent deserves more weight than the parenthetical citation of a case which might stand for a number of things. Congress specifically stated that it intended to re-enact substantially the same provisions as were found in the 1940 Act. Moreover, the history of that Act reveals no evidence of a desire to restrict the concept of religious belief. On the contrary the Chairman of the House Military Affairs Committee which reported out the 1940 exemption provisions stated:

> "We heard the conscientious objectors and all of their representatives that we could possibly hear, and, summing it all up, their whole objection to the bill, aside from their objection to compulsory military training, was based upon the right of conscientious objection and in most instances to the right of the ministerial students to continue in their studies, and we have provided ample protection for those classes and those groups." 86 Cong. Rec. 11368 (1940).

During the House debate on the bill, Mr. Faddis of Pennsylvania made the following statement:

> "We have made provision to take care of conscientious objectors. I am sure the committee has had all the sympathy in the world with those who appeared claiming to have religious scruples against rendering military service in its various degrees. Some appeared who had conscientious scruples against handling lethal weapons, but who had no

> scruples against performing other duties which did not actually bring them into combat. Others appeared who claimed to have conscientious scruples against participating in any of the activities that would go along with the Army. The committee took all of these into consideration and has written a bill which, I believe, will take care of all the reasonable objections of this class of people." 86 Cong. Rec. 11418 (1940).

Thus the history of the Act belies the notion that it was to be restrictive in application and available only to those believing in a traditional God.

As for the citation to *Berman*, it might mean a number of things. But we think that Congress' action in citing it must be construed in such a way as to make it consistent with its express statement that it meant substantially to re-enact the 1940 provision. As far as we can find, there is not one word to indicate congressional concern over any conflict between *Kauten* and *Berman*. Surely, if it thought that two clashing interpretations as to what amounted to "religious belief" had to be resolved, it would have said so somewhere in its deliberations. Thus, we think that rather than citing *Berman* for what it said "religious belief" was, Congress cited it for what it said "religious belief" was not. For both *Kauten* and *Berman* hold in common the conclusion that exemption must be denied to those whose beliefs are political, social or philosophical in nature, rather than religious. Both, in fact, denied exemption on that very ground. It seems more likely, therefore, that it was this point which led Congress to cite *Berman*. The first part of the § 6 (j) definition—belief in a relation to a Supreme Being—was indeed set out in *Berman*, with the exception that the court used the word "God" rather than "Supreme Being." However, as the Government recognizes, *Berman* took that language word for word from *Macintosh*. Far from

requiring a conclusion contrary to the one we reach here, Chief Justice Hughes' opinion, as we have pointed out, supports our interpretation.

Admittedly, the second half of the statutory definition—the rejection of sociological and moral views—was taken directly from *Berman*. But, as we have noted, this same view was adhered to in *United States* v. *Kauten, supra*. Indeed the Selective Service System has stated its view of the cases' significance in these terms: "The *United States* v. *Kauten* and *Herman Berman* v. *United States* cases ruled that a valid conscientious objector claim to exemption must be based solely on 'religious training and belief' and not on philosophical, political, social, or other grounds . . . ." Selective Service System Monograph No. 11, Conscientious Objection 337 (1950). See *id.*, at 278. That the conclusions of the Selective Service System are not to be taken lightly is evidenced in this statement by Senator Gurney, Chairman of the Senate Armed Services Committee and sponsor of the Senate bill containing the present version of § 6 (j):

> "The bill which is now pending follows the 1940 act, with very few technical amendments, worked out by those in Selective Service who had charge of the conscientious-objector problem during the war." 94 Cong. Rec. 7305 (1948).

Thus we conclude that in enacting § 6 (j) Congress simply made explicit what the courts of appeals had correctly found implicit in the 1940 Act. Moreover, it is perfectly reasonable that Congress should have selected *Berman* for its citation, since this Court denied certiorari in that case, a circumstance not present in *Kauten*.

Section 6 (j), then, is no more than a clarification of the 1940 provision involving only certain "technical amendments," to use the words of Senator Gurney. As such it continues the congressional policy of providing exemption from military service for those whose opposition

is based on grounds that can fairly be said to be "religious." [3] To hold otherwise would not only fly in the face of Congress' entire action in the past; it would ignore the historic position of our country on this issue since its founding.

4. Moreover, we believe this construction embraces the ever-broadening understanding of the modern religious community. The eminent Protestant theologian, Dr. Paul Tillich, whose views the Government concedes would come within the statute, identifies God not as a projection "out there" or beyond the skies but as the ground of our very being. The Court of Appeals stated in No. 51 that Jakobson's views "parallel [those of] this eminent theologian rather strikingly." 325 F. 2d, at 415–416. In his book, Systematic Theology, Dr. Tillich says:

> "I have written of the God above the God of theism . . . . In such a state [of self-affirmation] the God of both religious and theological language disappears. But something remains, namely, the seriousness of that doubt in which meaning within meaninglessness is affirmed. The source of this affirmation of meaning within meaninglessness, of certitude within doubt, is not the God of traditional theism but the 'God above God,' the power of being, which works through those who have no name for it, not even the name God." II Systematic Theology 12 (1957).

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[3] A definition of "religious training and belief" identical to that in § 6 (j) is found in § 337 of the Immigration and Nationality Act, 66 Stat. 258, 8 U. S. C. § 1448 (a) (1958 ed.). It is noteworthy that in connection with this Act, the Senate Special Subcommittee to Investigate Immigration and Naturalization stated: "The subcommittee realizes and respects the fact that the question of whether or not a person must bear arms in defense of his country may be one which invades the province of religion and personal conscience." Thus, it recommended that an alien not be required to vow to bear arms when he asserted "his opposition to participation in war in any form because of his personal religious training and belief." S. Rep. No. 1515, 81st Cong., 2d Sess., 742, 746.

Another eminent cleric, the Bishop of Woolwich, John A. T. Robinson, in his book, Honest To God (1963), states:

> "The Bible speaks of a God 'up there.' No doubt its picture of a three-decker universe, of 'the heaven above, the earth beneath and the waters under the earth,' was once taken quite literally. . . ." At 11.
>
> "[Later] *in place of a God who is literally or physically 'up there' we have accepted, as part of our mental furniture, a God who is spiritually or metaphysically 'out there.'* . . . But now it seems there is no room for him, not merely in the inn, but in the entire universe: for there are no vacant places left. In reality, of course, our new view of the universe has made not the slightest difference. . . ." At 13–14.
>
> "But the idea of a God spiritually or metaphysically 'out there' dies very much harder. Indeed, most people would be seriously disturbed by the thought that it should need to die at all. For it *is* their God, and they have nothing to put in its place. . . . Every one of us lives with some mental picture of a God 'out there,' a God who 'exists' above and beyond the world he made, a God 'to' whom we pray and to whom we 'go' when we die." At 14.
>
> "But the signs are that we are reaching the point at which the whole conception of a God 'out there,' which has served us so well since the collapse of the three-decker universe, is itself becoming more of a hindrance than a help." At 15–16. (Emphasis in original.)

The Schema of the recent Ecumenical Council included a most significant declaration on religion: [4]

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[4] Draft declaration on the Church's relations with non-Christians, Council Daybook, Vatican II, 3d Sess., p. 282, N. C. W. C., Washington, D. C., 1965.

"The community of all peoples is one. One is their origin, for God made the entire human race live on all the face of the earth. One, too, is their ultimate end, God. Men expect from the various religions answers to the riddles of the human condition: What is man? What is the meaning and purpose of our lives? What is the moral good and what is sin? What are death, judgment, and retribution after death?

. . . . . .

"Ever since primordial days, numerous peoples have had a certain perception of that hidden power which hovers over the course of things and over the events that make up the lives of men; some have even come to know of a Supreme Being and Father. Religions in an advanced culture have been able to use more refined concepts and a more developed language in their struggle for an answer to man's religious questions.

. . . . . .

"Nothing that is true and holy in these religions is scorned by the Catholic Church. Ceaselessly the Church proclaims Christ, 'the Way, the Truth, and the Life,' in whom God reconciled all things to Himself. The Church regards with sincere reverence those ways of action and of life, precepts and teachings which, although they differ from the ones she sets forth, reflect nonetheless a ray of that Truth which enlightens all men."

Dr. David Saville Muzzey, a leader in the Ethical Culture Movement, states in his book, Ethics As a Religion (1951), that "[e]verybody except the avowed atheists (and they are comparatively few) believes in some kind of God," and that "The proper question to ask, therefore, is

not the futile one, Do you believe in God? but rather, What *kind* of God do you believe in?" *Id.*, at 86–87. Dr. Muzzey attempts to answer that question:

> "Instead of positing a personal God, whose existence man can neither prove nor disprove, the ethical concept is founded on human experience. It is anthropocentric, not theocentric. Religion, for all the various definitions that have been given of it, must surely mean the devotion of man to the highest ideal that he can conceive. And that ideal is a community of spirits in which the latent moral potentialities of men shall have been elicited by their reciprocal endeavors to cultivate the best in their fellow men. What ultimate reality is we do not know; but we have the faith that it expresses itself in the human world as the power which inspires in men moral purpose." At 95.
>
> "Thus the 'God' that we love is not the figure on the great white throne, but the perfect pattern, envisioned by faith, of humanity as it should be, purged of the evil elements which retard its progress toward 'the knowledge, love and practice of the right.'" At 98.

These are but a few of the views that comprise the broad spectrum of religious beliefs found among us. But they demonstrate very clearly the diverse manners in which beliefs, equally paramount in the lives of their possessors, may be articulated. They further reveal the difficulties inherent in placing too narrow a construction on the provisions of § 6 (j) and thereby lend conclusive support to the construction which we today find that Congress intended.

5. We recognize the difficulties that have always faced the trier of fact in these cases. We hope that the test that we lay down proves less onerous. The examiner is fur-

nished a standard that permits consideration of criteria with which he has had considerable experience. While the applicant's words may differ, the test is simple of application. It is essentially an objective one, namely, does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?

Moreover, it must be remembered that in resolving these exemption problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways. In such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight. Recognition of this was implicit in this language, cited by the *Berman* court from *State* v. *Amana Society,* 132 Iowa 304, 109 N. W. 894 (1906):

> "Surely a scheme of life designed to obviate [man's inhumanity to man], and by removing temptations, and all the allurements of ambition and avarice, to nurture the virtues of unselfishness, patience, love, and service, ought not to be denounced as not pertaining to religion *when its devotees regard it as an essential tenet of their religious faith.*" 132 Iowa, at 315, 109 N. W., at 898, cited in *Berman* v. *United States,* 156 F. 2d 377, 381. (Emphasis by the Court of Appeals.)

The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's "Supreme Being" or the truth of his concepts. But these are inquiries foreclosed to Government. As MR. JUSTICE DOUGLAS stated in *United States* v. *Ballard,* 322 U. S. 78, 86 (1944): "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others." Local

boards and courts in this sense are not free to reject beliefs because they consider them "incomprehensible." Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.

But we hasten to emphasize that while the "truth" of a belief is not open to question, there remains the significant question whether it is "truly held." This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact—a prime consideration to the validity of every claim for exemption as a conscientious objector. The Act provides a comprehensive scheme for assisting the Appeal Boards in making this determination, placing at their service the facilities of the Department of Justice, including the Federal Bureau of Investigation and hearing officers. Finally, we would point out that in *Estep* v. *United States,* 327 U. S. 114 (1946), this Court held that:

> "The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant." At 122–123.

Application of § 6 (j) to the Instant Cases.

As we noted earlier, the statutory definition excepts those registrants whose beliefs are based on a "merely personal moral code." The records in these cases, how-

ever, show that at no time did any one of the applicants suggest that his objection was based on a "merely personal moral code." Indeed at the outset each of them claimed in his application that his objection was based on a religious belief. We have construed the statutory definition broadly and it follows that any exception to it must be interpreted narrowly. The use by Congress of the words "merely personal" seems to us to restrict the exception to a moral code which is not only personal but which is the sole basis for the registrant's belief and is in no way related to a Supreme Being. It follows, therefore, that if the claimed religious beliefs of the respective registrants in these cases meet the test that we lay down then their objections cannot be based on a "merely personal" moral code.

In *Seeger,* No. 50, the Court of Appeals failed to find sufficient "externally compelled beliefs." However, it did find that "it would seem impossible to say with assurance that [Seeger] is not bowing to 'external commands' in virtually the same sense as is the objector who defers to the will of a supernatural power." 326 F. 2d, at 853. It found little distinction between Jakobson's devotion to a mystical force of "Godness" and Seeger's compulsion to "goodness." Of course, as we have said, the statute does not distinguish between externally and internally derived beliefs. Such a determination would, as the Court of Appeals observed, prove impossible as a practical matter, and we have found that Congress intended no such distinction.

The Court of Appeals also found that there was no question of the applicant's sincerity. He was a product of a devout Roman Catholic home; he was a close student of Quaker beliefs from which he said "much of [his] thought is derived"; he approved of their opposition to war in any form; he devoted his spare hours to the Amer-

ican Friends Service Committee and was assigned to hospital duty.

In summary, Seeger professed "religious belief" and "religious faith." He did not disavow any belief "in a relation to a Supreme Being"; indeed he stated that "the cosmic order does, perhaps, suggest a creative intelligence." He decried the tremendous "spiritual" price man must pay for his willingness to destroy human life. In light of his beliefs and the unquestioned sincerity with which he held them, we think the Board, had it applied the test we propose today, would have granted him the exemption. We think it clear that the beliefs which prompted his objection occupy the same place in his life as the belief in a traditional deity holds in the lives of his friends, the Quakers. We are reminded once more of Dr. Tillich's thoughts:

> "And if that word [God] has not much meaning for you, translate it, and speak of the depths of your life, of the source of your being, of your ultimate concern, *of what you take seriously without any reservation.* Perhaps, in order to do so, you must forget everything traditional that you have learned about God . . . ." Tillich, The Shaking of the Foundations 57 (1948). (Emphasis supplied.)

It may be that Seeger did not clearly demonstrate what his beliefs were with regard to the usual understanding of the term "Supreme Being." But as we have said Congress did not intend that to be the test. We therefore affirm the judgment in No. 50.

In *Jakobson,* No. 51, the Court of Appeals found that the registrant demonstrated that his belief as to opposition to war was related to a Supreme Being. We agree and affirm that judgment.

We reach a like conclusion in No. 29. It will be remembered that Peter acknowledged "some power manifest in

nature . . . the supreme expression" that helps man in ordering his life. As to whether he would call that belief in a Supreme Being, he replied, "you could call that a belief in the Supreme Being or God. These just do not happen to be the words I use." We think that under the test we establish here the Board would grant the exemption to Peter and we therefore reverse the judgment in No. 29.

It is so ordered.

MR. JUSTICE DOUGLAS, concurring.

If I read the statute differently from the Court, I would have difficulties. For then those who embraced one religious faith rather than another would be subject to penalties; and that kind of discrimination, as we held in *Sherbert* v. *Verner,* 374 U. S. 398, would violate the Free Exercise Clause of the First Amendment. It would also result in a denial of equal protection by preferring some religions over others—an invidious discrimination that would run afoul of the Due Process Clause of the Fifth Amendment. See *Bolling* v. *Sharpe,* 347 U. S. 497.

The legislative history of this Act leaves much in the dark. But it is, in my opinion, not a *tour de force* if we construe the words "Supreme Being" to include the cosmos, as well as an anthropomorphic entity. If it is a *tour de force* so to hold, it is no more so than other instances where we have gone to extremes to construe an Act of Congress to save it from demise on constitutional grounds. In a more extreme case than the present one we said that the words of a statute may be strained "in the candid service of avoiding a serious constitutional doubt." *United States* v. *Rumely,* 345 U. S. 41, 47.[1]

[1] And see *Crowell* v. *Benson,* 285 U. S. 22, 62; *Ullmann* v. *United States,* 350 U. S. 422, 433; *Ashwander* v. *TVA,* 297 U. S. 288, 341, 348 (concurring opinion).

The words "a Supreme Being" have no narrow technical meaning in the field of religion. Long before the birth of our Judeo-Christian civilization the idea of God had taken hold in many forms. Mention of only two—Hinduism and Buddhism—illustrates the fluidity and evanescent scope of the concept. In the Hindu *religion* the Supreme Being is conceived in the forms of several cult Deities. The chief of these, which stand for the Hindu Triad, are Brahma, Vishnu and Siva. Another Deity, and the one most widely worshipped, is Sakti, the Mother Goddess, conceived as power, both destructive and creative. Though Hindu religion encompasses the worship of many Deities, it believes in only one single God, the eternally existent One Being with his manifold attributes and manifestations. This idea is expressed in Rigveda, the earliest sacred text of the Hindus, in verse 46 of a hymn attributed to the mythical seer Dirghatamas (Rigveda, I, 164):

> "They call it Indra, Mitra, Varuna and Agni
> And also heavenly beautiful Garutman:
> The Real is One, though sages name it variously—
> They call it Agni, Yama, Matarisvan."

See Smart, Reasons and Faiths, p. 35, n. 1 (1958); 32 Harvard Oriental Series, pp. 434–435 (Lanman ed. 1925). See generally 31 and 32 *id.;* Editors of Life Magazine, The World's Great Religions, Vol. 1, pp. 17–48 (1963).

Indian *philosophy,* which comprises several schools of thought, has advanced different theories of the nature of the Supreme Being. According to the Upanisads, Hindu sacred texts, the Supreme Being is described as the power which creates and sustains everything, and to which the created things return upon dissolution. The word which is commonly used in the Upanisads to indicate the Supreme Being is Brahman. Philosophically, the

Supreme Being is the transcendental Reality which is Truth, Knowledge, and Bliss. It is the source of the entire universe. In this aspect Brahman is Isvara, a personal Lord and Creator of the universe, an object of worship. But, in the view of one school of thought, that of Sankara, even this is an imperfect and limited conception of Brahman which must be transcended: to think of Brahman as the Creator of the material world is necessarily to form a concept infected with illusion, or *maya*—which is what the world really is, in highest truth. Ultimately, mystically, Brahman must be understood as without attributes, as *neti neti* (not this, not that). See Smart, *op. cit., supra,* p. 133.

Buddhism—whose advent marked the reform of Hinduism—continued somewhat the same concept. As stated by Nancy Wilson Ross, "God—if I may borrow that word for a moment—the universe, and man are one indissoluble existence, one total whole. Only THIS—capital THIS—is. Anything and everything that appears to us as an individual entity or phenomenon, whether it be a planet or an atom, a mouse or a man, is but a temporary manifestation of THIS in form; every activity that takes place, whether it be birth or death, loving or eating breakfast, is but a temporary manifestation of THIS in activity. When we look at things this way, naturally we cannot believe that each individual person has been endowed with a special and individual soul or self. Each one of us is but a cell, as it were, in the body of the Great Self, a cell that comes into being, performs its functions, and passes away, transformed into another manifestation. Though we have temporary individuality, that temporary, limited individuality is not either a true self or our true self. Our true self is the Great Self; our true body is the Body of Reality, or the Dharmakaya, to give it its technical Buddhist name." The World of Zen, p. 18 (1960).

Does a Buddhist believe in "God" or a "Supreme Being"? That, of course, depends on how one defines "God," as one eminent student of Buddhism has explained:

> "It has often been suggested that Buddhism is an atheistic system of thought, and this assumption has given rise to quite a number of discussions. Some have claimed that since Buddhism knew no God, it could not be a religion; others that since Buddhism obviously was a religion which knew no God, the belief in God was not essential to religion. These discussions assume that *God* is an unambiguous term, which is by no means the case." Conze, Buddhism, pp. 38–39 (1959).

Dr. Conze then says that if "God" is taken to mean a personal Creator of the universe, then the Buddhist has no interest in the concept. *Id.*, p. 39. But if "God" means something like the state of oneness with God as described by some Christian mystics, then the Buddhist surely believes in "God," since this state is almost indistinguishable from the Buddhist concept of Nirvana, "the supreme Reality; . . . the eternal, hidden and incomprehensible Peace." *Id.*, pp. 39–40. And finally, if "God" means one of the many Deities in an at least superficially polytheistic religion like Hinduism, then Buddhism tolerates a belief in many Gods: "the Buddhists believe that a Faith can be kept alive only if it can be adapted to the mental habits of the average person. In consequence, we find that, in the earlier Scriptures, the deities of Brahmanism are taken for granted and that, later on, the Buddhists adopted the local Gods of any district to which they came." *Id.*, p. 42.

When the present Act was adopted in 1948 we were a nation of Buddhists, Confucianists, and Taoists, as well as Christians. Hawaii, then a Territory, was indeed filled with Buddhists, Buddhism being "probably the major

faith, if Protestantism and Roman Catholicism are deemed different faiths." Stokes and Pfeffer, Church and State in the United States, p. 560 (1964). Organized Buddhism first came to Hawaii in 1887 when Japanese laborers were brought to work on the plantations. There are now numerous Buddhist sects in Hawaii, and the temple of the Shin sect in Honolulu is said to have the largest congregation of any religious organization in the city. See Mulholland, Religion in Hawaii, pp. 44–50 (1961).

In the continental United States Buddhism is found "in real strength" in Utah, Arizona, Washington, Oregon, and California. "Most of the Buddhists in the United States are Japanese or Japanese-Americans; however, there are 'English' departments in San Francisco, Los Angeles, and Tacoma." Mead, Handbook of Denominations, p. 61 (1961). The Buddhist Churches of North America, organized in 1914 as the Buddhist Mission of North America and incorporated under the present name in 1942, represent the Jodo Shinshu Sect of Buddhism in this country. This sect is the only Buddhist group reporting information to the annual Yearbook of American Churches. In 1961, the latest year for which figures are available, this group alone had 55 churches and an inclusive membership of 60,000; it maintained 89 church schools with a total enrollment of 11,150. Yearbook of American Churches, p. 30 (1965). According to one source, the total number of Buddhists of all sects in North America is 171,000. See World Almanac, p. 636 (1965).

When the Congress spoke in the vague general terms of a Supreme Being I cannot, therefore, assume that it was so parochial as to use the words in the narrow sense urged on us. I would attribute tolerance and sophistication to the Congress, commensurate with the religious complexion of our communities. In sum, I agree with the Court that any person opposed to war on the basis of a sincere belief, which in his life fills the same place as a be-

lief in God fills in the life of an orthodox religionist, is entitled to exemption under the statute. None comes to us an avowedly irreligious person or as an atheist; [2] one, as a sincere believer in "goodness and virtue for their own sakes." His questions and doubts on theological issues, and his wonder, are no more alien to the statutory standard than are the awe-inspired questions of a devout Buddhist.

[2] If he were an atheist, quite different problems would be presented. Cf. *Torcaso* v. *Watkins*, 367 U. S. 488.

DEPARTMENT OF MENTAL HYGIENE OF CALIFORNIA *v.* KIRCHNER, ADMINISTRATRIX.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 111. Argued January 19, 1965.—Decided March 8, 1965.

Petitioner sued the administratrix of the estate of a deceased daughter of an adjudged incompetent for the cost of support furnished the incompetent in a state mental institution and recovered a judgment which was reversed by the Supreme Court of California. That court found that the state statute creating support liability "violates the basic constitutional guaranty of equal protection of the law . . . ." *Held:* Since the California court did not specify whether its holding was based on the Equal Protection Clause of the United States Constitution or the equivalent provision of the state constitution, or both, this Court cannot be certain that the judgment below was not based on an adequate and independent nonfederal ground. In light of the doubt as to this Court's jurisdiction, the judgment is vacated and the case remanded. Pp. 195–201.

60 Cal. 2d 716, 388 P. 2d 720, judgment vacated and case remanded.

Elizabeth Palmer, Deputy Attorney General of California, argued the cause for petitioner. With her on the briefs were *Thomas C. Lynch,* Attorney General of California, *Harold B. Haas,* Assistant Attorney General, and *John Carl Porter* and *Asher Rubin,* Deputy Attorneys General.

Alan A. Dougherty argued the cause for respondent. With him on the brief was *John Walton Dinkelspiel.*

Briefs of *amici curiae,* urging reversal, were filed by *William G. Clark,* Attorney General of Illinois, *Richard E. Friedman,* First Assistant Attorney General, *Richard A. Michael,* Assistant Attorney General, and *Jerome F. Goldberg* and *John E. Coons,* Special Assistant Attorneys General, for the State of Illinois; by *William B. Saxbe,* Attorney General of Ohio, and *Joanne Wharton,* Assistant

Attorney General, for the State of Ohio; by *Robert Y. Thornton,* Attorney General of Oregon, and *A. Duane Pinkerton* and *Neil C. Hoyez,* Assistant Attorneys General, for the State of Oregon; and by *John J. O'Connell,* Attorney General of Washington, and *Stephen C. Way,* Assistant Attorney General, for the State of Washington.

Briefs of *amici curiae,* urging affirmance, were filed by *Robert W. Kenny* for the National Federation of the Blind and the California League of Senior Citizens, and by *A. Kenneth Pye, John R. Schmertz, Jr.,* and *Bernard D. Fischman* for the National Association for Retarded Children, Inc., and the American Orthopsychiatric Association.

Mr. Justice Harlan delivered the opinion of the Court.

Mrs. Auguste Schaeche was adjudged incompetent in 1953 and committed to a California state mental institution operated by petitioner. California Welfare and Institutions Code § 6650 provides in pertinent part:

> "The husband, wife, father, mother, or children of a mentally ill person or inebriate, and the administrators of their estates, and the estate of such mentally ill person or inebriate, shall be liable for his care, support, and maintenance in a state institution of which he is an inmate. The liability of such persons and estates shall be a joint and several liability . . . ."

Ellinor Vance, the daughter of Mrs. Schaeche, died in 1960 and respondent was appointed administratrix of her estate. Petitioner filed a claim for $7,554.22 with respondent, that being the cost of support furnished to the incompetent from 1956 to 1960, which was rejected by respondent. Petitioner then filed suit for that amount and obtained judgment on the pleadings. The District

Court of Appeal affirmed, 29 Cal. Rptr. 312, but the Supreme Court of California reversed, finding that § 6650 "violates the basic constitutional guaranty of equal protection of the law . . . ." 60 Cal. 2d 716, 717, 388 P. 2d 720. We granted certiorari to consider the important questions involved, 379 U. S. 811. After plenary briefing and argument, however, we are unable to say with requisite assurance that this Court has jurisdiction in the premises.

The California Supreme Court did not state whether its holding was based on the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States or the equivalent provisions of the California Constitution,[1] or both. While we might speculate from the choice of words used in the opinion, and the authorities cited by the court, which provision was the basis for the judgment of the state court, we are unable to say with

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[1] California Constitution, Art. I, §§ 11, 21, provides in pertinent part:

"Sec. 11. All laws of a general nature shall have a uniform operation.

. . . . . .

"Sec. 21. No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

These provisions have been interpreted by the California courts as being the equivalent of the Equal Protection Clause of the Fourteenth Amendment. See *Department of Mental Hygiene* v. *McGilvery,* 50 Cal. 2d 742, 754, 329 P. 2d 689, 695, quoted *infra,* p. 198; *Lelande* v. *Lowery,* 26 Cal. 2d 224, 157 P. 2d 639; *San Bernardino* v. *Way,* 18 Cal. 2d 647, 117 P. 2d 354; *People* v. *Sullivan,* 60 Cal. App. 2d 539, 141 P. 2d 230; *People* v. *England,* 140 Cal. App. 310, 35 P. 2d 565; 11 Cal. Jur. 2d § 272, and cases cited therein. See also *Los Angeles* v. *Southern Cal. Tel. Co.,* 32 Cal. 2d 378, 196 P. 2d 773, appeal dismissed, 336 U. S. 929.

any degree of certainty that the judgment of the California Supreme Court was not based on an adequate and independent nonfederal ground. This Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented, and the party seeking review here must show that we have jurisdiction of the case.[2] Were we to assume that the federal question was the basis for the decision below, it is clear that the California Supreme Court, either on remand or in another case presenting the same issues, could inform us that its opinion was in fact based, at least in part, on the California Constitution, thus leaving the result untouched by whatever conclusions this Court might have reached on the merits of the federal question. For reasons that follow we conclude that further clarifying proceedings in the California Supreme Court are called for under the principles stated in *Minnesota* v. *National Tea Co.*, 309 U. S. 551.

The first mention of any specific constitutional provision in this case appears to have been made in respondent's reply brief in the State District Court of Appeal, and it related solely to the State Constitution.[3] That court disposed of the constitutional claim in one paragraph,[4] citing *Department of Mental Hygiene* v. *McGilvery*, 50 Cal. 2d 742, 754–761, 329 P. 2d 689, 695–699. In *McGilvery* rehearing was granted by the California Supreme Court to consider the claim that "an absolute liability on a mother to pay for the care, support and maintenance of her mentally ill daughter in a state insti-

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[2] See Note, Supreme Court Treatment of State Court Cases Exhibiting Ambiguous Grounds of Decision, 62 Col. L. Rev. 822 (1962).

[3] Appellant's Reply Brief, p. 2, presented the rhetorical question: "Is not the taking of money from a daughter, or her estate, for the support of a mother who has an estate of her own violative of the Constitution *of the State of California?*" (Emphasis added.)

[4] 29 Cal. Rptr. 312, 317.

tution, is a deprivation of property without equal protection of law and without just compensation in violation of the state and federal Constitutions." 50 Cal. 2d, at 747, 329 P. 2d, at 691. On the pages cited by the District Court of Appeal, the California Supreme Court in *McGilvery* had concluded:

> "Article I, section 11 of the California Constitution requires that all laws of a general nature have a uniform operation. This has been held generally to require a reasonable classification of persons upon whom the law is to operate. The classification must be one that is founded upon some natural or intrinsic or constitutional distinction. [Citations.] Likewise, those within the class, that is those persons similarly situated with respect to that law, must be subjected to equal burdens. [Citation.] The clause of the Fourteenth Amendment to the federal Constitution which prohibits a state from denying to 'any person within its jurisdiction the equal protection of the laws' has been similarly construed." [5]

An examination of the opinion of the California Supreme Court in the case before us does not indicate whether that court relied on the State Constitution alone, the Federal Constitution alone, or both; and we would have jurisdiction to review only if the federal ground had been the *sole* basis for the decision, or the State Constitution was interpreted under what the state court deemed the compulsion of the Federal Constitution.[6]

The court first discussed *Department of Mental Hygiene* v. *Hawley,* 59 Cal. 2d 247, 379 P. 2d 22, a case decided under the Fourteenth Amendment, and then stated,

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[5] 50 Cal. 2d 742, 754, 329 P. 2d 689, 695.

[6] *State Tax Comm'n* v. *Van Cott,* 306 U. S. 511; *Fox Film Corp.* v. *Muller,* 296 U. S. 207.

"This holding is dispositive of the issue before us." 60 Cal. 2d, at 720, 388 P. 2d, at 722.

The court went on, however, to discuss other cases. After noting that in *Department of Mental Hygiene* v. *Shane,* 142 Cal. App. 2d 881, 299 P. 2d 747 (relied on in *McGilvery*), there was no "mention of either the United States or the California Constitutions," the court distinguished both *Shane* and *McGilvery* as cases in which the constitutional claims were not presented. 60 Cal. 2d, at 721, 388 P. 2d, at 723. It then discussed *Hoeper* v. *Tax Comm'n,* 284 U. S. 206, which dealt with reasonable classification, and compared a similar treatment in *Estate of Tetsubumi Yano,* 188 Cal. 645, 656–657 [14], 206 P. 995. In *Yano* the California Supreme Court found an alien land law in violation of the Equal Protection Clause of the Fourteenth Amendment, the Privileges and Immunities Clause, and of the California Constitution. The court's discussion of the Equal Protection Clause, however, was confined to pp. 654–656 of the opinion, and in headnote [14] on page 656 (cited by the court in the present case) the court dealt principally with the state constitutional ground.

After examining the statutory framework of the support statutes, the court in this case finally concluded with the following statement:

> "A statute obviously violates the equal protection clause if it selects one particular class of persons for a species of taxation and no rational basis supports such classification. (See *Blumenthal* v. *Board of Medical Examiners* (1962) 57 Cal. 2d 228, 237 [13] [18 Cal. Rptr. 501, 368 P. 2d 101]; *Bilyeu* v. *State Employees' Retirement System* (1962) 58 Cal. 2d 618, 623 [2] [25 Cal. Rptr. 562, 375 P. 2d 442].) Such a concept for the state's taking of a free man's

> property manifestly denies him equal protection of the law." 60 Cal. 2d, at 722–723, 388 P. 2d, at 724.

Blumenthal v. *Board of Medical Examiners,* 57 Cal. 2d 228, 368 P. 2d 101, involved an attack on a licensing statute under both the Fourteenth Amendment and §§ 11 and 21 of Article I of the California Constitution. See 57 Cal. 2d, at 232, 368 P. 2d, at 103. The court did not specifically rely on one constitutional provision, but merely held the statute unconstitutional. *Bilyeu* v. *State Employees' Retirement System,* 58 Cal. 2d 618, 375 P. 2d 442, involved an attack on a classification of state employees subject to retirement benefits. At headnote [2] of the opinion, cited by the court in *Kirchner,* appears the following language:

> "There is no constitutional requirement of uniform treatment, but only that there be a reasonable basis for each classification." [7]

The use of such language suggests that the court may have been adverting to the California constitutional provision that "[a]ll laws of a general nature shall have a uniform operation." Calif. Const., Art. I, § 11.

On the basis of the foregoing, it is clear that we cannot say with the requisite certainty that the California judgment rested *solely* on the Fourteenth Amendment, or, amounting to the same thing, that in striking the statute down under the State Constitution the court below acted under what it conceived to be the compulsion of the Federal Constitution (cf. *Jankovich* v. *Indiana Toll Road Comm'n,* 379 U. S. 487, 492); one or the other determination would be necessary to our exercising jurisdiction. While the ambiguity of the opinion might normally lead us to dismiss the writ of certiorari as improvidently granted, we think the preferable course is to leave the way

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[7] 58 Cal. 2d, at 623, 375 P. 2d, at 445.

open for obtaining clarification from the California Supreme Court (*Minnesota* v. *National Tea Co., supra*), in view of the importance of and widespread interest in the case.[8] Unfortunately, because of California law, we cannot hold the case on our calendar until the parties submit a clarifying certificate from the California Supreme Court, see *Dixon* v. *Duffy,* 344 U. S. 143, 145, but we can obviate undue delay by vacating the judgment of the California Supreme Court, directing that our mandate issue forthwith, and giving leave to the parties to file a new petition for certiorari incorporating by reference the record and briefs now on file in this Court, supplemented by such additional papers as may be necessary or appropriate, if on further proceedings the California Supreme Court holds that its judgment does not rest on an adequate independent nonfederal ground.

The judgment of the Supreme Court of California is vacated and the cause remanded to that court for such further proceedings as may be appropriate under state law. The judgment and mandate of this Court shall issue forthwith.

Vacated and remanded.

MR. JUSTICE DOUGLAS, believing it clear that the Supreme Court of California did not rest solely on the Fourteenth Amendment of the Constitution of the United States, would dismiss the writ.

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[8] Forty-two States, Puerto Rico, and the District of Columbia have similar statutes on their books, and eight States have filed *amicus* briefs in this Court, either supporting the petition for certiorari or the petitioner's position on the merits.

SWAIN *v.* ALABAMA.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 64. Argued December 8, 1964.—Decided March 8, 1965.

Petitioner, a Negro, was indicted and convicted of rape in the Circuit Court of Talladega County, Alabama, and sentenced to death. Of those in the county eligible for jury selection for grand and petit juries 26% are Negroes, while the jury panels since 1953 have averaged 10% to 15% Negroes. In this case there were four or five Negroes on the grand jury panel and two served on the grand jury. Although petit jury venires in criminal cases include an average of six to seven Negroes, no Negro has served on a petit jury in the county since about 1950. Here of the eight Negroes on the venire, two were exempt and six were peremptorily struck by the prosecutor. Petitioner's motions to quash the indictment, to strike the trial jury venire, and to void the trial jury, all based on discrimination in the selection of jurors, were denied and his conviction was affirmed by the Alabama Supreme Court. *Held:*

1. A defendant in a criminal case is not constitutionally entitled to a proportionate number of his race on the trial jury or the jury panel. P. 208.

2. Purposeful racial discrimination is not satisfactorily established by showing only that an identifiable group has been underrepresented by as much as 10%. P. 208.

3. There is no evidence in this case that the jury commissioners applied different jury selection standards as between Negroes and whites. P. 209.

4. An imperfect system of selection of jury panels is not equivalent to purposeful racial discrimination. P. 209.

5. The prosecutor's striking of Negroes from the jury panel in one particular case under the peremptory challenge system, which permits a challenge without a reason stated, does not constitute denial of equal protection of the laws. P. 221.

6. Even if a State's systematic striking of Negroes in selecting trial juries raises a prima facie case of discrimination under the Fourteenth Amendment the record here is insufficient to establish such systematic striking in the county. Pp. 222–228.

(a) Petitioner has the burden of proof and he has failed to meet it. P. 226.

(b) Total exclusion of Negroes from venires by state officials creates an inference of discrimination, but this rule of proof cannot be applied where it is not shown that the State is responsible for the exclusion of Negroes through peremptory challenges. Pp. 226–227.

275 Ala. 508, 156 So. 2d 368, affirmed.

Constance Baker Motley argued the cause for petitioner. With her on the brief were *Jack Greenberg, James M. Nabrit III, Orzell Billingsley, Jr., Peter A. Hall* and *Michael Meltsner.*

Leslie Hall, Assistant Attorney General of Alabama, argued the cause for respondent. With him on the brief was *Richmond M. Flowers,* Attorney General of Alabama.

MR. JUSTICE WHITE delivered the opinion of the Court.

The petitioner, Robert Swain, a Negro, was indicted and convicted of rape in the Circuit Court of Talladega County, Alabama, and sentenced to death. His motions to quash the indictment, to strike the trial jury venire and to declare void the petit jury chosen in the case, all based on alleged invidious discrimination in the selection of jurors, were denied. The Alabama Supreme Court affirmed the conviction, 275 Ala. 508, 156 So. 2d 368, and we granted certiorari, 377 U. S. 915.

In support of his claims, petitioner invokes the constitutional principle announced in 1880 in *Strauder* v. *West Virginia,* 100 U. S. 303, where the Court struck down a state statute qualifying only white people for jury duty. Such a statute was held to contravene the central purposes of the Fourteenth Amendment: "exemption from unfriendly legislation against [Negroes] distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy . . . ." 100 U. S., at 308. Although a Negro defendant is not entitled to a jury containing members of his race, a State's pur-

poseful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause. *Ex parte Virginia,* 100 U. S. 339; *Gibson* v. *Mississippi,* 162 U. S. 565. This principle was further elaborated in *Carter* v. *Texas,* 177 U. S. 442, 447, where, in respect to exclusion from grand juries, the Court said:

> "Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied . . . ."

And it has been consistently and repeatedly applied in many cases coming before this Court.[1] The principle of these cases is broadly based.

> "For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government." *Smith* v. *Texas,* 311 U. S. 128, 130.

Further, "[j]urymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race." *Cassell* v. *Texas,* 339 U. S. 282, 286 (opinion of Mr. Justice Reed, announcing judgment). Nor is the

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[1] *Neal* v. *Delaware,* 103 U. S. 370; *Norris* v. *Alabama,* 294 U. S. 587; *Hale* v. *Kentucky,* 303 U. S. 613; *Pierre* v. *Louisiana,* 306 U. S. 354; *Smith* v. *Texas,* 311 U. S. 128; *Hill* v. *Texas,* 316 U. S. 400; *Akins* v. *Texas,* 325 U. S. 398; *Patton* v. *Mississippi,* 332 U. S. 463; *Cassell* v. *Texas,* 339 U. S. 282; *Avery* v. *Georgia,* 345 U. S. 559; *Hernandez* v. *Texas,* 347 U. S. 475; *Reece* v. *Georgia,* 350 U. S. 85; *Eubanks* v. *Louisiana,* 356 U. S. 584; *Arnold* v. *North Carolina,* 376 U. S. 773.

constitutional command forbidding intentional exclusion limited to Negroes. It applies to any identifiable group in the community which may be the subject of prejudice. *Hernandez* v. *Texas,* 347 U. S. 475.

But purposeful discrimination may not be assumed or merely asserted. *Brownfield* v. *South Carolina,* 189 U. S. 426; *Tarrance* v. *Florida,* 188 U. S. 519; *Smith* v. *Mississippi,* 162 U. S. 592; *Bush* v. *Kentucky,* 107 U. S. 110. It must be proven, *Tarrance* v. *Florida, supra; Martin* v. *Texas,* 200 U. S. 316, the quantum of proof necessary being a matter of federal law. *Norris* v. *Alabama,* 294 U. S. 587; *Smith* v. *Texas,* 311 U. S. 128. It is not the soundness of these principles, which is unquestioned, but their scope and application to the issues in this case that concern us here.

I.

We consider first petitioner's claims concerning the selection of grand jurors and the petit jury venire. The evidence was that while Negro males over 21 constitute 26% of all males in the county in this age group, only 10 to 15% of the grand and petit jury panels drawn from the jury box since 1953 have been Negroes, there having been only one case in which the percentage was as high as 23%. In this period of time, Negroes served on 80% of the grand juries selected, the number ranging from one to three. There were four or five Negroes on the grand jury panel of about 33 in this case, out of which two served on the grand jury which indicted petitioner. Although there has been an average of six to seven Negroes on petit jury venires in criminal cases, no Negro has actually served on a petit jury since about 1950. In this case there were eight Negroes on the petit jury venire but none actually served, two being exempt and six being struck by the prosecutor in the process of selecting the jury.

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It is wholly obvious that Alabama has not totally excluded a racial group from either grand or petit jury panels, as was the case in *Norris* v. *Alabama,* 294 U. S. 587; *Hill* v. *Texas,* 316 U. S. 400; *Patton* v. *Mississippi,* 332 U. S. 463; *Hernandez* v. *Texas,* 347 U. S. 475; and *Reece* v. *Georgia,* 350 U. S. 85. Moreover, we do not consider an average of six to eight Negroes on these panels as constituting forbidden token inclusion within the meaning of the cases in this Court. *Thomas* v. *Texas,* 212 U. S. 278; *Akins* v. *Texas,* 325 U. S. 398; *Avery* v. *Georgia,* 345 U. S. 559. Nor do we consider the evidence in this case to make out a prima facie case of invidious discrimination under the Fourteenth Amendment.

Alabama law requires that the three jury commissioners in Talladega County place on the jury roll all male citizens in the community over 21 who are reputed to be honest, intelligent men and are esteemed for their integrity, good character and sound judgment. Ala. Code, Tit. 30, §§ 20, 21 (1958).[2] In practice, however, the

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[2] There is a special statute governing jury selection in Talladega County. Ala. Acts, 1955 Sess., Act No. 475, vol. 2, at 1081. The provisions pertinent to this case follow the general state statute and thus all references will be to the latter.

Ala. Code, Tit. 30, § 21 (1958) provides:

"Qualifications of persons on jury roll.—The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder his name may be placed on the jury roll and in the jury box. No person over the age of sixty-five years shall be required to serve on a jury or to remain on the panel of jurors unless he is willing to do so."

commissioners do not place on the roll all such citizens, either white or colored.[3] A typical jury roll at best contains about 2,500 names, out of a total male population over 21, according to the latest census, of 16,406 persons. Each commissioner, with the clerk's assistance, produces for the jury list names of persons who in his judgment are qualified. The sources are city directories, registration lists, club and church lists, conversations with other persons in the community, both white and colored, and personal and business acquaintances.[4]

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[3] Although the statute aims at an exhaustive jury list, failure to include the name of every qualified person on the jury roll is not a ground to quash an indictment or venire, absent fraud or purposeful discrimination. *Fikes* v. *Alabama*, 263 Ala. 89, 81 So. 2d 303 (1955), rev'd on other grounds, 352 U. S. 191.

[4] The commissioners testified that since 1959 they have met once or twice yearly, for about an hour each meeting, at which time each commissioner presented a list of persons he deemed qualified for jury service. Their names were obtained from disparate sources, each commissioner going about his task in his area of the county in his own way. The chief commissioner testified that with the assistance of city directories, and registration lists, he went out into the beats to which he was assigned and asked persons he knew for suggestions and information. He also secured names from customers of his paint store. He averred that he was familiar with Negro and white members of the community, talked with both, and used the same method for determining the qualifications of both Negro and white citizens. Another commissioner, working a predominantly rural area, testified that membership lists of Farm Bureau Cooperatives in the area and the Rural Electric Cooperative were his main sources of names, both organizations having a substantial number of Negro and white persons. He also relied on the city directory for Talladega City and on the people he knew through his 40 years of residence and farming in the area. He noted that he did not rely on predominantly white social clubs or on Negro churches, adding that he was not familiar with the relative percentage of Negroes or whites in his beats and could not identify the persons on the jury list by race. He also stated that the jury list did not contain the names of all qualified citizens and that compilation of an all-inclusive list would be impossible. The third commissioner testified that he used the tele-

Venires drawn from the jury box made up in this manner unquestionably contained a smaller proportion of the Negro community than of the white community. But a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn. *Virginia* v. *Rives,* 100 U. S. 313, 322–323; *Gibson* v. *Mississippi,* 162 U. S. 565; *Thomas* v. *Texas,* 212 U. S. 278, 282; *Cassell* v. *Texas,* 339 U. S. 282. Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group. "Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of Negroes as a race and no discrimination because of color, proportional limitation is not permissible." *Cassell* v. *Texas,* 339 U. S. 282, 286–287 (opinion of Mr. Justice Reed, announcing judgment). We cannot say that purposeful discrimination based on race alone is satisfactorily

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phone directory and went out into the various beats to gather names through local merchants and citizens, both Negro and white. He also relied on the customers of his business. He too was unable to identify the persons on the jury list by race. The clerk stated that she assisted by supplying some additional names to the commissioners; she compiled these names from various directories, church rolls, club rolls and from lists sent by the managers of local plants and industries. She testified that she was acquainted with more white persons than Negroes but that she did not visit the beats or talk with persons in the beats to gather names for the commission's approval. All the commissioners averred that they did not watch the color line in obtaining names, did not know the number of Negroes in their beats, and, accordingly, did not count the number of whites and colored people in preparing the lists. The record contains no admission by the commissioners that they had relatively few Negro acquaintances or that they tended primarily to use white church lists or white club lists.

proved by showing that an identifiable group in a community is underrepresented by as much as 10%. See *Thomas* v. *Texas,* 212 U. S. 278, 283; *Akins* v. *Texas,* 325 U. S. 398; *Cassell* v. *Texas,* 339 U. S. 282. Here the commissioners denied that racial considerations entered into their selections of either their contacts in the community or the names of prospective jurors. There is no evidence that the commissioners applied different standards of qualifications to the Negro community than they did to the white community. Nor was there any meaningful attempt to demonstrate that the same proportion of Negroes qualified under the standards being administered by the commissioners. It is not clear from the record that the commissioners even knew how many Negroes were in their respective areas, or on the jury roll or on the venires drawn from the jury box. The overall percentage disparity has been small, and reflects no studied attempt to include or exclude a specified number of Negroes. Undoubtedly the selection of prospective jurors was somewhat haphazard and little effort was made to ensure that all groups in the community were fully represented. But an imperfect system is not equivalent to purposeful discrimination based on race.[5] We do not think that the burden of proof was carried by petitioner in this case.

II.

Petitioner makes a further claim relating to the exercise of peremptory challenges to exclude Negroes from serving on petit juries.

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[5] " 'It may be that the jury commissioners did not give the negro race a full *pro rata* with the white race in the selection of the grand and petit jurors in this case, still this would not be evidence of discrimination. If they fairly and honestly endeavored to discharge their duty, and did not in fact discriminate against the negro race in the selection of the jury lists, then the Constitution of the United States has not been violated.' " *Thomas* v. *Texas,* 212 U. S. 278, 283.

In Talladega County the petit jury venire drawn in a criminal case numbers about 35 unless a capital offense is involved, in which case it numbers about 100. Ala. Code, Tit. 30, §§ 60, 62, 63 (1958). After excuses and removals for cause, the venire in a capital case is reduced to about 75. The jury is then "struck"—the defense striking two veniremen and the prosecution one in alternating turns, until only 12 jurors remain. Ala. Code, Tit. 30, § 64 (1958). This essentially is the Alabama struck-jury system, applicable in all criminal cases and available in civil cases. Ala. Code, Tit. 30, §§ 54, 60 (1958). In this case, the six Negroes available for jury service were struck by the prosecutor in the process of selecting the jury which was to try petitioner.

In the trial court after the jury was selected, petitioner moved to have the jury declared void on Fourteenth Amendment grounds. Among other things the motion alleged:

> "(4) That because of the systematic and arbitrary method of selecting the names of qualified male citizens, negro male citizens, by the Jury Commission of Talladega County, Alabama, the State can, and did in this case, readily strike members of the negro race and that there were only six negroes remaining on the final venire in this cause, in violation of the Fourteenth Amendment of the Constitution of the United States and also the Constitution of the State of Alabama . . . ."

The main thrust of the motion according to its terms was the striking of the six Negroes from the petit jury venire.[6] No evidence was taken, petitioner apparently

[6] The issue in regard to striking Negroes was raised in a different form in the motion to quash the venire. It read in pertinent part:

"4. Defendant avers the existence of a system or practice in the drawing or organization of juries to serve in Talladega County, Alabama, deliberately designed to discriminate against members of the Negro race in order to prevent them from serving on juries by either

being content to rely on the record which had been made in connection with the motion to quash the indictment. We think the motion, seeking as it did to invalidate the alleged purposeful striking of Negroes from the jury which was to try petitioner, was properly denied.

In providing for jury trial in criminal cases, Alabama adheres to the common-law system of trial by an impartial jury of 12 men who must unanimously agree on a verdict,[7] the system followed in the federal courts by virtue of the Sixth Amendment. As part of this system it provides for challenges for cause and substitutes a system of strikes for the common-law method of peremptory challenge.[8] Alabama contends that its system of pe-

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excluding them from the venire altogether or by keeping the number included so small that they can be systematically and uniformly struck from the venire and prevented from serving in the trial of any case."

This claim was repeated in the motion to declare void the petit jury selected.

"(3) That because of the systematic and arbitrary method of selecting the names of qualified male citizens by the jury commission of Talladega County, Alabama, it is impossible for qualified members of the negro race to serve as jurors in this cause or any cause . . . ."

The above claim as well as the objection to the prosecutor's exercise of his strikes against the six Negroes in this case was repeated in the motion for a new trial. No further claims were made and no further evidence was taken on any of these motions.

[7] In all prosecutions by indictment the accused has a right to a speedy public trial by an impartial jury in the county in which the offense was committed. Ala. Const. of 1901, § 6. See also Ala. Const. of 1901, §§ 11, 12; *Collins* v. *State,* 88 Ala. 212, 7 So. 260 (1890).

[8] Alabama had long provided both the defendant and prosecutor with a substantial number of peremptory challenges. Under the 1867 Code, the defendant was entitled to 21 peremptories in capital cases and 15 in noncapital felony cases; correspondingly the State had 14 peremptories in capital trials and 10 in other felony trials. 1867 Ala. Rev. Code §§ 4178, 4179. These numbers were altered in the 1907 Act, the defendant having eight peremptories in a noncapital felony case and the State four. The numbers in capital cases remained

remptory strikes—challenges without cause, without explanation and without judicial scrutiny—affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial. This system, it is said, in and of itself, provides justification for striking any group of otherwise qualified jurors in any given case, whether they be Negroes, Catholics, accountants or those with blue eyes. Based on the history of this system and its actual use and operation in this country, we think there is merit in this position.

The peremptory challenge has very old credentials. In all trials for felonies at common law, the defendant was allowed to challenge peremptorily 35 jurors,[9] and the

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the same. 1907 Ala. Code § 7275. The struck-jury system was introduced in 1909 as a part of a comprehensive amendment of the statutes governing the selection and impaneling of juries in the State. 1909 Leg. Acts, Spec. Sess., p. 319. The history and purposes of this legislation, as set out by the sponsor of the Act, may be found in John, The Jury Law, 1910–1911 Alabama Bar Assn. Rep. 198:

"The provision for struck juries in criminal cases, is found to be much fairer to the Solicitor and the Attorneys for defendants, and under it a jury can be more easily and quickly obtained, and it would be a decided step backward to restore the challenge system, with its delay and chances for errors." *Id.*, at 205.

[9] It was thought that peremptory challenges were allowed at common law in capital felonies only. Thus Blackstone states: "[I]n criminal cases, or at least in capital ones, there is, *in favorem vitae*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all; which is called a *peremptory* challenge: a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous." 4 Blackstone Commentaries 353 (15th ed. 1809) (hereafter Bl. Comm.).

This statement was not far amiss, since most felonies were generally punishable by death. 4 Bl. Comm. 98. But peremptories were allowable in trials of felonies that were not capital. *Gray* v. *Reg.*, 11 Cl. & Fin. 427 (H. L. 1844). See I Thompson, Trials § 42 (2d ed. 1912) (hereafter Thompson); I Stephen, History of Criminal Law of England 302 (1883) (hereafter Stephen).

prosecutor originally had a right to challenge any number of jurors without cause, a right which was said to tend to "infinite delayes and danger." Coke on Littleton 156 (14th ed. 1791).[10] Thus The Ordinance for Inquests, 33 Edw. 1, Stat. 4 (1305), provided that if "they that sue for the King will challenge any . . . Jurors, they shall assign . . . a Cause certain." So persistent was the view that a proper jury trial required peremptories on both sides, however, that the statute was construed to allow the prosecution to direct any juror after examination to "stand aside" until the entire panel was gone over and the defendant had exercised his challenges; only if there was a deficiency of jurors in the box at that point did the Crown have to show cause in respect to jurors recalled to make up the required number.[11] Peremptories on both sides became the settled law of England, continuing in the above form until after the separation of the Colonies.[12]

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[10] The defendant's right remained unaltered until 22 Hen. 8, c. 14, § 6 (1530); 25 Hen. 8, c. 3 (1533), when the number was limited to 20 in all cases except high treason. See generally Proffatt, Trial By Jury § 156 (1877) (hereafter Proffatt).

[11] *Lord Grey's Case,* 9 How. St. Tr. 128 (1682); *Reg.* v. *Frost,* 9 Car. & P. 129 (1839); *Mansell* v. *Reg.,* 8 El. & Bl. 54 (1857); 4 Bl. Comm. 353. The number of jurors called was in the discretion of the court and it is reported that the right to stand aside was exercised liberally. Proffatt § 160. All attempts to limit or abolish the Crown's right were rejected. *Reg.* v. *Frost, supra; O'Coigly's Case,* 26 How. St. Tr. 1191, 1231; I Thompson § 49; Busch, Law and Tactics in Jury Trials § 69 (1949) (hereafter Busch).

[12] It remains the law of England today, except the number the defendant may now exercise is seven. See 6 Geo. 4, c. 50, § 29 (1825); 11 & 12 Geo. 6, c. 58, § 35 (Criminal Justice Act of 1948). The actual use of challenges by either side has been rare, for at least a century, but the continued availability of the right is considered important. I Stephen 303; Devlin, Trial By Jury 29–37 (1956) (hereafter Devlin); Howard, Criminal Justice In England 362–364 (1931) (hereafter Howard).

This common law provided the starting point for peremptories in this country. In the federal system, Congress early took a part of the subject in hand in establishing that the defendant was entitled to 35 peremptories in trials for treason and 20 in trials for other felonies specified in the 1790 Act as punishable by death, 1 Stat. 119 (1790). In regard to trials for other offenses without the 1790 statute, both the defendant and the Government were thought to have a right of peremptory challenge, although the source of this right was not wholly clear.[13] In 1865, the Government was given by statute five peremptory challenges in capital and treason cases, the defendant being entitled to 20, and two in other cases where the right of the defendant to challenge then existed,

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[13] *United States* v. *Johns*, 4 Dall. 412, 414 (Cir. Ct. Pa. 1806). Mr. Justice Washington, sitting on circuit, stated:

"The right of challenge was a privilege highly esteemed, and anxiously guarded, at the common law; and it cannot be doubted, but that at the common law, a prisoner is entitled, on a capital charge, to challenge peremptorily, thirty-five jurors. If, therefore, the act of congress has substituted no other rule . . . the common law rule must be pursued." See also *United States* v. *Wilson & Porter*, 1 Bald. 78, 82 (Cir. Ct. Pa. 1830); *United States* v. *Douglass*, Fed. Cas. No. 14989, 2 Blatch. C. C. 207 (Cir. Ct. S. D. N. Y. 1851). But see *United States* v. *Cottingham*, Fed. Cas. No. 14872, 2 Blatch. C. C. 470 (Cir. Ct. N. D. N. Y. 1852).

In *United States* v. *Marchant*, 12 Wheat. 480, this Court indicated that the Crown's power to stand aside was a part of the common law inherited from the English. Federal courts allowed the Government to stand aside on the basis of this decision. *United States* v. *Wilson & Porter, supra; United States* v. *Douglass, supra.* In 1856, the Court held in *United States* v. *Shackleford*, 18 How. 588, that federal statutes affording the defendant a right of challenge did not incorporate the Government's right to stand aside. The Government could do this only by virtue of the 1840 Act, 5 Stat. 394, empowering the federal courts to adopt the state practice in regard to selection and impaneling of juries.

he being entitled to 10. 13 Stat. 500 (1865).[14] Subsequent enactments increased the number of challenges the Government could exercise, the Government now having an equal number with the defendant in capital cases, and six in cases where the crime is punishable by more than one year's imprisonment, the defendant or defendants having ten.[15]

The course in the States apparently paralleled that in the federal system. The defendant's right of challenge was early conferred by statute, the number often corresponding to the English practice,[16] the prosecution was

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[14] A few years later Congress extended the defendant's right to 10 challenges in all noncapital felony cases and the Government was entitled to three in such cases; it also extended the right to misdemeanors and civil cases, each party being entitled to three. 17 Stat. 282 (1872).

[15] See 36 Stat. 1166, § 287 (1911) providing that where the offense is a capital offense or treason, the defendant is entitled to 20 peremptory challenges and the United States to six; in all other felony trials, the defendant has 10, the United States six.

Rule 24 (b) of the Federal Rules of Criminal Procedure provides: "(b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly."

The Government's right to stand aside was deemed to survive early statutes giving the Government peremptory challenges. *Sawyer* v. *United States,* 202 U. S. 150.

[16] See *Waterford & Whitehall Turnpike Co.* v. *People,* 9 Barb. 161 (Sup. Ct. N. Y. 1850); *People* v. *McQuade,* 110 N. Y. 284, 293, 18 N. E. 156, 158 (1888); *State* v. *Humphreys,* 1 Tenn. 306 (1808); *Brown* v. *State,* 62 N. J. L. 666, 678–688, 42 A. 811, 814–818 (1899), aff'd, 175 U. S. 172; *Hendrick* v. *Commonwealth,* 5 Leigh 707, 715

thought to have retained the Crown's common-law right to stand aside,[17] and by 1870, most, if not all, States had enacted statutes conferring on the prosecution a substantial number of peremptory challenges, the number generally being at least half, but often equal to, the number had by the defendant.[18] Although there has been some criticism in the twentieth century leveled at peremptory challenges, on the basis of the delays, expense and elimination of qualified jurors incident to their use,[19] the sys-

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(Va. Gen. Ct. 1834); *Robinson* v. *State*, 1 Ga. 563, 571 (1846); *State* v. *Arthur*, 13 N. C. 217 (1829); *State* v. *Benton*, 19 N. C. 196 (1836). But cf. *State* v. *George*, 1 Del. Cas. 161 (Ct. Q. Sess. 1797). See also II Bishop, Criminal Procedure § 941 (1913) (hereafter Bishop); I Thompson § 42.

[17] *Waterford & Whitehall Turnpike Co., supra; Commonwealth* v. *Eisenhower*, 181 Pa. 470, 37 A. 521 (1897); *Jewell* v. *Commonwealth*, 22 Pa. 94 (1853); *State* v. *Arthur*, 13 N. C. 217 (1829); Proffatt § 162; I Thompson § 49; II Bishop §§ 938, 939.

[18] *E. g.*, 1873 N. Y. Laws, c. 427; 1874 Ill. Rev. Stat., p. 411; *Maton* v. *People*, 15 Ill. 536 (1854); *Brown* v. *State*, 62 N. J. L. 666, 684–685, 42 A. 811, 817 (1899), aff'd, 175 U. S. 172; 1869 Mass. Acts, c. 151; 1860 Pa. Laws 427, Act No. 375, §§ 36, 37; *Warren* v. *Commonwealth*, 37 Pa. 45 (1860); *State* v. *Briggs*, 27 S. C. 80, 2 S. E. 854 (1887); *Boon* v. *State*, 1 Ga. 618 (1846); Cal. Laws 1850–1853, c. 121, § 343; 1863–1864 Cal. Stats., c. 348, p. 394, § 1; Proffatt § 161.

The State's right to stand aside was deemed to survive these statutes, *Warren* v. *Commonwealth*, 37 Pa. 45 (1860); *Haines* v. *Commonwealth*, 100 Pa. 317, 322 (1882); *State* v. *McNinch*, 12 S. C. 89 (1879); *State* v. *Benton*, 19 N. C. 196, 203 (1836); I Thompson § 49, although opinion was divided, *Sealy* v. *State*, 1 Ga. 213 (1846); *Mathis* v. *State*, 31 Fla. 291, 315, 12 So. 681, 688 (1893). In many States this right has been expressly barred by statute. *E. g.*, N. C. Gen. Stat. §§ 15–163, 15–164 (1953); Pa. Stat. Ann., Tit. 19, § 811 (1964); S. C. Code § 38–211 (1962).

[19] The charges leveled at peremptory challenges have been that they required summoning a large number of veniremen, that they were used by defendants to eliminate intelligent and highly qualified jurors, that the imbalance in number in favor of defendants was unfair, that the *voir dire* as a predicate for their exercise was too extensive and that they generally protracted the selection process. See Proposed

tem has survived these attacks. In every State, except where peremptory strikes are a substitute, peremptory challenges are given by statute to both sides in both criminal and civil cases, the number in criminal cases still being considerably greater. Under these statutes the prosecution generally possesses a substantial number of challenges.[20]

The system of struck juries also has its roots in ancient common-law heritage.[21] Since striking a jury allowed

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Legislation For Jury Reform in New York, 30 Col. L. Rev. 721, 726 (1930); Missouri Crime Survey 356–357 (1926); Evans, Recommendations For Reforms In Criminal Procedure, 24 Ill. L. Rev. 112, 113–114 (1929); Challenges and the Powers of Judges, 23 Green Bag 84 (1911); 3 Proc. Am. Law Inst. 501 (1925); Report of Illinois Judicial Advisory Council 17–18 (1931); Extracts from Rep. of Comm. to Third Ann. Meeting of A. L. I., Defects in Criminal Justice, 11 A. B. A. J. 297, 298 (1925); Smith, Criminal Justice in America: A Reply, 11 A. B. A. J. 797–798 (1925).

[20] Classification of offenses and punishment on which the number exercisable depends varies among the States, as does the number of challenges within these categories, and hence meaningful generalization in regard to current statutes is not feasible. For an example of these variations, see Ariz. Rev. Stat., Rules Crim. Proc. 225 (1956); Conn. Gen. Stat. § 51–242 (1958); Del. Code Ann., Super. Ct. Rules Crim. Proc. 24 (b) (1953); Cal. Penal Code § 1070 (1956); Fla. Stat. § 913.08 (1963); Ga. Code Ann. § 59–805 (1937); Ill. Ann. Stat., c. 38, § 115–4 (e) (1964); Mass. Gen. Laws Ann., c. 234, § 29 (1959); Md. Ann. Code, Rules Proc. 746 (1963); Mo. Ann. Stat. § 546.180 (1953); N. J. Stat. Ann. 2A:78–7 c and d (1952); N. Y. Crim. Code and Penal Law §§ 370, 373 (1964); N. C. Gen. Stat. §§ 15–163, 15–164 (1953); Ohio Rev. Code Ann., Tit. 29, §§ 2945.21, 2945.22 (1954); Pa. Stat. Ann., Tit. 19, § 811 (1964); S. C. Code § 38–211 (1962); Tenn. Code Ann. § 40–2510 (1955); Tex. Code Crim. Proc., Tit. 8, Arts. 615, 634 (1941); Utah Code Ann. § 77–30–15 (1953).

For a listing of the state statutes in effect in 1930 and the variations in number and classifications among the States, see A. L. I. Code of Criminal Procedure, Commentary to § 282, at 855–862 (1930).

[21] Historically 48 names would be selected from a special jury list and each side would alternately strike 12 names, the remaining 24

both sides a greater number of challenges and an opportunity to become familiar with the entire venire list, it was deemed an effective means of obtaining more impartial and better qualified jurors. Accordingly, it was used in causes of "great nicety" or "where the sheriff [responsible for the jury list] was suspected of partiality." 3 Bl. Comm. 357. It is available in many States for both civil and criminal cases.[22] The Alabama system adheres to the common-law form, except that the veniremen are drawn from the regular jury list, are summoned to court before striking begins and the striking continues until 12 rather than 24 remain. It was adopted as a fairer system to the defendant and prosecutor and a more efficacious, quicker way to obtain an impartial jury satisfactory to the parties.[23]

In contrast to the course in England, where both peremptory challenge and challenge for cause have fallen into disuse, peremptories were and are freely used and relied upon in this country, perhaps because juries here are drawn from a greater cross-section of a heterogeneous society.[24] The *voir dire* in American trials tends to be

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being summoned for the case. *Brown* v. *State*, 62 N. J. L. 666, 688–690, 42 A. 811, 818 (1899), aff'd, 175 U. S. 172; 3 Bl. Comm. 357; Forsyth, History of Trial by Jury 173. Use of the struck jury system was not confined to criminal cases at common law, as the peremptory challenge was. Busch § 62; Proffatt § 72.

[22] See N. J. Stat. Ann. 2A:75–1, 2A:75–2, 2A:75–3; Md. Ann. Code, Rules Proc. 543 (1963); Busch § 62; 31 Am. Jur. § 90. Cf. 28 U. S. C. § 1866 (1958 ed.).

[23] John, The Jury Law, 1910–1911 Alabama Bar Assn. Rep. 198, 205.

[24] Devlin, *supra*, at 20–36. Another reason suggested for the difference lies in the greater control in England over pretrial publicity. "[O]ne of the salient reasons why both court and counsel have confidence in the impartiality and integrity of trial jurors is the authority the courts exercise in preventing the newspapers from prejudging a pending case." Howard 363 (1931).

extensive and probing, operating as a predicate for the exercise of peremptories, and the process of selecting a jury protracted.[25] The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury. See *Lewis* v. *United States,* 146 U. S. 370, 376. Although "[t]here is nothing in the Constitution of the United States which requires the Congress [or the States] to grant peremptory challenges," *Stilson* v. *United States,* 250 U. S. 583, 586, nonetheless the challenge is "one of the most important of the rights secured to the accused," *Pointer* v. *United States,* 151 U. S. 396, 408. The denial or impairment of the right is reversible error without a showing of prejudice, *Lewis* v. *United States, supra; Harrison* v. *United States,* 163 U. S. 140; cf. *Gulf, Colorado & Santa Fe R. Co.* v. *Shane,* 157 U. S. 348. "For it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose." *Lewis* v. *United States, supra,* at 378.

The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *In re Murchison,* 349 U. S. 133, 136. Indeed the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the *voir dire* and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility

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[25] See Devlin, *supra,* at 32–34; Busch §§ 145–154; Bodin, Selecting a Jury 44–72 (PLI 1954) (hereafter Bodin).

through examination and challenge for cause. Although historically the incidence of the prosecutor's challenge has differed from that of the accused, the view in this country has been that the system should guarantee "not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." *Hayes* v. *Missouri,* 120 U. S. 68, 70.

The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. *State* v. *Thompson,* 68 Ariz. 386, 206 P. 2d 1037 (1949); *Lewis* v. *United States,* 146 U. S. 370, 378. While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. *Hayes* v. *Missouri,* 120 U. S. 68, 70. It is often exercised upon the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another," *Lewis, supra,* at 376, upon a juror's "habits and associations," *Hayes* v. *Missouri, supra,* at 70, or upon the feeling that "the bare questioning [a juror's] indifference may sometimes provoke a resentment," *Lewis, supra,* at 376. It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty.[26] For the question a prosecutor or defense

[26] See, *e. g., Aldridge* v. *United States,* 283 U. S. 308; *Hall* v. *United States,* 83 U. S. App. D. C. 166, 168 F. 2d 161, cert. denied, 334 U. S. 853; *State* v. *Higgs,* 143 Conn. 138, 120 A. 2d 152 (1956); *Gurley* v. *State,* 164 Ark. 397, 262 S. W. 636 (1924); *People* v. *Car Soy,* 57 Cal. 102 (1880); *People* v. *Reyes,* 5 Cal. 347 (1855); *Fendrick* v. *State,* 39 Tex. Cr. R. 147, 45 S. W. 589 (1898); *State* v. *Carson,* 131 S. C. 42,

counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be.[27] It is well known that these factors are widely explored during the *voir dire*, by both prosecutor and accused, *Miles* v. *United States*, 103 U. S. 304; *Aldridge* v. *United States*, 283 U. S. 308.[28] This Court has held that the fairness of trial by jury requires no less. *Aldridge, supra.*[29] Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried.

With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change

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126 S. E. 757 (1925); *Wasy* v. *State*, 234 Ind. 52, 123 N. E. 2d 462 (1955); *People* v. *Roxborough*, 307 Mich. 575, 12 N. W. 2d 466 (1943), cert. denied, 323 U. S. 749. See generally Busch § 146; 54 A. L. R. 2d 1204; Bodin 61–67.

[27] This is especially so under the Alabama strike system, where all the veniremen are known to the parties before striking begins.

[28] See cases cited in n. 26, *supra.*

[29] Race or religion and beliefs stemming therefrom have at times constituted grounds of challenge for cause. *State* v. *Sanders*, 103 S. C. 216, 88 S. E. 10 (1916); *Potter* v. *State*, 86 Tex. Cr. R. 380, 216 S. W. 886 (1919); *McFadden* v. *Commonwealth*, 23 Pa. 12 (1853). But cf. *Johnson* v. *State*, 88 Neb. 565, 130 N. W. 282 (1911); *State* v. *Giudice*, 170 Iowa 731, 153 N. W. 336 (1915); *Commonwealth* v. *DePalma*, 268 Pa. 25, 110 A. 756 (1920); *Romero* v. *State*, 107 Tex. Cr. R. 70, 294 S. W. 857 (1927). See generally 54 A. L. R. 2d 1204.

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in the nature and operation of the challenge. The challenge, *pro tanto,* would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards. The prosecutor's judgment underlying each challenge would be subject to scrutiny for reasonableness and sincerity. And a great many uses of the challenge would be banned.

In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it. Hence the motion to strike the trial jury was properly denied in this case.

III.

Petitioner, however, presses a broader claim in this Court.[30] His argument is that not only were the Negroes

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[30] This claim was not set forth in the motion to quash the venire or the motion to declare void the petit jury selected, the only motions in which the Alabama strike system was challenged in the trial court. However, the decision of the Alabama Supreme Court may be read to have ruled on the challenge to the exercise of strikes against Negroes in its broadest form.

"As to the contention that Negroes are systematically excluded from trial juries, the evidence discloses that Negroes are commonly on trial

removed by the prosecutor in this case but that there never has been a Negro on a petit jury in either a civil or criminal case in Talladega County and that in criminal cases prosecutors have consistently and systematically exercised their strikes to prevent any and all Negroes on petit jury venires from serving on the petit jury itself. This systematic practice, it is claimed, is invidious discrimination for which the peremptory system is insufficient justification.

We agree that this claim raises a different issue and it may well require a different answer. We have decided that it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged. But when the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance. Cf. *Yick Wo* v. *Hopkins,* 118 U. S. 356. In these circumstances, giving even the

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venires but are always struck by attorneys in selecting the trial jury. It has long been held that, where allowed by statute, peremptory challenges may be used without any assigned or stated cause. Both the federal and Alabama jurisdictions have statutes providing for peremptory challenges. The fact that the prosecution peremptorily strikes every Negro from the jury panel in a case where the defendant is a Negro does not constitute a violation of the defendant's constitutional rights . . . ." 275 Ala. 508, 515, 156 So. 2d 368, 375 (citations omitted). Cf. *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 267–268; *Charleston Federal Savings & Loan Assn.* v. *Alderson,* 324 U. S. 182, 185–186.

widest leeway to the operation of irrational but trial-related suspicions and antagonisms, it would appear that the purposes of the peremptory challenge are being perverted. If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome. Such proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. These ends the peremptory challenge is not designed to facilitate or justify.

We need pursue this matter no further, however, for even if a State's systematic striking of Negroes in the selection of petit juries raises a prima facie case under the Fourteenth Amendment, we think it is readily apparent that the record in this case is not sufficient to demonstrate that the rule has been violated by the peremptory system as it operates in Talladega County. Cf. *Glasser* v. *United States,* 315 U. S. 60, 87.

The difficulty with the record before us, perhaps flowing from the fact that it was made in connection with the motion to quash the indictment, is that it does not with any acceptable degree of clarity, show when, how often, and under what circumstances the prosecutor alone has been responsible for striking those Negroes who have appeared on petit jury panels in Talladega County. The record is absolutely silent as to those instances in which the prosecution participated in striking Negroes, except for the indication that the prosecutor struck the Negroes in this case and except for those occasions when the defendant himself indicated that he did not want Negroes on the jury. Apparently in some cases, the prosecution

agreed with the defense to remove Negroes. There is no evidence, however, of what the prosecution did or did not do on its own account in any cases other than the one at bar.[31] In one instance the prosecution offered the defendant an all-Negro jury but the defendant in that case did not want a jury with any Negro members. There was other testimony that in many cases the Negro defendant preferred an all-white to a mixed jury. One lawyer, who had represented both white and Negro defendants in criminal cases, could recall no Negro client who wanted Negroes on the jury which was to try him. The prosecutor himself, who had served since 1953, said that if the Negro defendant wanted Negroes on the jury it would depend "upon the circumstances and the conditions and the case and what I thought justice demanded and what [it] was in that particular case," and that striking is done differently depending on the race of the defendant and the victim of the crime. These statements

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[31] The prosecutor testified that on occasion he would ask defense counsel if he wanted Negroes on the jury; if the defense did not, and the prosecutor agreed, "what we do then is just to take them off. Strike them first." The record makes clear that this was not a general practice and the matter was not explored further:

"Q. Let me ask you this. You stated that the defendants generally do not want a negro to serve on a jury that is sworn to try him?

"A. I didn't say that. I didn't—they generally didn't want it. I said in the past there has been occasion here where that has happened.

"Q. Have there been any cases where they did want negroes to serve on juries in their behalf?

"A. I wouldn't know if there has been. Not to my knowledge, because I am not representing defendants. I am representing the State. Do you see what I mean?

"Q. Yes.

"A. In other words, that would be between attorney and client, privileged, and I wouldn't know what they wanted. You would have to ask these defense attorneys about that."

do not support an inference that the prosecutor was bent on striking Negroes, regardless of trial-related considerations. The fact remains, of course, that there has not been a Negro on a jury in Talladega County since about 1950. But the responsibility of the prosecutor is not illuminated in this record. There is no allegation or explanation, and hence no opportunity for the State to rebut, as to when, why and under what circumstances in cases previous to this one the prosecutor used his strikes to remove Negroes. In short, petitioner has not laid the proper predicate for attacking the peremptory strikes as they were used in this case. Petitioner has the burden of proof and he has failed to carry it.

A dissent asserts that a showing that there are qualified Negroes and that none have served makes out a prima facie case of purposeful discrimination on the part of the State and that the continued vitality of *Strauder* v. *West Virginia,* 100 U. S. 303, as well as "a practical accommodation" between the constitutional right of equal protection and the statutory right of peremptory challenge, requires application of such a rule here. Where discrimination is said to occur in the selection of veniremen by state jury commissioners, "proof that Negroes constituted a substantial segment of the population . . . , that some Negroes were qualified to serve as jurors, and that none *had been called* for jury service over an extended period of time . . . constitute[s] prima facie proof of the systematic exclusion of Negroes from jury service," *Hernandez* v. *Texas,* 347 U. S. 475, 480, as does proof "that no Negro had served on a criminal court *grand or petit jury* for a period of thirty years," *Patton* v. *Mississippi,* 332 U. S. 463, 466. (Emphasis added.) See also *Norris* v. *Alabama,* 294 U. S. 587; *Harper* v. *Mississippi,* 251 Miss. 699, 171 So. 2d 129 (1965). Total exclusion of Negroes by the state officers

responsible for selecting names of jurors gives rise to a fair inference of discrimination on their part, an inference which is determinative absent sufficient rebuttal evidence. But this rule of proof cannot be woodenly applied to cases where the discrimination is said to occur during the process of peremptory challenge of persons called for jury service. Unlike the selection process, which is wholly in the hands of state officers, defense counsel participate in the peremptory challenge system, and indeed generally have a far greater role than any officers of the State. It is for this reason that a showing that Negroes have not served during a specified period of time does not, absent a sufficient showing of the prosecutor's participation, give rise to the inference of systematic discrimination on the part of the State. The ordinary exercise of challenges by defense counsel does not, of course, imply purposeful discrimination by state officials. This is not to say that a defendant attacking the prosecutor's use of peremptory challenges over a period of time need elicit an admission from the prosecutor that discrimination accounted for his rejection of Negroes, any more than a defendant attacking jury selection need obtain such an admission from the jury commissioners. But the defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time. This is the teaching of *Hernandez* v. *Texas,* 347 U. S. 475; *Norris* v. *Alabama,* 294 U. S. 587; *Patton* v. *Mississippi,* 332 U. S. 463. We see no reason, except for blind application of a proof standard developed in a context where there is no question of state responsibility for the alleged exclusion, why the defendant attacking the prosecutor's systematic use of challenges against Negroes should not be required to establish on the record the prosecutor's conduct in this regard, especially where the same prosecutor

for many years is said to be responsible for this practice and is quite available for questioning on this matter.[32] Accordingly the judgment is

Affirmed.

MR. JUSTICE HARLAN, concurring.

In joining the opinion of the Court, I deem it appropriate to emphasize my understanding that the Court reserves, and does not decide, the question which in Part III of its opinion it finds not presented by the record in this case.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE GOLDBERG, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, dissenting.

In 1880 this Court, in *Strauder* v. *West Virginia,* 100 U. S. 303, one of the first cases applying the Fourteenth Amendment to racial discrimination, held that under the Equal Protection Clause, a State cannot systematically exclude persons from juries solely because of their race or color. Since *Strauder* and until today this Court has consistently applied this constitutional principle. See *Ex parte Virginia,* 100 U. S. 339; *Neal* v. *Delaware,* 103 U. S. 370; *Gibson* v. *Mississippi,* 162 U. S. 565; *Carter* v. *Texas,* 177 U. S. 442; *Rogers* v. *Alabama,* 192 U. S. 226; *Martin* v. *Texas,* 200 U. S. 316; *Norris* v. *Alabama,* 294 U. S. 587;

[32] We also reject the assertion that the method of selecting veniremen in Talladega County, with its lower proportion of Negroes on the venire list, when considered with the system of peremptory strikes establishes a prima facie case of discrimination. Absent a showing of purposeful exclusion of Negroes in the selection of veniremen, which has not been made, the lower proportion of Negroes on the venire list sheds no light whatsoever on the validity of the peremptory strike system or on whether the prosecutor systematically strikes Negroes in the county. Moreover, the constitutional issue in regard to the prosecutor's systematic use of strikes against Negroes remains much the same whatever the number of Negroes on the venire list.

Hale v. *Kentucky,* 303 U. S. 613; *Pierre* v. *Louisiana,* 306 U. S. 354; *Smith* v. *Texas,* 311 U. S. 128; *Hill* v. *Texas,* 316 U. S. 400; *Akins* v. *Texas,* 325 U. S. 398; *Patton* v. *Mississippi,* 332 U. S. 463; *Cassell* v. *Texas,* 339 U. S. 282; *Hernandez* v. *Texas,* 347 U. S. 475; *Reece* v. *Georgia,* 350 U. S. 85; *Eubanks* v. *Louisiana,* 356 U. S. 584; *Arnold* v. *North Carolina,* 376 U. S. 773.

The rationale upon which these decisions rest was clearly stated in *Norris* v. *Alabama, supra,* at 589:

> "There is no controversy as to the constitutional principle involved. . . . Summing up precisely the effect of earlier decisions, this Court thus stated the principle in *Carter* v. *Texas,* 177 U. S. 442, 447, in relation to exclusion from service on grand juries: 'Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. *Strauder* v. *West Virginia,* 100 U. S. 303; *Neal* v. *Delaware,* 103 U. S. 370, 397; *Gibson* v. *Mississippi,* 162 U. S. 565.' This statement was repeated in the same terms in *Rogers* v. *Alabama,* 192 U. S. 226, 231, and again in *Martin* v. *Texas,* 200 U. S. 316, 319. The principle is equally applicable to a similar exclusion of negroes from service on petit juries. *Strauder* v. *West Virginia, supra; Martin* v. *Texas, supra.* And although the state statute defining the qualifications of jurors may be fair on its face, the constitutional provision affords protection against action of the State through its administrative officers in effecting the prohibited

discrimination. *Neal* v. *Delaware, supra; Carter* v. *Texas, supra.* Compare *Virginia* v. *Rives,* 100 U. S. 313, 322, 323; *In re Wood,* 140 U. S. 278, 285; *Thomas* v. *Texas,* 212 U. S. 278, 282, 283."

This set of principles was recently and explicitly reaffirmed by this Court in *Eubanks* v. *Louisiana, supra,* and *Arnold* v. *North Carolina, supra.*

The reasons underlying the Court's decisions in these cases were well expressed in *Strauder:*

> "The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. Blackstone, in his Commentaries, says, 'The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter.' It is also guarded by statutory enactments intended to make impossible what Mr. Bentham called 'packing juries.' It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." 100 U. S., at 308–309.

Moreover,

> "[t]he very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race

> prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." 100 U. S., at 308.

The principles and reasoning upon which this long line of decisions rests are sound. The need for their reaffirmation is present. The United States Commission on Civil Rights in its 1961 Report, Justice 103, after exhaustive study of the practice of discrimination in jury selection, concluded that "[t]he practice of racial exclusion from juries persists today even though it has long stood indicted as a serious violation of the 14th amendment." It is unthinkable, therefore, that the principles of *Strauder* and the cases following should be in any way weakened or undermined at this late date particularly when this Court has made it clear in other areas, where the course of decision has not been so uniform, that the States may not discriminate on the basis of race. Compare *Plessy* v. *Ferguson,* 163 U. S. 537, with *Brown* v. *Board of Education,* 347 U. S. 483; compare *Pace* v. *Alabama,* 106 U. S. 583, with *McLaughlin* v. *Florida,* 379 U. S. 184.

Regrettably, however, the Court today while referring with approval to *Strauder* and the cases which have followed, seriously impairs their authority and creates additional barriers to the elimination of jury discrimination practices which have operated in many communities to nullify the command of the Equal Protection Clause. This is evident from an analysis of the Court's holding as applied to the facts which are virtually undisputed.

Petitioner, a 19-year-old Negro, was indicted in Talladega County for the rape of a 17-year-old white girl, found guilty, and sentenced to death by an all-white jury. The petitioner established by competent evidence and without contradiction that not only was there no Negro on the jury that convicted and sentenced him, but also that no Negro within the memory of persons now living

has ever served on any petit jury in any civil or criminal case tried in Talladega County, Alabama. Yet, of the group designated by Alabama as generally eligible for jury service in that county, 74% (12,125) were white and 26% (4,281) were Negro.

Under well-established principles this evidence clearly makes out "a *prima facie* case of the denial of the equal protection which the Constitution guarantees." *Norris* v. *Alabama, supra,* at 591. The case here is at least as strong as that in *Norris* where

> "proof that Negroes constituted a substantial segment of the population of the jurisdiction, that some Negroes were qualified to serve as jurors, and that none had been called for jury service over an extended period of time, was held to constitute prima facie proof of the systematic exclusion of Negroes from jury service. This holding, sometimes called the 'rule of exclusion,' has been applied in other cases, and it is available in supplying proof of discrimination against any delineated class." *Hernandez* v. *Texas, supra,* at 480.

It is also at least as strong as the case in *Patton* v. *Mississippi, supra,* where the Court stated:

> "It is to be noted at once that the indisputable fact that no Negro had served on a criminal court grand or petit jury for a period of thirty years created a very strong showing that during that period Negroes were systematically excluded from jury service because of race. When such a showing was made, it became a duty of the State to try to justify such an exclusion as having been brought about for some reason other than racial discrimination." 332 U. S., at 466.

It is clear that, unless the State here can "justify such an exclusion as having been brought about for some rea-

son other than racial discrimination," *Patton* v. *Mississippi, ibid.*, this conviction "cannot stand." *Id.*, at 469. *Norris* v. *Alabama, supra,* at 596–598; *Arnold* v. *North Carolina, supra,* at 774. "Long continued omission of Negroes from jury service establishes a prima facie case of systematic discrimination. The burden of proof is then upon the State to refute it." *Harper* v. *Mississippi,* 251 Miss. 699, 707, 171 So. 2d 129, 132–133.[1]

Alabama here does not deny that Negroes as a race are excluded from serving on juries in Talladega County. The State seeks to justify this admitted exclusion of Negroes from jury service by contending that the fact that no Negro has ever served on a petit jury in Talladega County has resulted from use of the jury-striking system, which is a form of peremptory challenge. While recognizing that no Negro has ever served on any petit jury in Talladega County, that the method of venire selection was inadequate, that the prosecutor in this case used the peremptory challenge system to exclude all Negroes as a class, and that the systematic misuse by the State of a peremptory challenge system to exclude all Negroes from all juries is prohibited by the Fourteenth Amendment, the Court affirms petitioner's conviction on the ground that petitioner has "failed to carry" his burden of proof. The Court holds this because it believes the record is silent as to whether the State participated in this total exclusion of all Negroes in previous cases; it would require petitioner specifically to negative the possibility that total exclusion of Negroes from jury service in all other cases was produced solely by the action of defense attorneys.

I cannot agree that the record is silent as to the State's involvement in the total exclusion of Negroes from jury service in Talladega County. The Alabama Supreme

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[1] See also *State* v. *Lowry,* 263 N. C. 536, 139 S. E. 2d 870.

Court found that "Negroes are commonly on trial venires but are always struck by attorneys in selecting the trial jury." 275 Ala. 508, 515, 156 So. 2d 368, 375. In response to a question concerning the operation of the jury-striking system, the Circuit Solicitor, the state prosecuting attorney, stated:

> "Sometimes, it depends on who is involved in a case. We have been very fortunate in this county, we have not had any white against black or black against white. If we have—where we have a situation arising in a case such as that, in the cases that we have had—we have had no capital felonies, but, we strike a jury different from what if it was two white men involved or two colored men."

This statement, it seems to me, plainly indicates that, at the very least, the State—"we"—participates, in Talladega County, in employing the striking or peremptory challenge system to exclude Negroes from jury service in cases where white men are involved.

Also, the state prosecuting attorney testified as follows:

> "Many times I have asked, Mr. Love for instance, I would say there are so many colored men on this jury venire, do you want to use any of them, and he would say, my client doesn't want them, or we don't see fit to use them. And then if I didn't see fit to use them, then we would take them off. We would strike them first, or take them off.
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> . . . . . .
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> "If I am trying a case for the State, I will ask them what is their wish, do they want them [Negro jurors], and they will as a rule discuss it with their client, and then they will say, we don't want them. If we are not going to want them, if he doesn't want them, and if I don't want them, what we do then is just take them off. Strike them first."

These quotations show either that the State "many times" abandons even the facade of the jury-striking system and agrees with the defense to remove all Negroes as a class from the jury lists even before the striking begins, or that pursuant to an agreement the State directly participates in the striking system to remove Negroes from the venire. Indeed the Court recognizes that "[a]pparently in some cases, the prosecution agreed with the defense to remove Negroes." *Ante,* at 224–225. The Court, however, goes on to state that "[t]he record makes clear that this was not a general practice . . . ." *Ante,* at 225, n. 31. With all deference, it seems clear to me that the record statement quoted by the Court to support this conclusion, cuts against rather than in favor of the Court's statement and inference that the general practice was not to exclude Negroes by agreement between the prosecution and defense or by the State acting alone. The prosecutor, in the statement quoted by the court, denied that he had stated that Negro defendants "generally do not want" Negroes to serve on juries and stated that there had only "been occasion here where that has happened." *Ante,* at 225, n. 31. Since it is undisputed that no Negro has ever served on a jury in the history of the county, and a great number of cases have involved Negroes, the only logical conclusion from the record statement that only on occasion have Negro defendants desired to exclude Negroes from jury service, is that in a good many cases Negroes have been excluded by the state prosecutor, either acting alone or as a participant in arranging agreements with the defense.[2]

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[2] I believe that the record shows that agreement between the State and the defense to exclude Negroes has occurred "many times." The Court itself admits that at least "in some cases, the prosecution agreed with the defense to remove Negroes." *Ante,* at 224–225. It concludes, however, that this is not sufficient on the ground that "[t]here is no evidence, however, of what the prosecution did or did not do *on its own account* in any cases other than the one at bar." *Ibid.* (Em-

Moreover, the record shows that in one case, the only one apparently in the history of the county where the State offered Negroes an opportunity to sit on a petit jury, the state prosecutor offered a Negro accused an all-Negro jury where the case involved an alleged crime against another Negro. The offer was refused but it tends to confirm the conclusion that the State joins in systematically excluding Negroes from jury service because it objects to any mixing of Negro and white jurors and to a Negro sitting in a case in which a white man is in any way involved.

Furthermore, the State concededly is responsible for the selection of the jury venire. As the Court recognizes, *ante,* at 205, the evidence showed that while Negroes represent 26% of the population generally available to be called for jury service in Talladega County, Negroes constituted a lesser proportion, generally estimated from 10% to 15%, of the average venire. The Alabama Supreme

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phasis added.) This Court, however, has never held in any case involving racial discrimination under the Fourteenth Amendment that such discrimination is unconstitutional only if it is brought about by the State acting *alone.* The test which has been applied is whether the State "to some significant extent . . . has been . . . involved." *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, 722. See *Peterson* v. *Greenville,* 373 U. S. 244; *Lombard* v. *Louisiana,* 373 U. S. 267. "The vital requirement is State responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied . . . rights merely because they are colored." *Terry* v. *Adams,* 345 U. S. 461, 473 (separate opinion of Mr. Justice Frankfurter). The State's agreement with the defense, which the record establishes, to remove Negroes from jury venires, under the Court's settled decisions meets the "state action" requirement of the Fourteenth Amendment. Under the principles of *Strauder* and the cases following, it constitutes "action of a State . . . through its . . . administrative officers" excluding persons "solely because of their race or color" from serving on juries. *Carter* v. *Texas, supra,* at 447.

Court noted that under state law "the jury commission is required to keep a roll containing the names of all male citizens living in the county who possess the qualifications prescribed by law and who are not exempted by law from serving on juries," 275 Ala., at 514, 156 So. 2d, at 374, and, in fact, this had not been done in Talladega County. The Alabama Supreme Court concluded that the method of jury selection in Talladega County was "not exhaustive enough to insure the inclusion of all qualified persons," *ibid.*, and this Court admits it is "imperfect," *ante,* at 209, and that "[v]enires drawn from the jury box made up in this manner unquestionably contained a smaller proportion of the Negro community than of the white community." *Ante,* at 208. It may be, for the reasons stated by the Court, that this "haphazard" method of jury selection standing alone as an alleged constitutional violation does not show unlawful jury discrimination. However, this method of venire selection cannot be viewed in isolation and must be considered in connection with the peremptory challenge system with which it is inextricably bound. When this is done it is evident that the maintenance by the State of the disproportionately low number of Negroes on jury panels enables the prosecutor, alone or in agreement with defense attorneys, to strike all Negroes from panels without materially impairing the number of peremptory challenges available for trial strategy purposes.

Finally, it is clear that Negroes were removed from the venire and excluded from service by the prosecutor's use of the peremptory challenge system in this case and that they have never served on the jury in any case in the history of the county. On these facts, and the inferences reasonably drawn from them, it seems clear that petitioner has affirmatively proved a pattern of racial discrimination in which the State is significantly involved, cf. *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, 722;

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Lombard v. *Louisiana,* 373 U. S. 267; *Peterson* v. *Greenville,* 373 U. S. 244, or for which the State is responsible, cf. *Terry* v. *Adams,* 345 U. S. 461, 473. As this Court held in *Strauder,* systematic exclusion of Negroes from jury service constitutes a brand of inferiority affixed upon them and state involvement in affixing such a brand is forbidden by the Fourteenth Amendment.

There is, however, a more fundamental defect in the Court's holding. Even if the Court were correct that the record is silent as to state involvement in previous cases in which Negroes have been systematically excluded from jury service, nevertheless, it is undisputed that no Negro has ever served on any petit jury in the history of Talladega County. Under *Norris, Patton* and the other cases discussed above, it is clear that petitioner by proving this made out a prima facie case of unlawful jury exclusion. The burden of proof then shifted to the State to prove, if it could, that this exclusion was brought about for some reason other than racial discrimination in which the State participated.

This established principle is well illustrated by the recent decision of the Mississippi Supreme Court, *Harper* v. *Mississippi, supra,* in which that court rejected an argument of the State of Mississippi strikingly similar to the one advanced here by the State of Alabama and accepted by this Court. In the Mississippi case a Negro defendant made out a prima facie case of jury exclusion by showing that only a token number of Negroes had served on juries in the county in question. The State attempted to rebut this prima facie case by contending that the exclusion resulted from a perfectly neutral system of employing voting registration lists to select prospective jurors and the fact that the number of Negroes selected was in proportion to their number on the voting registration lists. The Mississippi Supreme Court held, however, that this did not rebut the prima facie case of jury exclusion unless

the State could additionally prove that the disproportionately low number of Negroes on the voting registration list was caused by factors other than state-involved racial discrimination. Similarly, in the instant case, it seems to me indisputable that Alabama did not rebut petitioner's prima facie case, which here is based on a showing of total exclusion, by the contention that it is the result of a neutral peremptory challenge system unless the State additionally proved that the peremptory challenge system is not being used in a way constituting state-involved discrimination. That it did not do so is uncontested.

Despite the fact that the petitioner therefore has made out what is, under the settled decisions of this Court, a prima facie case of jury exclusion which the State has not rebutted, the Court today affirms petitioner's conviction because, according to the Court, petitioner has "failed to carry" his burden of proof. *Ante,* at 226. The Court concedes that if this case involved exclusion of Negroes from jury panels, under *Norris* and *Patton* a prima facie case of unconstitutional jury exclusion would be made out. However, the Court argues that because this case involves exclusion from the jury itself and not from the jury venire, the burden of proof on a defendant should be greater. This distinction is novel to say the least.

The Court's jury decisions, read together, have never distinguished between exclusion from the jury panel and exclusion from the jury itself. Indeed, no such distinction can be drawn. The very point of all these cases is to prevent that deliberate and systematic discrimination against Negroes or any other racial group that would prevent them, not merely from being placed upon the panel, but from serving on the jury. The Court quotes from *Hernandez* v. *Texas, supra,* to show that the prima facie rule applies only where no Negro *"had been called* for jury service," *ante,* at 226, but such a view is rejected by

Patton's statement of the rule, for *Patton* held that a prima facie case was made out when it was shown that "no Negro had *served* on a criminal court grand or petit jury for a period of thirty years." 332 U. S., at 466. (Emphasis added.) And, *Patton* is confirmed by our very recent cases, *Eubanks* v. *Louisiana, supra,* and *Arnold* v. *North Carolina, supra,* which also speak only in terms of jury "service" and jury "duty." "The exclusion of otherwise eligible persons from jury *service* solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment." *Hernandez* v. *Texas, supra,* at 479. (Emphasis added.)

The rule of exclusion set forth in these cases is a highly pragmatic one. It is designed to operate in jury cases so that once the defendant has made a showing of total exclusion, the burden of going forward with the evidence is placed upon the State, the party in the better position to develop the facts as to how the exclusion came about. The defendant is a party to one proceeding only, and his access to relevant evidence is obviously limited. The State is a party to all criminal cases and has greater access to the evidence, if any, which would tend to negative the State's involvement in discriminatory jury selection. The burden of proof rule developed in *Norris, Patton,* and other cases, which until today the Court has uniformly applied, is a simple and workable one designed to effectuate the Constitution's command. This is demonstrated by our past cases, as well as state cases.[3] Because the same factors—availability of evidence, simplicity, and workability—exist whether exclusion from the jury panel or exclusion from the jury itself is involved, to apply the prima facie rule of *Norris* and *Patton* to this case is neither "blind" nor "wooden," but is realistic and sensible.

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[3] See *Harper* v. *Mississippi, supra; State* v. *Lowry, supra.*

I agree with the Court that it is a reasonable inference that the State is involved in unconstitutional discrimination where total exclusion of Negroes from all venires is established. I believe that it is also a reasonable inference that the State is involved where, although some Negroes are on venires, none has ever served on a jury, cf. *Eubanks* v. *Louisiana, supra; Arnold* v. *North Carolina, supra,* and the State in the case at bar has excluded from jury service the Negroes on the venire by exercise of its peremptory challenges. The Court in *Patton* and in other cases rejected the State's argument, and held that it would be unreasonable to assume where Negroes were totally excluded from venires that this came about because all Negroes were unqualified, unwilling, or unable to serve. It would be similarly unreasonable to assume where total exclusion from service has been established and the prosecutor has used peremptory challenges to exclude all Negroes from the jury in the given case that in all previous cases Negroes were excluded solely by defense attorneys without any state involvement. If the instant case is really a unique case, as the Court implies, surely the burden of proof should be on the State to show it.

Finally, the Court's reasoning on this point completely overlooks the fact that the total exclusion of Negroes from juries in Talladega County results from the interlocking of an inadequate venire selection system, for which the State concededly is responsible, and the use of peremptory challenges. All of these factors confirm my view that no good reason exists to fashion a new rule of burden of proof, which will make it more difficult to put an end to discriminatory selection of juries on racial grounds and will thereby impair the constitutional promise of "Equal Protection of the Laws," made effective by *Strauder* and the cases which follow it. By undermining the doctrine of the prima facie case while paying lip service to

Strauder the Court today allies itself with those "that keep the word of promise to our ear and break it to our hope."

The Court departs from the long-established burden of proof rule in this area, and imposes substantial additional burdens upon Negro defendants such as petitioner, because of its view of the importance of retaining inviolate the right of the State to use peremptory challenges. I believe, however, that the preference granted by the Court to the State's use of the peremptory challenge is both unwarranted and unnecessary.

To begin with, the peremptory challenge has long been recognized primarily as a device to protect *defendants*. As stated by Blackstone in a passage quoted with approval by this Court:

> "[I]n criminal cases, or at least in capital ones, there is, *in favorem vitae,* allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all; which is called a *peremptory* challenge: a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two reasons.
>
> "1. As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike.
>
> "2. Because, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference

> may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside." 4 Bl. Comm. 353.

Quoted with approval in *Lewis* v. *United States,* 146 U. S. 370, 376; see also *United States* v. *Marchant,* 12 Wheat. 480, 482.

Indeed in England, as the Court points out, *ante,* at 212-213, although the Crown at early common law had an unlimited number of peremptory challenges, as early as 1305 that right was taken away, and since that time in England peremptories may be exercised only by the defendant. Orfield, Criminal Procedure From Arrest to Appeal 355 (1947). Harris, Criminal Law 443 (20th ed. 1960).[4] It appears that in modern times peremptories are rarely used in England, even by defendants. *Ibid.*

While peremptory challenges are commonly used in this country both by the prosecution and by the defense, we have long recognized that the right to challenge peremptorily is not a fundamental right, constitutionally guaranteed, even as applied to a defendant, much less to the State. *Stilson* v. *United States,* 250 U. S. 583. This Court has sanctioned numerous incursions upon the right to challenge peremptorily. Defendants may be tried together even though the exercise by one of his right to

[4] The Crown's right to challenge peremptorily was removed in that year by 33 Edw. 1, Stat. 4, because the King's right to challenge without showing cause "was mischievous to the subject, tending to infinite delayes and danger." Coke on Littleton 156 (14th ed. 1791). Since 33 Edw. 1, Stat. 4, the Crown can only require jurors whom it wishes to challenge to stand aside from the panel until the defendant has exercised all his challenges. Then, if a jury has not been selected, the jurors, who have been "stood aside" will be used unless the Crown can challenge them for cause. Orfield, *supra,* at 356, Harris, *supra,* at 443, III Bacon's Abridgment 764 (5th ed. 1798). Even this limited procedure as the Court notes, *ante,* at 213, n. 12, however, is rarely used today. Orfield, *supra,* at 355; Harris, *supra,* at 443.

challenge peremptorily may deprive his codefendant of a juror he desires or may require that codefendant to use his challenges in a way other than he wishes. *United States* v. *Marchant, supra.* A defendant may be required to exercise his challenges prior to the State, so that some may be wasted on jurors whom the State would have challenged. *Pointer* v. *United States,* 151 U. S. 396. Congress may regulate the number of peremptory challenges available to defendants by statute and may require codefendants to be treated as a single defendant so that each has only a small portion of the number of peremptories he would have if tried separately. *Stilson* v. *United States, supra.* In *Stilson* this Court stated, "There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured." 250 U. S., at 586. The Fourteenth Amendment would impose no greater obligation upon the States. Today this Court reverses *Stilson's* maxim, in effect holding that "There is nothing in the Constitution of the United States which requires the State to grant trial by an impartial jury so long as the inviolability of the peremptory challenge is secured."

Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former. *Marbury* v. *Madison,* 1 Cranch 137, settled beyond doubt that when a constitutional claim is opposed by a nonconstitutional one, the former must prevail. But no such choice is compelled in this situation. The holding called for by this case, is that where, as here, a Negro defendant proves that Negroes constitute a substantial segment of the population, that Negroes are qualified to serve as jurors, and

that none or only a token number [5] has served on juries over an extended period of time, a prima facie case of the exclusion of Negroes from juries is then made out; that the State, under our settled decisions, is then called upon to show that such exclusion has been brought about "for some reason other than racial discrimination," *Patton* v. *Mississippi, supra,* at 466; and that the State wholly fails to meet the prima facie case of systematic and purposeful racial discrimination by showing that it has been accomplished by the use of a peremptory challenge system unless the State also shows that it is not involved in the misuse of such a system to prevent all Negroes from ever sitting on any jury. Such a holding would not interfere with the rights of *defendants* to use peremptories, nor the right of the State to use peremptories as they normally and traditionally have been used.

It would not mean, as the Court's prior decisions, to which I would adhere, make clear, that Negroes are entitled to proportionate representation on a jury. *Cassell* v. *Texas, supra,* at 286–287 (opinion of Mr. Justice Reed). Nor would it mean that where systematic exclusion of Negroes from jury service has not been shown, a prosecutor's motives are subject to question or judicial inquiry when he excludes Negroes or any other group from sitting on a jury in a particular case. Only where systematic exclusion has been shown, would the State be called upon to justify its use of peremptories or to negative the State's involvement in discriminatory jury selection.

This holding would mean, however, that a conviction cannot stand where, as here, a Negro defendant, by showing widespread systematic exclusion, makes out a prima facie case of unconstitutional discrimination which the

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[5] See *Cassell* v. *Texas, supra; Harper* v. *Mississippi, supra.*

State does not rebut. Drawing the line in this fashion, in my view, achieves a practical accommodation of the constitutional right and the operation of the peremptory challenge system without doing violence to either.

I deplore the Court's departure from its holdings in *Strauder* and *Norris*. By affirming petitioner's conviction on this clear record of jury exclusion because of race, the Court condones the highly discriminatory procedures used in Talladega County under which Negroes never have served on any petit jury in that county. By adding to the present heavy burden of proof required of defendants in these cases, the Court creates additional barriers to the elimination of practices which have operated in many communities throughout the Nation to nullify the command of the Equal Protection Clause in this important area in the administration of justice. See 1961 United States Commission on Civil Rights Report, Justice 81–103.

I would be faithful to the teachings of this Court in its prior jury exclusion cases and the view, repeatedly expressed by this Court, that distinctions between citizens solely because of their race, religion, or ancestry, are odious to the Fourteenth Amendment. I would reaffirm and apply here what this Court said in *Smith* v. *Texas*, *supra*, at 130:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government. . . . The fact that the written words of a state's laws hold out a promise that no such discrimi-

> nation will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given—not merely promised."

Applying these principles, I would reverse. This, of course, would "not mean that a guilty defendant must go free." *Patton* v. *Mississippi, supra,* at 469; see *Hill* v. *Texas, supra,* at 406. For, as the Court pointed out in *Patton* v. *Mississippi, supra,* at 469, the State, if it so desired, could retry petitioner by a jury "selected as the Constitution commands."

HUGHES TOOL CO. ET AL. *v.* TRANS WORLD AIRLINES, INC.

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

No. 443. Argued March 3, 1965.—Decided March 8, 1965.

Certiorari dismissed as improvidently granted.

Reported below: 332 F. 2d 602.

Chester C. Davis argued the cause for petitioners. With him on the briefs were *Paul A. Porter, Victor H. Kramer, Abe Krash, Dennis G. Lyons, Werner J. Kronstein* and *Daniel A. Rezneck.*

John F. Sonnett argued the cause for respondent. With him on the briefs were *Dudley B. Tenney, Raymond L. Falls, Jr., Marshall H. Cox, Jr.,* and *Abraham P. Ordover.*

Acting Solicitor General Spritzer, Assistant Attorney General Orrick, Lionel Kestenbaum, O. D. Ozment and *Robert L. Toomey* filed a memorandum for the Civil Aeronautics Board, as *amicus curiae.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

HUGHES TOOL CO. *v.* TRANS WORLD AIRLINES, INC., ET AL.

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

No. 501. Argued March 4, 1965.—Decided March 8, 1965.

Certiorari dismissed as improvidently granted.

Reported below: 332 F. 2d 602.

Chester C. Davis argued the cause for petitioner. With him on the briefs were *Paul A. Porter, Victor H. Kramer, Abe Krash, Dennis G. Lyons, Werner J. Kronstein* and *Daniel A. Rezneck.*

Bruce Bromley argued the cause for respondents. With him on the brief for the Equitable Life Assurance Society of the United States et al. were *William C. Chanler, William M. Bradner, Jr.,* and *Edward R. Neaher.* On the brief for Trans World Airlines, Inc., was *John F. Sonnett.*

Acting Solicitor General Spritzer, Assistant Attorney General Orrick, Lionel Kestenbaum, O. D. Ozment and *Robert L. Toomey* filed a memorandum for the Civil Aeronautics Board, as *amicus curiae.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

ARTHUR *v.* COLORADO.

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

No. 486, Misc. Decided March 8, 1965.

Certiorari granted and judgment reversed.

Reported below: —— Colo. ——, 393 P. 2d 371.

Edward C. King for petitioner.

Duke W. Dunbar, Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *John E. Bush,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is reversed. *Gideon* v. *Wainwright,* 372 U. S. 335; *Pickelsimer* v. *Wainwright,* 375 U. S. 2.

HALL *v.* ILLINOIS.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 848, Misc. Decided March 8, 1965.

Appeal dismissed and certiorari denied.

PER CURIAM.

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

DAVIS, ASSESSOR-COLLECTOR OF TAXES, BEXAR COUNTY, TEXAS, ET AL. *v.* MABRY ET AL.

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

No. 774. Decided March 8, 1965.

232 F. Supp. 930, affirmed.

Waggoner Carr, Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, *Mary K. Wall,* Assistant Attorney General, *James E. Barlow* and *Preston H. Dial, Jr.,* for appellants.

PER CURIAM.

The judgment is affirmed. *Carrington* v. *Rash, ante,* p. 89.

MR. JUSTICE HARLAN would reverse the judgment of the District Court for the reasons stated in his dissenting opinion in *Carrington* v. *Rash, ante,* at 97.

STADLER ET AL., EXECUTORS *v.* STATE BOARD OF EQUALIZATION OF CALIFORNIA.

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

No. 797. Decided March 8, 1965.

Appeal dismissed for want of a substantial federal question.
Reported below: 227 Cal. App. 2d 314, 38 Cal. Rptr. 587.

Theodore W. Russell and *R. Y. Schureman* for appellants.

Thomas C. Lynch, Attorney General of California, *Dan Kaufman,* Assistant Attorney General, and *Neal J. Gobar,* Deputy Attorney General, for appellee.

PER CURIAM.

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

BARNES *v.* TEXAS.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 346, Misc. Decided March 8, 1965.

Certiorari granted and judgment reversed.

Clyde W. Woody for petitioner.

Waggoner Carr, Attorney General of Texas, and *Howard M. Fender, Charles B. Swanner, Gilbert J. Pena* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is reversed. *Giordenello* v. *United States,* 357 U. S. 480; *Aguilar* v. *Texas,* 378 U. S. 108.

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SEALS *v.* ALABAMA.

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

No. 465, Misc. Decided March 8, 1965.

Certiorari granted and judgment reversed.

Reported below: 276 Ala. 654, 165 So. 2d 742.

Vernon Crawford, Morton Stavis, Martin R. Bradley, Jr., Arthur Kinoy and *William M. Kunstler* for petitioner.

Richmond M. Flowers, Attorney General of Alabama, and *Leslie Hall,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The Court is of the view that on the record the petitioner is an indigent. Therefore, the judgment must be reversed. *Griffin* v. *Illinois,* 351 U. S. 12.

RADIO & TELEVISION BROADCAST TECHNICIANS LOCAL UNION 1264, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, ET AL. *v.* BROADCAST SERVICE OF MOBILE, INC.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 61. Argued March 2–3, 1965.—Decided March 15, 1965.

The National Labor Relations Board declines jurisdiction over radio stations with yearly gross receipts below $100,000, but takes jurisdiction where several nominally separate entities comprise an integrated enterprise of a single employer having receipts in excess of that figure. Where, as here, the criteria of interrelation of operations, common management and ownership, and centralized control of labor relations are met, the Board will assert jurisdiction, and state jurisdiction must yield.

276 Ala. 93, 159 So. 2d 452, reversed.

J. R. Goldthwaite, Jr., argued the cause and filed a brief for petitioners.

Willis C. Darby, Jr., argued the cause for respondent. With him on the brief was *George E. Stone, Jr.*

Solicitor General Cox, Arnold Ordman, Dominick L. Manoli and *Norton J. Come* filed a brief for the United States, as *amicus curiae*, urging reversal.

PER CURIAM.

The union, Radio and Television Broadcast Technicians, challenged the Alabama Circuit Court's jurisdiction over a suit by Broadcast Service of Mobile, the corporate name of Radio Station WSIM, to restrain peaceful picketing by the union and its solicitation of advertisers aimed at persuading them to cease doing business with the station. It contended that although the annual gross receipts of WSIM are below the National Labor

Relations Board's jurisdictional minimum of $100,000 per year for radio stations, WSIM is an integral part of a group of radio stations owned and operated by Charles W. Holt and the Holt Broadcasting Service and that the annual receipts of the common enterprise are in excess of $100,000, which is determinative under the Board's standards. Stating that every court has judicial power to determine its jurisdiction and that the union failed to allege "that the appellant's [WSIM's] gross business exceeded $100,000 per annum," the Alabama Supreme Court held that the state courts had jurisdiction over WSIM's complaint. We granted certiorari. 379 U. S. 812. The judgment below must be reversed.

Although a state court may assume jurisdiction over labor disputes over which the National Labor Relations Board has, but declines to assert, jurisdiction, 29 U. S. C. §§ 164 (c)(1) and (2) (1958 ed., Supp. V), there must be a proper determination of whether the case is actually one of those which the Board will decline to hear. *Hattiesburg Building Trades Council* v. *Broome*, 377 U. S. 126. The Board will assert jurisdiction over an employer operating a radio station if his gross receipts equal or exceed $100,000 per year, *Raritan Valley Broadcasting Co.*, 122 N. L. R. B. 90, and in determining the relevant employer, the Board considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise, N. L. R. B. Twenty-first Ann. Rep. 14–15 (1956). The controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership. *Sakrete of Northern California, Inc.*, 137 N. L. R. B. 1220, aff'd 332 F. 2d 902 (C. A. 9th Cir.), cert. denied, 379 U. S. 961; *Family Laundry, Inc.*, 121 N. L. R. B. 1619; *Canton, Carp's, Inc.*, 125 N. L. R. B. 483; *V. I. P. Radio, Inc.*, 128 N. L. R. B. 113; *Perfect T. V., Inc.*, 134 N. L. R. B. 575; *Overton Markets, Inc.*,

142 N. L. R. B. 615. The record made below is more than adequate to show that all of these factors are present in regard to the Holt enterprise* and that this is not a case which the Board has announced it would decline to hear. Since the conduct set out in the complaint is regulated by the Labor Management Relations Act, 1947, 29 U. S. C. § 141 *et seq.* (1958 ed.), "due regard for the federal enactment requires that state jurisdiction must yield." *San Diego Building Trades* v. *Garmon,* 359 U. S. 236, 244; *Construction & General Laborers' Union* v. *Curry,* 371 U. S. 542.

Reversed.

*The United States, as *amicus curiae,* confirms the view that the Board's standards for determining a single employer enterprise were fully satisfied by the structure and operation of the Holt stations.

RESERVE LIFE INSURANCE CO. *v.* BOWERS, TAX COMMISSIONER OF OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 96. Argued March 4, 1965.—Decided March 15, 1965.

175 Ohio St. 468, 196 N. E. 2d 87, reversed and case remanded.

Harris K. Weston argued the cause for appellant. With him on the briefs was *William E. Miller.*

Edgar L. Lindley, Assistant Attorney General of Ohio, argued the cause for appellee. With him on the brief was *William B. Saxbe,* Attorney General of Ohio.

PER CURIAM.

The judgment is reversed and the case is remanded to the Court of Appeals, First Appellate District, Ohio. *Wheeling Steel Corp.* v. *Glander,* 337 U. S. 562.

MR. JUSTICE BLACK dissents.

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

TRANS-LUX DISTRIBUTING CORP. *v.* BOARD OF REGENTS OF THE UNIVERSITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 314. Decided March 15, 1965.

14 N. Y. 2d 88, 198 N. E. 2d 242, reversed.

Harry I. Rand for appellant.

Charles A. Brind for appellee.

PER CURIAM.

The judgment is reversed. *Freedman* v. *Maryland*, *ante*, p. 51.

SANTOS *v.* TEXAS.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 340, Misc. Decided March 15, 1965.

Certiorari granted, judgment vacated and case remanded.

Reported below: 379 S. W. 2d 667.

Orville A. Harlan for petitioner.

Waggoner Carr, Attorney General of Texas, and *Howard M. Fender*, *Gilbert J. Pena* and *Allo B. Crow, Jr.*, Assistant Attorneys General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Criminal Appeals of Texas for further consideration in light of the opinion of this Court in *Aguilar* v. *Texas*, 378 U. S. 108.

BAKER ET AL., DBA BAKER & FORD *v.* ALASKA.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 849. Decided March 15, 1965.

Appeal dismissed for want of a substantial federal question.
Reported below: 64 Wash. 2d 207, 390 P. 2d 1009.

Bruce T. Rinker, Charles S. Rhyne and *Alfred J. Tighe, Jr.*, for appellants.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted.

MARTINEZ *v.* UNITED STATES.

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

No. 397, Misc. Decided March 15, 1965.

Certiorari granted, judgment vacated and case remanded.
Reported below: 333 F. 2d 405.

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 a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States District Court for the Northern District of California with instructions to make findings with respect to petitioner's consent to the search.

HARRISON *v.* McNAMARA, SECRETARY OF DEFENSE, ET AL.

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

No. 527, Misc. Decided March 15, 1965.

228 F. Supp. 406, affirmed.

Burton M. Weinstein for appellant.

Solicitor General Cox, Assistant Attorney General Yeagley, Kevin T. Maroney and *Lee B. Anderson* for appellees.

PER CURIAM.

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

GENOVESE *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 794, Misc. Decided March 15, 1965.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

Fred V. Skok, Barry M. Byron and *Alan D. Wright* for appellee.

PER CURIAM.

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

MARVEL *v.* UNITED STATES.

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

No. 476, Misc. Decided March 15, 1965.

Certiorari granted, judgment vacated and case remanded.
Reported below: 335 F. 2d 101.

Petitioner *pro se.*

Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg and *Theodore George Gilinsky* 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 Middle District of Alabama for a hearing as to whether petitioner was misled by the trial judge as to the maximum sentence.

TEXTILE WORKERS UNION OF AMERICA *v.* DARLINGTON MANUFACTURING CO. ET AL.

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

No. 37. Argued December 9–10, 1964.—
Decided March 29, 1965.*

A majority of the stock of Darlington Manufacturing Company, a textile mill, was owned by Deering Milliken, a marketing corporation, and the National Labor Relations Board found that the latter company was in turn controlled by Roger Milliken, Darlington's president, and members of his family. An organizational campaign by petitioner union at Darlington, although strongly resisted by the company, including threats to close the mill, was successful. Shortly thereafter the company was liquidated, the plant closed and the equipment sold. The National Labor Relations Board found that the closing was due to Roger Milliken's antiunion animus, a violation of § 8 (a) (3) of the National Labor Relations Act; that Darlington was part of a single integrated employer group controlled by the Milliken family through Deering Milliken, operating 17 textile companies with 27 mills; and, alternatively, since Darlington was part of the integrated enterprise, Deering Milliken violated the Act by closing part of its business for a discriminatory purpose. The Court of Appeals held that, even assuming Deering Milliken was a single employer, it had the right to terminate all or part of its business regardless of antiunion motives. *Held:*

1. It is not an unfair labor practice for an employer to close his entire business, even if the closing is due to antiunion animus. Pp. 269–274.

2. Closing part of a business is an unfair labor practice under § 8 (a) (3) of the Act if the purpose is to discourage unionism in any of the employer's remaining plants and if the employer may reasonably have foreseen such effect. Pp. 274–275.

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*Together with No. 41, *National Labor Relations Board* v. *Darlington Manufacturing Co. et al.*, also on certiorari to the same court.

3. If those exercising control over a plant that is being closed for antiunion reasons have an interest in another business, whether or not affiliated with or in the same line of commerce as the closed plant, of sufficient substantiality to promise a benefit from nonunionization of that business; act to close their plant for that purpose; and have a relationship to the other business which makes it probable that its employees will fear closing down if organizational activities are continued, an unfair labor practice has been made out. Pp. 275–276.

4. Since no findings were made by the Board as to the purpose and effect of the Darlington closing with respect to the employees of the other plants in the Deering Milliken group, the judgments are vacated and the cases remanded to permit such findings to be made. Pp. 276–277.

325 F. 2d 682, judgments vacated and remanded.

Irving Abramson argued the cause for petitioner in No. 37. With him on the brief were *Everett E. Lewis, Donald Grody* and *Leonard Greenwald.*

Dominick L. Manoli argued the cause for petitioner in No. 41. With him on the briefs were *Solicitor General Cox, Arnold Ordman, Norton J. Come* and *Nancy M. Sherman.*

Sam J. Ervin, Jr., and *Stuart N. Updike* argued the cause for respondents in both cases. With *Mr. Ervin* on the brief for Darlington Manufacturing Co. was *Thornton H. Brooks.* With *Mr. Updike* on the brief for Deering Milliken, Inc., were *John Lord O'Brian, Hugh B. Cox* and *John R. Schoemer, 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.

Briefs of *amici curiae,* urging affirmance, were filed by *Rowland F. Kirks* for the American Textile Manufacturers Institute, and by *Gerard D. Reilly* for the Chamber of Commerce of the United States.

MR. JUSTICE HARLAN delivered the opinion of the Court.

We here review judgments of the Court of Appeals setting aside and refusing to enforce an order of the National Labor Relations Board which found respondent Darlington guilty of an unfair labor practice by reason of having permanently closed its plant following petitioner union's election as the bargaining representative of Darlington's employees.

Darlington Manufacturing Company was a South Carolina corporation operating one textile mill. A majority of Darlington's stock was held by Deering Milliken, a New York "selling house" marketing textiles produced by others.[1] Deering Milliken in turn was controlled by Roger Milliken, president of Darlington, and by other members of the Milliken family.[2] The National Labor Relations Board found that the Milliken family, through Deering Milliken, operated 17 textile manufacturers, including Darlington, whose products, manufactured in 27 different mills, were marketed through Deering Milliken.

In March 1956 petitioner Textile Workers Union initiated an organizational campaign at Darlington which the company resisted vigorously in various ways, including threats to close the mill if the union won a representation election.[3] On September 6, 1956, the union won an

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[1] Deering Milliken & Co. owned 41% of the Darlington stock. Cotwool Manufacturing Corp., another textile manufacturer, owned 18% of the stock. In 1960 Deering Milliken & Co. was merged into Cotwool, the survivor being named Deering Milliken, Inc.

[2] The Milliken family owned only 6% of the Darlington stock, but held a majority stock interest in both Deering Milliken & Co. and Cotwool, see n. 1, *supra*.

[3] The Board found that Darlington had interrogated employees and threatened to close the mill if the union won the election. After the decision to liquidate was made (see *infra*), Darlington employees were told that the decision to close was caused by the election, and

election by a narrow margin. When Roger Milliken was advised of the union victory, he decided to call a meeting of the Darlington board of directors to consider closing the mill. Mr. Milliken testified before the Labor Board:

> "I felt that as a result of the campaign that had been conducted and the promises and statements made in these letters that had been distributed [favoring unionization], that if before we had had some hope, possible hope of achieving competitive [costs] . . . by taking advantage of new machinery that was being put in, that this hope had diminished as a result of the election because a majority of the employees had voted in favor of the union . . . ." (R. 457.)

The board of directors met on September 12 and voted to liquidate the corporation, action which was approved by the stockholders on October 17. The plant ceased operations entirely in November, and all plant machinery and equipment were sold piecemeal at auction in December.

The union filed charges with the Labor Board claiming that Darlington had violated §§ 8 (a)(1) and (3) of the National Labor Relations Act by closing its plant,[4]

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they were encouraged to sign a petition disavowing the union. These practices were held to violate § 8 (a)(1) of the National Labor Relations Act, n. 4, *infra*, and that part of the Board decision is not challenged here.

[4] National Labor Relations Act, §§ 8 (a)(1) and (3), as amended, 61 Stat. 140 (1947), 29 U. S. C. §§ 158 (a)(1) and (3) (1958 ed.), provide in pertinent part:

"(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 [section 157 of this title];

. . . . . .

"(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 . . . ."

and § 8 (a)(5) by refusing to bargain with the union after the election.[5] The Board, by a divided vote, found that Darlington had been closed because of the antiunion animus of Roger Milliken, and held that to be a violation of § 8 (a)(3).[6] The Board also found Darlington to be part of a single integrated employer group controlled by the Milliken family through Deering Milliken; therefore Deering Milliken could be held liable for the unfair labor practices of Darlington.[7] Alternatively, since Darlington was a part of the Deering Milliken enterprise, Deering Milliken had violated the Act by closing part of its business for a discriminatory purpose. The Board ordered back pay for all Darlington employees until they obtained substantially equivalent work or were put on preferential hiring lists at the other Deering Milliken mills. Respondent Deering Milliken was ordered to bargain with the union in regard to details of compliance with the Board order. 139 N. L. R. B. 241.

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[5] The union asked for a bargaining conference on September 12, 1956 (the day that the board of directors voted to liquidate), but was told to await certification by the Board. The union was certified on October 24, and did meet with Darlington officials in November, but no actual bargaining took place. The Board found this to be a violation of § 8 (a)(5). Such a finding was in part based on the determination that the plant closing was an unfair labor practice, and no argument is made that § 8 (a)(5) requires an employer to bargain concerning a purely business decision to terminate his enterprise. Cf. *Fibreboard Paper Products Corp.* v. *Labor Board,* 379 U. S. 203.

[6] Since the closing was held to be illegal, the Board found that the gradual discharges of all employees during November and December constituted § 8 (a)(1) violations. The propriety of this determination depends entirely on whether the decision to close the plant violated § 8 (a)(3).

[7] Members Leedom and Rodgers agreed with the trial examiner that Deering Milliken was not a single employer. Member Rodgers dissented in arguing that Darlington had not violated § 8 (a)(3) by closing.

On review, the Court of Appeals, sitting *en banc,* set aside the order and denied enforcement by a divided vote. 325 F. 2d 682. The Court of Appeals held that even accepting *arguendo* the Board's determination that Deering Milliken had the status of a single employer, a company has the absolute right to close out a part or all of its business regardless of antiunion motives. The court therefore did not review the Board's finding that Deering Milliken was a single integrated employer. We granted certiorari, 377 U. S. 903, to consider the important questions involved. We hold that so far as the Labor Relations Act is concerned, an employer has the absolute right to terminate his entire business for any reason he pleases, but disagree with the Court of Appeals that such right includes the ability to close part of a business no matter what the reason. We conclude that the cause must be remanded to the Board for further proceedings.

Preliminarily it should be observed that both petitioners argue that the Darlington closing violated § 8 (a) (1) as well as § 8 (a)(3) of the Act. We think, however, that the Board was correct in treating the closing only under § 8 (a)(3).[8] Section 8 (a)(1) provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of" § 7 rights.[9] Naturally, certain business decisions will, to some

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[8] The Board did find that Darlington's discharges of employees following the decision to close violated § 8 (a)(1). See n. 6, *supra.*

[9] NLRA § 7, as amended, 29 U. S. C. § 157 (1958 ed.), provides:

"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) [section 158 (a)(3) of this title]."

degree, interfere with concerted activities by employees. But it is only when the interference with § 7 rights outweighs the business justification for the employer's action that § 8 (a)(1) is violated. See, *e. g., Labor Board* v. *Steelworkers,* 357 U. S. 357; *Republic Aviation Corp.* v. *Labor Board,* 324 U. S. 793. A violation of § 8 (a)(1) alone therefore presupposes an act which is unlawful even absent a discriminatory motive. Whatever may be the limits of § 8 (a)(1), some employer decisions are so peculiarly matters of management prerogative that they would never constitute violations of § 8 (a)(1), whether or not they involved sound business judgment, unless they also violated § 8 (a)(3). Thus it is not questioned in this case that an employer has the right to terminate his business, whatever the impact of such action on concerted activities, if the decision to close is motivated by other than discriminatory reasons.[10] But such action, if discriminatorily motivated, is encompassed within the literal language of § 8 (a)(3). We therefore deal with the Darlington closing under that section.

I.

We consider first the argument, advanced by the petitioner union but not by the Board, and rejected by the Court of Appeals, that an employer may not go completely out of business without running afoul of the Labor Relations Act if such action is prompted by a desire to

[10] It is also clear that the ambiguous act of closing a plant following the election of a union is not, absent an inquiry into the employer's motive, inherently discriminatory. We are thus not confronted with a situation where the employer "must be held to intend the very consequences which foreseeably and inescapably flow from his actions . . ." (*Labor Board* v. *Erie Resistor Corp.,* 373 U. S. 221, 228), in which the Board could find a violation of § 8 (a)(3) without an examination into motive. See *Radio Officers* v. *Labor Board,* 347 U. S. 17, 42–43; *Teamsters Local* v. *Labor Board,* 365 U. S. 667, 674–676.

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avoid unionization.[11] Given the Board's findings on the issue of motive, acceptance of this contention would carry the day for the Board's conclusion that the closing of this plant was an unfair labor practice, even on the assumption that Darlington is to be regarded as an independent unrelated employer. A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Relations Act. We find neither.

So far as legislative manifestation is concerned, it is sufficient to say that there is not the slightest indication in the history of the Wagner Act or of the Taft-Hartley Act that Congress envisaged any such result under either statute.

As for judicial precedent, the Board recognized that "[t]here is no decided case directly dispositive of Darlington's claim that it had an absolute right to close its mill, irrespective of motive." 139 N. L. R. B., at 250. The only language by this Court in any way adverting to this problem is found in *Southport Petroleum Co.* v. *Labor Board,* 315 U. S. 100, 106, where it was stated:

> "Whether there was a *bona fide* discontinuance and a true change of ownership—which would terminate the duty of reinstatement created by the Board's order—or merely a disguised continuance of the old employer, does not clearly appear . . . ."

The courts of appeals have generally assumed that a complete cessation of business will remove an employer

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[11] The Board predicates its argument on the finding that Deering Milliken was an integrated enterprise, and does not consider it necessary to argue that an employer may not go completely out of business for antiunion reasons. Brief for National Labor Relations Board, p. 3, n. 2.

from future coverage by the Act. Thus the Court of Appeals said in these cases: The Act "does not compel a person to become or remain an employee. It does not compel one to become or remain an employer. Either may withdraw from that status with immunity, so long as the obligations of any employment contract have been met." 325 F. 2d, at 685. The Eighth Circuit, in *Labor Board* v. *New Madrid Mfg. Co.*, 215 F. 2d 908, 914, was equally explicit:

> "But none of this can be taken to mean that an employer does not have the absolute right, at all times, to permanently close and go out of business . . . for whatever reason he may choose, whether union animosity or anything else, and without his being thereby left subject to a remedial liability under the Labor Management Relations Act for such unfair labor practices as he may have committed in the enterprise, except up to the time that such actual and permanent closing . . . has occurred." [12]

The AFL–CIO suggests in its *amicus* brief that Darlington's action was similar to a discriminatory lockout, which is prohibited " 'because designed to frustrate organizational efforts, to destroy or undermine bargaining representation, or to evade the duty to bargain.' " [13] One of the purposes of the Labor Relations Act is to prohibit the discriminatory use of economic weapons in an effort to obtain future benefits. The discriminatory lockout designed to destroy a union, like a "runaway shop," is a lever which has been used to discourage collective employee activities

[12] In *New Madrid* the business was transferred to a new employer, which was held liable for the unfair labor practices committed by its predecessor before closing. The closing itself was not found to be an unfair labor practice.

[13] Brief for AFL–CIO, p. 7, quoting from *Labor Board* v. *Truck Drivers Local*, 353 U. S. 87, 93. This brief was incorporated by reference as Point I of the petitioner union's brief in this Court.

in the future. But a complete liquidation of a business yields no such future benefit for the employer, if the termination is bona fide.[14] It may be motivated more by spite against the union than by business reasons, but it is not the type of discrimination which is prohibited by the Act. The personal satisfaction that such an employer may derive from standing on his beliefs and the mere possibility that other employers will follow his example are surely too remote to be considered dangers at which the labor statutes were aimed.[15] Although employees may be prohibited from engaging in a strike under certain conditions, no one would consider it a violation of the Act for the same employees to quit their employment *en masse*, even if motivated by a desire to ruin the employer. The very permanence of such action would negate any future economic benefit to the employees. The employer's right to go out of business is no different.

We are not presented here with the case of a "runaway shop," [16] whereby Darlington would transfer its

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[14] The Darlington property and equipment could not be sold as a unit, and were eventually auctioned off piecemeal. We therefore are not confronted with a sale of a going concern, which might present different considerations under §§ 8 (a)(3) and (5). Cf. *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543; *Labor Board* v. *Deena Artware, Inc.*, 361 U. S. 398.

[15] Cf. NLRA § 8 (c), 29 U. S. C. § 158 (c) (1958 ed.). Different considerations would arise were it made to appear that the closing employer was acting pursuant to some arrangement or understanding with other employers to discourage employee organizational activities in their businesses.

[16] *E. g., Labor Board* v. *Preston Feed Corp.*, 309 F. 2d 346; *Labor Board* v. *Wallick*, 198 F. 2d 477. An analogous problem is presented where a department is closed for antiunion reasons but the work is continued by independent contractors. See, *e. g., Labor Board* v. *Kelly & Picerne, Inc.*, 298 F. 2d 895; *Jays Foods, Inc.* v. *Labor Board*, 292 F. 2d 317; *Labor Board* v. *R. C. Mahon Co.*, 269 F. 2d 44; *Labor Board* v. *Bank of America*, 130 F. 2d 624; *Williams Motor Co.* v. *Labor Board*, 128 F. 2d 960.

work to another plant or open a new plant in another locality to replace its closed plant.[17] Nor are we concerned with a shutdown where the employees, by renouncing the union, could cause the plant to reopen.[18] Such cases would involve discriminatory employer action for the purpose of obtaining some benefit from the employees in the future.[19] We hold here only that when

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[17] After the decision to close the plant, Darlington accepted no new orders, and merely continued operations for a time to fill pending orders. 139 N. L. R. B., at 244.

[18] *E. g., Labor Board* v. *Norma Mining Corp.*, 206 F. 2d 38. Similarly, if all employees are discharged but the work continues with new personnel, the effect is to discourage any future union activities. See *Labor Board* v. *Waterman S. S. Co.*, 309 U. S. 206; *Labor Board* v. *National Garment Co.*, 166 F. 2d 233; *Labor Board* v. *Stremel*, 141 F. 2d 317.

[19] All of the cases to which we have been cited involved closings found to have been motivated, at least in part, by the expectation of achieving future benefits. See cases cited in notes 16, 18, *supra*. The two cases which are urged as indistinguishable from *Darlington* are *Labor Board* v. *Savoy Laundry*, 327 F. 2d 370, and *Labor Board* v. *Missouri Transit Co.*, 250 F. 2d 261. In *Savoy Laundry* the employer operated one laundry plant where he processed both retail laundry pickups and wholesale laundering. Once the laundry was marked, all of it was processed together. After some of the employees organized, the employer discontinued most of the wholesale service, and thereafter discharged some of his employees. There was no separate wholesale department, and the discriminatory motive was obviously to discourage unionization in the entire plant. *Missouri Transit* presents a similar situation. A bus company operated an interstate line and an intrastate shuttle service connecting a military base with the interstate terminal. When the union attempted to organize all of the drivers, the shuttle service was sold and the shuttle drivers were discharged. Although the two services were treated as separate departments, it is clear from the facts of the case that the union was attempting to organize all of the drivers, and the discriminatory motive of the employer was to discourage unionization in the interstate service as well as the shuttle service.

an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice.[20]

II.

While we thus agree with the Court of Appeals that viewing Darlington as an independent employer the liquidation of its business was not an unfair labor practice, we cannot accept the lower court's view that the same conclusion necessarily follows if Darlington is regarded as an integral part of the Deering Milliken enterprise.

The closing of an entire business, even though discriminatory, ends the employer-employee relationship; the force of such a closing is entirely spent as to that business when termination of the enterprise takes place. On the other hand, a discriminatory partial closing may have

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[20] Nothing we have said in this opinion would justify an employer's interfering with employee organizational activities by threatening to close his plant, as distinguished from announcing a decision to close already reached by the board of directors or other management authority empowered to make such a decision. We recognize that this safeguard does not wholly remove the possibility that our holding may result in some deterrent effect on organizational activities independent of that arising from the closing itself. An employer may be encouraged to make a definitive decision to close on the theory that its mere announcement before a representation election will discourage the employees from voting for the union, and thus his decision may not have to be implemented. Such a possibility is not likely to occur, however, except in a marginal business; a solidly successful employer is not apt to hazard the possibility that the employees will call his bluff by voting to organize. We see no practical way of eliminating this possible consequence of our holding short of allowing the Board to order an employer who chooses so to gamble with his employees not to carry out his announced intention to close. We do not consider the matter of sufficient significance in the overall labor-management relations picture to require or justify a decision different from the one we have made.

repercussions on what remains of the business, affording employer leverage for discouraging the free exercise of § 7 rights among remaining employees of much the same kind as that found to exist in the "runaway shop" and "temporary closing" cases. See *supra,* pp. 272–273. Moreover, a possible remedy open to the Board in such a case, like the remedies available in the "runaway shop" and "temporary closing" cases, is to order reinstatement of the discharged employees in the other parts of the business.[21] No such remedy is available when an entire business has been terminated. By analogy to those cases involving a continuing enterprise we are constrained to hold, in disagreement with the Court of Appeals, that a partial closing is an unfair labor practice under § 8 (a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect.

While we have spoken in terms of a "partial closing" in the context of the Board's finding that Darlington was part of a larger single enterprise controlled by the Milliken family, we do not mean to suggest that an organizational integration of plants or corporations is a necessary prerequisite to the establishment of such a violation of § 8 (a)(3). If the persons exercising control over a plant that is being closed for antiunion reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and

[21] In the view we take of these cases we do not reach any of the challenges made to the Board's remedy afforded here.

(3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities, we think that an unfair labor practice has been made out.

Although the Board's single employer finding necessarily embraced findings as to Roger Milliken and the Milliken family which, if sustained by the Court of Appeals, would satisfy the elements of "interest" and "relationship" with respect to other parts of the Deering Milliken enterprise, that and the other Board findings fall short of establishing the factors of "purpose" and "effect" which are vital requisites of the general principles that govern a case of this kind.

Thus, the Board's findings as to the purpose and foreseeable effect of the Darlington closing pertained *only* to its impact on the Darlington employees. No findings were made as to the purpose and effect of the closing with respect to the employees in the other plants comprising the Deering Milliken group. It does not suffice to establish the unfair labor practice charged here to argue that the Darlington closing necessarily had an adverse impact upon unionization in such other plants. We have heretofore observed that employer action which has a foreseeable consequence of discouraging concerted activities generally [22] does not amount to a violation of § 8 (a)(3) in the absence of a showing of motivation which is aimed at achieving the prohibited effect. See *Teamsters Local* v. *Labor Board,* 365 U. S. 667, and the concurring opinion therein, at 677. In an area which trenches so closely upon otherwise legitimate employer prerogatives, we consider the absence of Board findings on this score a fatal defect in its decision. The Court of Appeals for its part

[22] See n. 10, *supra.*

did not deal with the question of purpose and effect at all, since it concluded that an employer's right to close down his entire business because of distaste for unionism, also embraced a partial closing so motivated.

Apart from this, the Board's holding should not be accepted or rejected without court review of its single employer finding, judged, however, in accordance with the general principles set forth above. Review of that finding, which the lower court found unnecessary on its view of the cause, now becomes necessary in light of our holding in this part of our opinion, and is a task that devolves upon the Court of Appeals in the first instance. *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474.

In these circumstances, we think the proper disposition of this cause is to require that it be remanded to the Board so as to afford the Board the opportunity to make further findings on the issue of purpose and effect. See, *e. g., Labor Board* v. *Virginia Elec. & Power Co.,* 314 U. S. 469, 479–480. This is particularly appropriate here since the cases involve issues of first impression. If such findings are made, the cases will then be in a posture for further review by the Court of Appeals on all issues. Accordingly, without intimating any view as to how any of these matters should eventuate, we vacate the judgments of the Court of Appeals and remand the cases to that court with instructions to remand them to the Board for further proceedings consistent with this opinion.

It is so ordered.

Mr. Justice Stewart took no part in the decision of these cases.

Mr. Justice Goldberg took no part in the consideration or decision of these cases.

NATIONAL LABOR RELATIONS BOARD *v.* BROWN ET AL., DBA BROWN FOOD STORE, ET AL.

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

No. 7. Argued January 19, 1965.—Decided March 29, 1965.

Respondents were members of a multiemployer bargaining group with a history of successful bargaining. After the union struck another member of the group, which continued operations using temporary replacements, respondents locked out their employees and utilized temporary replacements to continue business operations. The National Labor Relations Board found that, while the use of temporary replacements by the struck employer was lawful, the lockout of regular employees and their temporary replacement by respondents violated §§ 8 (a)(1) and (3) of the National Labor Relations Act. The Court of Appeals disagreed and refused to enforce the Board's order. *Held:*

1. Although the Board need not inquire into employer motivation to support a finding of an unfair labor practice where the employer's conduct is demonstrably destructive of employee rights and is not justified by the service of significant or important business ends, respondents' lockout and subsequent operations with temporary help in the face of the struck employer's continued operations during the whipsaw strike do not constitute such conduct. Pp. 282–286.

(a) Since the struck employer continued to operate, respondents might reasonably have been concerned that the integrity of the employer group was threatened unless they managed to stay open during the lockout. P. 284.

(b) Respondents' continued operations with the use of temporary employees after the lockout was wholly consistent with a legitimate business purpose. P. 285.

(c) Respondents' use of temporary replacements rather than some of their regular employees does not justify an inference of hostile motivation; to limit the respondents to the use of regular employees under the circumstances here present would be to render largely illusory the right of lockout recognized by *Labor Board* v. *Truck Drivers Union*, 353 U. S. 87. P. 285.

(d) Absent evidentiary findings of hostile motive there is no support for a conclusion that respondents violated § 8 (a) (1) of the Act. P. 286.

2. Indispensable to a violation of § 8 (a) (3) is a determination that the employer's actions were motivated by an unlawful intent, and while no specific evidence of this unlawful intent is necessary when an employer practice is inherently destructive of employee rights and is not justified by legitimate business reasons, where, as here, the tendency to discourage membership is comparatively slight, and the employer's conduct is reasonably adapted to achieve legitimate business ends, the improper intent of the employer must be established by independent evidence. Not only is the record devoid of any evidence that respondents acted with an improper intent, but it contains positive evidence of their good faith. Pp. 286–290.

3. While courts should be slow to overturn an administrative decision, they are not left to sheer acceptance of the Board's conclusions, and must set aside a Board decision which rests on an erroneous legal foundation. Pp. 290–292.

319 F. 2d 7, affirmed.

Norton J. Come argued the cause for petitioner. With him on the brief were *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli, Gary Green* and *Nathan Lewin.*

William L. Keller argued the cause for respondents. With him on the brief was *Allen Butler.*

S. G. Lippman and *Tim L. Bornstein* filed a brief for the Retail Clerks International Association, as *amicus curiae,* urging reversal.

Joseph M. McLaughlin and *Frederick A. Morgan* filed a brief for Food Employers Council, Inc., et al., as *amici curiae,* urging affirmance.

Mr. Justice Brennan delivered the opinion of the Court.

The respondents, who are members of a multiemployer bargaining group, locked out their employees in response

to a whipsaw strike against another member of the group. They and the struck employer continued operations with temporary replacements. The National Labor Relations Board found that the struck employer's use of temporary replacements was lawful under *Labor Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, but that the respondents had violated §§ 8 (a)(1) and (3) of the National Labor Relations Act [1] by locking out their regular employees and using temporary replacements to carry on business. 137 N. L. R. B. 73. The Court of Appeals for the Tenth Circuit disagreed and refused to enforce the Board's order. 319 F. 2d 7. We granted certiorari, 375 U. S. 962. We affirm the Court of Appeals.

Five operators of six retail food stores in Carlsbad, New Mexico, make up the employer group. The stores had bargained successfully on a group basis for many years with Local 462 of the Retail Clerks International Association. Negotiations for a new collective-bargaining agreement to replace the expiring one began in January 1960. Agreement was reached by mid-February on all

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[1] National Labor Relations Act, as amended, § 8 (a), 61 Stat. 140, 29 U. S. C. § 158 (a) (1958 ed.) provides: "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 157 of this title;

. . . . . .

"(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 . . . ."

National Labor Relations Act, as amended, § 7, 61 Stat. 140, 29 U. S. C. § 157 (1958 ed.) provides: "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 . . . ."

terms except the amount and effective date of a wage increase. Bargaining continued without result, and on March 2 the Local informed the employers that a strike had been authorized. The employers responded that a strike against any member of the employer group would be regarded as a strike against all. On March 16, the union struck Food Jet, Inc., one of the group. The four respondents, operating five stores, immediately locked out all employees represented by the Local, telling them and the Local that they would be recalled to work when the strike against Food Jet ended. The stores, including Food Jet, continued to carry on business by using management personnel, relatives of such personnel, and a few temporary employees; all of the temporary replacements were expressly told that the arrangement would be discontinued when the whipsaw strike ended.[2] Bargaining continued until April 22 when an agreement was reached. The employers immediately released the temporary replacements and restored the strikers and the locked-out employees to their jobs.

The Board and the Court of Appeals agreed that the case was to be decided in light of our decision in the so-called *Buffalo Linen* case, *Labor Board* v. *Truck Drivers Union,* 353 U. S. 87. There we sustained the Board's finding that, in the absence of specific proof of unlawful motivation, the use of a lockout by members of a multiemployer bargaining unit in response to a whipsaw strike did

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[2] Food Jet used supervisory personnel and hired some "sack boys"; respondent Safeway Stores, which operated two stores in Carlsbad, closed one and transferred its managerial personnel to the other; respondent Thrifty Way Food Stores used management personnel and their wives and also hired some part-time "box boys"; respondent Brown Food Store relied on management personnel and their relatives, and a "sack boy" transferred from an out-of-town branch store; respondent Cashway Food Stores also relied on management personnel and their relatives and some transferees from out-of-town branches.

not violate either § 8 (a)(1) or § 8 (a)(3). We held that, although the lockout tended to impair the effectiveness of the whipsaw strike, the right to strike "is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide. . . . The ultimate problem is the balancing of the conflicting legitimate interests." 353 U. S., at 96. We concluded that the Board correctly balanced those interests in upholding the lockout, since it found that the nonstruck employers resorted to the lockout to preserve the multiemployer bargaining unit from the disintegration threatened by the whipsaw strike. But in the present case the Board held, two members dissenting, that the respondents' continued operations with temporary replacements constituted a "critical difference" from *Buffalo Linen*—where all members of the employer group shut down operations—and that in this circumstance it was reasonable to infer that the respondents did not act to protect the multiemployer group, but "for the purpose of inhibiting a lawful strike." 137 N. L. R. B., at 76. Thus the respondents' act was both a coercive practice condemned by § 8 (a)(1) and discriminatory conduct in violation of § 8 (a)(3).

The Board's decision does not rest upon independent evidence that the respondents acted either out of hostility toward the Local or in reprisal for the whipsaw strike. It rests upon the Board's appraisal that the respondents' conduct carried its own indicia of unlawful intent, thereby establishing, without more, that the conduct constituted an unfair labor practice. It was disagreement with this appraisal, which we share, that led the Court of Appeals to refuse to enforce the Board's order.

It is true that the Board need not inquire into employer motivation to support a finding of an unfair labor practice where the employer conduct is demonstrably destructive of employee rights and is not justified by the service of significant or important business ends. See, *e. g.*, *Labor*

Board v. *Erie Resistor Corp.*, 373 U. S. 221; *Labor Board* v. *Burnup & Sims, Inc.*, 379 U. S. 21. We agree with the Court of Appeals that, in the setting of this whipsaw strike and Food Jet's continued operations, the respondents' lockout and their continued operations with the use of temporary replacements, viewed separately or as a single act, do not constitute such conduct.

We begin with the proposition that the Act does not constitute the Board as an "arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands." *Labor Board* v. *Insurance Agents*, 361 U. S. 477, 497. In the absence of proof of unlawful motivation, there are many economic weapons which an employer may use that either interfere in some measure with concerted employee activities, or which are in some degree discriminatory and discourage union membership, and yet the use of such economic weapons does not constitute conduct that is within the prohibition of either § 8 (a)(1) or § 8 (a)(3). See, *e. g.*, *Labor Board* v. *Mackay Radio & Telegraph Co., supra; Labor Board* v. *Dalton Brick & Tile Corp.*, 301 F. 2d 886, 896. Even the Board concedes that an employer may legitimately blunt the effectiveness of an anticipated strike by stockpiling inventories, readjusting contract schedules, or transferring work from one plant to another, even if he thereby makes himself "virtually strikeproof." [3] As a general matter he may completely liquidate his business without violating either § 8 (a)(1) or § 8 (a)(3), whatever the impact of his action on concerted employee activities. *Texile Workers* v. *Darlington Mfg. Co.*, Nos. 37 and 41, decided today, *ante*, p. 263. Specifically, he may in various circumstances use the lockout as a legitimate economic weapon. See, *e. g.*, *Labor Board* v. *Truck*

[3] See brief for the National Labor Relations Board in *American Ship Building Co.* v. *Labor Board*, No. 255, *post*, p. 300, also decided today, at p. 17. See also 76 Harv. L. Rev. 1494, 1497.

Drivers Union, supra; Labor Board v. *Dalton Brick & Tile Corp., supra; Leonard* v. *Labor Board,* 205 F. 2d 355; *Betts Cadillac Olds, Inc.,* 96 N. L. R. B. 268; *International Shoe Co.,* 93 N. L. R. B. 907; *Pepsi-Cola Bottling Co.,* 72 N. L. R. B. 601, 602; *Duluth Bottling Assn.,* 48 N. L. R. B. 1335; *Link-Belt Co.,* 26 N. L. R. B. 227. And in *American Ship Building Co.* v. *Labor Board,* No. 255, decided today, *post,* p. 300, we hold that a lockout is not an unfair labor practice simply because used by an employer to bring pressure to bear in support of his bargaining position after an impasse in bargaining negotiations has been reached.

In the circumstances of this case, we do not see how the continued operations of respondents and their use of temporary replacements imply hostile motivation any more than the lockout itself; nor do we see how they are inherently more destructive of employee rights. Rather, the compelling inference is that this was all part and parcel of respondents' defensive measure to preserve the multiemployer group in the face of the whipsaw strike. Since Food Jet legitimately continued business operations, it is only reasonable to regard respondents' action as evincing concern that the integrity of the employer group was threatened unless they also managed to stay open for business during the lockout. For with Food Jet open for business and respondents' stores closed, the prospect that the whipsaw strike would succeed in breaking up the employer association was not at all fanciful. The retail food industry is very competitive and repetitive patronage is highly important. Faced with the prospect of a loss of patronage to Food Jet, it is logical that respondents should have been concerned that one or more of their number might bolt the group and come to terms with the Local, thus destroying the common front essential to multiemployer bargaining. The Court of Appeals correctly pictured the respondents' dilemma in saying,

"If . . . the struck employer does choose to operate with replacements and the other employers cannot replace after lockout, the economic advantage passes to the struck member, the non-struck members are deterred in exercising the defensive lockout, and the whipsaw strike . . . enjoys an almost inescapable prospect of success." 319 F. 2d, at 11. Clearly respondents' continued operations with the use of temporary replacements following the lockout were wholly consistent with a legitimate business purpose.

Nor are we persuaded by the Board's argument that justification for the inference of hostile motivation appears in the respondents' use of temporary employees rather than some of the regular employees. It is not commonsense, we think, to say that the regular employees were "willing to work at the employers' terms." 137 N. L. R. B., at 76. It seems probable that this "willingness" was motivated as much by their understandable desire to further the objective of the whipsaw strike—to break through the employers' united front by forcing Food Jet to accept the Local's terms—as it was by a desire to work for the employers under the existing unacceptable terms. As the Board's dissenting members put it, "These employees are willing only to receive wages while their brethren in the rest of the associationwide unit are exerting whipsaw pressure on one employer to gain benefits that will ultimately accrue to all employees in the associationwide unit, including those here locked out." 137 N. L. R. B., at 78. Moreover, the course of action to which the Board would limit the respondents would force them into the position of aiding and abetting the success of the whipsaw strike and consequently would render "largely illusory," 137 N. L. R. B., at 78–79, the right of lockout recognized by *Buffalo Linen;* the right would be meaningless if barred to nonstruck stores that find it necessary to operate because the struck store does so.

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The Board's finding of a § 8 (a)(1) violation emphasized the impact of respondents' conduct upon the effectiveness of the whipsaw strike. It is no doubt true that the collective strength of the stores to resist that strike is maintained, and even increased, when all stores stay open with temporary replacements. The pressures on the employees are necessarily greater when none of the union employees is working and the stores remain open. But these pressures are no more than the result of the Local's inability to make effective use of the whipsaw tactic. Moreover, these effects are no different from those that result from the legitimate use of any economic weapon by an employer. Continued operations with the use of temporary replacements may result in the failure of the whipsaw strike, but this does not mean that the employers' conduct is demonstrably so destructive of employee rights and so devoid of significant service to any legitimate business end that it cannot be tolerated consistently with the Act. Certainly then, in the absence of evidentiary findings of hostile motive, there is no support for the conclusion that respondents violated § 8 (a)(1).

Nor does the record show any basis for concluding that respondents violated § 8 (a)(3). Under that section both discrimination and a resulting discouragement of union membership are necessary, but the added element of unlawful intent is also required. In *Buffalo Linen* itself the employers treated the locked-out employees less favorably because of their union membership, and this may have tended to discourage continued membership, but we rejected the notion that the use of the lockout violated the statute. The discriminatory act is not by itself unlawful unless intended to prejudice the employees' position because of their membership in the union; some element of antiunion animus is necessary. See *Radio Officers' Union* v. *Labor Board*, 347 U. S. 17, 42–44; *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301

U. S. 1, at 46. We have determined that the "real motive" of the employer in an alleged § 8 (a)(3) violation is decisive, *Associated Press* v. *Labor Board,* 301 U. S. 103, 132; if any doubt still persisted, we laid it to rest in *Radio Officers' Union* v. *Labor Board, supra,* where we reviewed the legislative history of the provision and concluded that Congress clearly intended the employer's purpose in discriminating to be controlling. *Id.,* at 44. See also *Textile Workers* v. *Darlington Mfg. Co., ante,* at 275, 276; *American Ship Building Co.* v. *Labor Board, post,* at 311–313; *Local 357, International Brotherhood of Teamsters* v. *Labor Board,* 365 U. S. 667, 674–676.

We recognize that, analogous to the determination of unfair practices under § 8 (a)(1), when an employer practice is inherently destructive of employee rights and is not justified by the service of important business ends, no specific evidence of intent to discourage union membership is necessary to establish a violation of § 8 (a)(3). This principle, we have said, is "but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct." *Radio Officers' Union* v. *Labor Board, supra,* at 45. For example, in *Labor Board* v. *Erie Resistor Corp., supra,* we held that an employer's action in awarding superseniority to employees who worked during a strike was discriminatory conduct that carried with it its own indicia of improper intent. The only reasonable inference that could be drawn by the Board from the award of superseniority—balancing the prejudicial effect upon the employees against any asserted business purpose—was that it was directed against the striking employees because of their union membership; conduct so inherently destructive of employee interests could not be saved from illegality by an asserted overriding business purpose pursued in good faith. But where, as here, the tendency to discourage union membership is comparatively slight, and the em-

ployers' conduct is reasonably adapted to achieve legitimate business ends or to deal with business exigencies, we enter into an area where the improper motivation of the employers must be established by independent evidence. When so established, antiunion motivation will convert an otherwise ordinary business act into an unfair labor practice. *Labor Board* v. *Erie Resistor Corp., supra,* at 227, and cases there cited.

We agree with the Court of Appeals that respondents' conduct here clearly fits into the latter category, where actual subjective intent is determinative, and where the Board must find from evidence independent of the mere conduct involved that the conduct was primarily motivated by an antiunion animus. While the use of temporary nonunion personnel in preference to the locked-out union members is discriminatory, we think that any resulting tendency to discourage union membership is comparatively remote, and that this use of temporary personnel constitutes a measure reasonably adapted to the effectuation of a legitimate business end. Here discontent on the part of the Local's membership in all likelihood is attributable largely to the fact that the membership was locked out as the result of the Local's whipsaw stratagem. But the lockout itself is concededly within the rule of *Buffalo Linen.* We think that the added dissatisfaction, with its resultant pressure on membership, attributable to the fact that the nonstruck employers remain in business with temporary replacements is comparatively insubstantial. First, the replacements were expressly used for the duration of the labor dispute only; thus, the displaced employees could not have looked upon the replacements as threatening their jobs. At most the union would be forced to capitulate and return its members to work on terms which, while not as desirable as hoped for, were still better than under the old contract.

Second, the membership, through its control of union policy, could end the dispute and terminate the lockout at any time simply by agreeing to the employers' terms and returning to work on a regular basis. Third, in light of the union-shop provision that had been carried forward into the new contract from the old collective-bargaining agreement, it would appear that a union member would have nothing to gain, and much to lose, by quitting the union. Under all these circumstances, we cannot say that the employers' conduct had any great tendency to discourage union membership. Not only was the prospect of discouragement of membership comparatively remote, but the respondents' attempt to remain open for business with the help of temporary replacements was a measure reasonably adapted to the achievement of a legitimate end—preserving the integrity of the multiemployer bargaining unit.[4]

When the resulting harm to employee rights is thus comparatively slight, and a substantial and legitimate business end is served, the employers' conduct is prima facie lawful. Under these circumstances the finding of an unfair labor practice under § 8 (a)(3) requires a showing of improper subjective intent. Here, there is no assertion by either the union or the Board that the respondents were motivated by antiunion animus, nor is there any evidence that this was the case. On the contrary, the background of the employer association's relations with the union and all the circumstances of the respondents' behavior during the dispute tend to support the contrary conclusion: the history of labor relations between the employers and the Local divulges that the relationship has always been more than amicable;

[4] For a history of rejection by Congress of proposals to limit or outlaw multiemployer bargaining see *Buffalo Linen,* 353 U. S., at 95–96.

union-shop provisions have been incorporated in the collective-bargaining agreement between the Local and the employers for many years; in these very negotiations, the employers' association waived the failure of the Local to give timely notice of its desire to bargain over new terms of employment and consented to hear the Local's claims at the bargaining table; the record contains undisputed testimony by the store owners that they had no bone to pick with the Local, that on the contrary they thought that unions were a good thing, but felt forced to take action in order to preserve the multiemployer group from disintegration and to save their considerable stock of perishable food produce. Even the struck member of the association did not resort to permanent replacements for the striking workers, though it could have under *Mackay;* rather it sought to ride out the dispute with temporary replacements to avoid depriving the regular employees of their jobs. Thus, not only is there absent in the record any independent evidence of improper motive, but the record contains positive evidence of the employers' good faith. In sum, the Court of Appeals was required to conclude that there was not sufficient evidence gathered from the record as a whole to support the Board's finding that respondents' conduct violates § 8 (a)(3). See *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474.

It is argued, finally, that the Board's decision is within the area of its expert judgment and that, in setting it aside, the Court of Appeals exceeded the authorized scope of judicial review. This proposition rests upon our statement in *Buffalo Linen* that in reconciling the conflicting interests of labor and management the Board's determination is to be subjected to "limited judicial review." 353 U. S., at 96. When we used the phrase "limited judicial review" we did not mean that the balance struck by the Board is immune from judicial examination and reversal

in proper cases.[5] Courts are expressly empowered to enforce, modify or set aside, in whole or in part, the Board's orders, except that the findings of the Board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. National Labor Relations Act, as amended, §§ 10 (e), (f), 29 U. S. C. §§ 160 (e), (f) (1958 ed.). Courts should be "slow to overturn an administrative decision," *Labor Board* v. *Babcock & Wilcox Co.*, 351 U. S. 105, 112, but they are not left "to 'sheer acceptance' of the Board's conclusions," *Republic Aviation Corp.* v. *Labor Board*, 324 U. S. 793, 803. Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their

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[5] This is evident from the authorities cited in *Buffalo Linen*, 353 U. S., at 96, n. 28.

In *Labor Board* v. *Babcock & Wilcox Co.*, 351 U. S. 105, we set aside, as resting on an erroneous legal foundation, a Board decision finding that the employer's refusal to allow distribution of union literature on a company-owned parking lot violated § 8 (a) (1). In *Republic Aviation Corp.* v. *Labor Board*, 324 U. S. 793, we sustained the Board's decision but emphasized that judicial review is contemplated by 29 U. S. C. §§ 160 (e), (f), 324 U. S., at 799. *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, involved a question of remedy as to which the statute expressly grants the Board broad authority, 29 U. S. C. § 160 (c). Since *Buffalo Linen* numerous Board orders have been set aside as outside of the Board's statutory authority. See, *e. g.*, *Labor Board* v. *Insurance Agents*, 361 U. S. 477; *Labor Board* v. *Drivers Local Union*, 362 U. S. 274; *Local 357, International Brotherhood of Teamsters* v. *Labor Board*, 365 U. S. 667; *Labor Board* v. *Fruit Packers*, 377 U. S. 58. Even where the Board is sustained, its analysis in support of its conclusion is subjected to full, independent judicial review. See *Labor Board* v. *Erie Resistor Corp.*, *supra*.

responsibility if they did not fully review such administrative decisions. Of course due deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole. But where, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, "[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Building Co.* v. *Labor Board, post,* at 318.

Courts must, of course, set aside Board decisions which rest on an "erroneous legal foundation." *Labor Board* v. *Babcock & Wilcox Co., supra,* at 112–113. Congress has not given the Board untrammelled authority to catalogue which economic devices shall be deemed freighted with indicia of unlawful intent. *Labor Board* v. *Insurance Agents, supra,* at 498. In determining here that the respondents' conduct carried its own badge of improper motive, the Board's decision, for the reasons stated, misapplied the criteria governing the application of §§ 8 (a) (1) and (3). Since the order therefore rested on an erroneous legal foundation, the Court of Appeals properly refused to enforce it.[6]

Affirmed.

MR. JUSTICE GOLDBERG, whom THE CHIEF JUSTICE joins, concurring.

I agree with the Court that, given the *Buffalo Linen* case, *Labor Board* v. *Truck Drivers Union,* 353 U. S.

[6] We do not here decide whether the case would be the same had the struck employer exercised its prerogative to hire permanent replacements for the strikers under our rule in *Labor Board* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, and the nonstruck employers had then hired permanent replacements for their locked-out employees.

87, and applying it in light of the actualities of industrial relations, the employers' conduct here is shown to be justified and necessary to preserve the integrity of the employers' bargaining unit. After the union attempted a whipsaw strike against one member of the multiemployer bargaining unit, the other members locked out their employees. The struck employer attempted to carry on business by using management personnel, relatives of such personnel, and a few temporary employees. To avoid the whipsaw effect of the strike, the nonstruck employers then did the same. During the period of the lockout, all of the employers, struck as well as nonstruck, bargained with the union and, when agreement was reached, in all cases the temporary employees were dismissed and the union employees returned to their jobs.

As the Court seems to recognize, *ante,* p. 292, n. 6, this would be an entirely different case had the nonstruck employers locked out their employees and hired *permanent* replacements even if the struck employer had exercised his right to hire permanent replacements under the doctrine of *Labor Board* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333. If the Labor Board determined in such a case that the interference with employee rights was not justified by the legitimate economic interests of the employer, the Labor Board determination might well be controlling. See my concurring opinion in *American Ship Building Co.* v. *Labor Board, post,* at 327. Cf. *Labor Board* v. *Erie Resistor Corp.,* 373 U. S. 221. There would be grave doubts as to whether the act of locking out employees and hiring permanent replacements is justified by any legitimate interest of the nonstruck employers, for *Buffalo Linen* makes clear that the test in such a situation is not whether parity is achieved between struck and nonstruck employers, but, rather, whether the nonstruck employers' actions are necessary to counteract the whipsaw effects of the strike and to preserve the em-

ployer bargaining unit. Since in this case the nonstruck employers did nothing more than hire temporary replacements, an activity necessary to counter whipsawing by the union and to preserve the bargaining unit, I agree that, applying *Buffalo Linen*, the judgment of the Court of Appeals should be affirmed.

MR. JUSTICE WHITE, dissenting.

I cannot agree with the severe restrictions which the Court imposes on the Board's role in determining the employer conduct banned by §§ 8 (a)(1) and (3) of the NLRA. This Court has long recognized that "[a] statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application," *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 194, and has repeatedly held that the Board may find some conduct sufficiently destructive of concerted activities and union membership as to fall within the broad language of §§ 8 (a)(1) and (3) notwithstanding that the employer has a business justification for his actions. *Republic Aviation Corp.* v. *Labor Board*, 324 U. S. 793; *Labor Board* v. *Truck Drivers Union*, 353 U. S. 87 (*Buffalo Linen*); *Labor Board* v. *Erie Resistor Corp.*, 373 U. S. 221; *Labor Board* v. *Burnup & Sims, Inc.*, 379 U. S. 21. The Board holds that a lockout together with the hiring of replacements by the nonstruck employers of a multiemployer bargaining unit violates §§ 8 (a)(1) and (3). The Court decides that this holding is an "unauthorized assumption by an agency of major policy decisions properly made by Congress," *ante*, at 292, and that the "proper balance to be struck between conflicting interests" requires affirmance of the denial of enforcement of the Board's order. This decision represents a departure from the many decisions of this Court holding that the Board has primary responsibility to

weigh the interest of employees in concerted activities against that of the employer in operating his business, *Phelps Dodge,* 313 U. S. 177; *Buffalo Linen,* 353 U. S. 87, 95; *Erie Resistor,* 373 U. S. 221; *Burnup & Sims,* 379 U. S. 21. The Board's discretion under these sections is not without substantial limits imposed by the policy of the Act and the requirement that the Board "disclose the basis of its order" and "give clear indication that it has exercised the discretion with which Congress has empowered it." *Phelps Dodge,* 313 U. S. 177, 197; cf. *Burlington Truck Lines* v. *United States,* 371 U. S. 156, 168. But in my view the Board has set out the basis and requisite findings for its order in this case and has not exceeded its power in finding the lockout and replacement of union employees an unfair labor practice.

The Court reasons that *Buffalo Linen* gave the nonstruck employer in a multiemployer unit a "right" to lock out whenever a member of the unit is struck so that a parity of economic advantage or disadvantage between the struck and nonstruck employers can be maintained. In order to maintain parity where the struck employer hires replacements, the nonstruck employers must also be free to hire replacements, lest the right to lock out to protect the unit be illusory. And they need not offer these jobs to the locked-out employees desiring to work, lest the parity between the struck and nonstruck employers be lost and the right to lock out be meaningless. If this reasoning is sound, the nonstruck employers can not only lock out employees who belong to the union because of their union membership but also hire permanent as well as temporary nonunion replacements whenever the struck employer hires such replacements, for parity may well so require. But I cannot accept this reasoning.

One, *Buffalo Linen* established no unqualified "right" of employers in a multiemployer unit to lock out. Rather it held that the Board was well within the policy and

language of the Act in finding no unfair labor practice in the nonstruck members' ceasing operations after the union had successfully shut down the operations of one of the employers. Although a departure from the Board's general ban on lockouts because of their severe effect on protected employee rights, the Board found such a lockout justified by the union-imposed pressure on the employer unit where one employer could not operate and the others maintained full operations. The Board decided that the Act did not require the employers to contribute to this pressure by maintaining full operations.

Two, the threat to the integrity of the multiemployer unit, the consideration that was decisive in *Buffalo Linen*, is obviously very different where the struck employer continues operations with replacements; it certainly cannot be assumed that the struck employer operating with replacements is at the same disadvantage *vis-à-vis* the nonstruck employers as the employer in *Buffalo Linen* whose operations were totally shut down by the union. Indeed, there was no showing here that the struck employer was substantially disadvantaged at all, and the Board found that there was "no economic necessity . . . for the other members shutting down." 137 N. L. R. B. 73, at 77. The Court makes irrelevant the consideration that justified the lockout in *Buffalo Linen*—the effect of the single employer strike on the unit—on the faulty premise that *Buffalo Linen* established the nonstruck members' right to lock out. Neither the Board nor this Court said the right to lock out ineluctably follows from a single employer strike.

Three, the disparity between the struck employer who resumes operations and the nonstruck employers who choose to lock out to maintain a united front is caused by the unilateral action of one of the employer members of the unit and not by the union's whipsawing tactic. The integrity of the multiemployer unit may be important,

but surely that consideration cannot justify employer tandem action destructive of concerted activity.

Four, the Court asserts that the right of nonstruck employers to hire temporary replacements, and to refuse to hire union men, is but a concomitant of the right to lock out to preserve the multiemployer group. This sanctification of the multiemployer unit ignores the fundamental rule that an employer may not displace union members with nonunion members solely on account of union membership, the prototype of discrimination under § 8 (a)(3), *Labor Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, and may not maintain operations and refuse to retain or hire nonstriking union members, notwithstanding that most of the union members and most of the workers at that very plant are on strike. The struck employer need not continue operations, but if he does, he may not give a preference to employees not affiliated with the striking union, any more than he may do so after the strike, for § 7 explicitly and unequivocally protects the right of employees to engage and not to engage in a concerted activity and § 8 (a)(3) clearly prohibits discrimination which discourages union membership. See *Firth Carpet Co.* v. *Labor Board,* 129 F. 2d 633 (C. A. 2d Cir.); *Labor Board* v. *Shenandoah-Dives Mining Co.,* 145 F. 2d 542 (C. A. 10th Cir.); *Labor Board* v. *Clausen,* 188 F. 2d 439 (C. A. 3d Cir.), cert. denied, 342 U. S. 868; *Labor Board* v. *Anchor Rome Mills,* 228 F. 2d 775, 780 (C. A. 5th Cir.); *Labor Board* v. *Robinson,* 251 F. 2d 639 (C. A. 6th Cir.). If dismissing and replacing nonstriking union members at a struck plant discourages union membership and interferes with concerted activities, I fail to understand how this same conduct at a nonstruck plant, even if in the name of multiemployer parity and unity, has a different effect on employee rights. The employees are not on strike, and desire to work, for whatever reasons, and nothing in the right to lock out can alter these facts.

The Court finds it unnecessary to explain how they are removed from the explicit protections of the Act, except to say they belong to the union or the unit the union represents and to assume conclusively they share its whipsawing purpose. Membership has never quite meant this before. The Court's justification for this invasion of employee rights by a member of a multiemployer unit is the employer's right to burden the union strike fund with all its members to bring economic pressure to bear on the union. Unfortunately, this reasoning has equal, if not greater, force in the single employer partial strike situation.

Finally, I cannot agree with the Court's fundamental premise on which its balance of rights is founded: that a lockout followed by the hiring of nonunion men to operate the plant has but a "slight" tendency to discourage union membership, which includes participation in union activities, *Radio Officers' Union* v. *Labor Board,* 347 U. S. 17, and to impinge on concerted activity generally. This proposition overturns the Board's long-held views on the effect of lockouts and dismissal of union members. Moreover, it is difficult to fathom the logic or industrial experience which on the one hand dictates that a guarantee to strike replacements that they will not be laid off after a strike is "inherently destructive of employee interests," although based on a legitimate and important business justification, *Erie Resistor,* 373 U. S. 221, and yet at the same time dictates that the dismissal of and refusal to hire nonstriking union members, who desire to work, because other union members working for a different employer have struck, have but a slight unimportant inhibiting effect on the affiliation with the union and on concerted activities. I think the Board's finding that this activity substantially burdens concerted activities and discourages union membership is far more consistent with *Erie Resistor* and industrial realities. Hence the Board

was well within its authority in opting for explicitly protected statutory rights of employees as against a limited employer privilege allowable only in exceptional circumstances under an unbroken line of Board decisions since the inception of the Act.

> "Although the Act protects the right of the employees to strike in support of their demands, this protection is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide. Conflict may arise, for example, between the right to strike and the interest of small employers in preserving multi-employer bargaining . . . . 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." *Buffalo Linen,* 353 U. S. 87, 96.

This is especially so where integrity of a multiemployer bargaining unit is the principal factor to be considered, since "the compelling conclusion is that Congress . . . 'intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future.'" *Ibid.* I think the Court now repudiates this decision and assumes for itself the "delicate task . . . of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner." *Erie Resistor,* 373 U. S. 221, 229. I would adhere to our prior cases and affirm the decision of the Board.

AMERICAN SHIP BUILDING CO. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 255. Argued January 21, 1965.—Decided March 29, 1965.

Petitioner, operator of four shipyards, entered negotiations with the unions representing its employees for the purpose of securing a new agreement to replace the current contract, soon to expire. After a bargaining impasse was reached, petitioner temporarily closed down one yard and laid off employees at the others. The National Labor Relations Board found that the employer could not have reasonably anticipated a strike, that the sole purpose of the layoffs was to bring economic pressure to secure a prompt and favorable settlement of the labor dispute, and that therefore petitioner violated §§ 8 (a) (1) and (3) of the National Labor Relations Act. The Court of Appeals granted enforcement of the Board's order. *Held:* An employer does not commit an unfair labor practice under either § 8 (a) (1) or § 8 (a) (3) of the Act when, after an impasse has been reached in negotiations, he temporarily shuts down his plant and lays off his employees for the sole purpose of applying economic pressure in support of his legitimate bargaining position. Pp. 308–318.

118 U. S. App. D. C. 78, 331 F. 2d 839, reversed.

William S. Tyson argued the cause for petitioner. With him on the brief was *Charles Cavano.*

Norton J. Come argued the cause for respondent. With him on the brief were *Solicitor General Cox, Frank Goodman, Arnold Ordman* and *Dominick L. Manoli.*

William B. Barton filed a brief for the Chamber of Commerce of the United States, as *amicus curiae,* urging reversal.

Briefs of *amici curiae,* urging affirmance, were filed by *J. Albert Woll, Robert C. Mayer, Theodore J. St. Antoine* and *Thomas E. Harris* for the American Federation of

Labor and Congress of Industrial Organizations, and by *Bernard M. Mamet* for Local 374, International Brotherhood of Boilermakers.

MR. JUSTICE STEWART delivered the opinion of the Court.

The American Ship Building Company seeks review of a decision of the United States Court of Appeals for the District of Columbia Circuit enforcing an order of the National Labor Relations Board which found that the company had committed an unfair labor practice under §§ 8 (a)(1) and (3) of the National Labor Relations Act.[1] The question presented is that expressly reserved in *Labor Board* v. *Truck Drivers Local Union,* 353 U. S. 87, 93; namely, whether an employer commits an unfair labor practice under these sections of the Act when he temporarily lays off or "locks out" his employees during a labor dispute to bring economic pressure in support of

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[1] 142 N. L. R. B. 1362, enforced, 118 U. S. App. D. C. 78, 331 F. 2d 839 (1964).

National Labor Relations Act, as amended, § 8 (a), 61 Stat 140, 29 U. S. C. § 158 (a) (1958 ed.): "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 157 of this title;

. . . . . .

"(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 . . . ."

National Labor Relations Act, as amended, § 7, 61 Stat. 140, 29 U. S. C. § 157 (1958 ed.): "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 . . . ."

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his bargaining position. To resolve an asserted conflict among the circuits[2] upon this important question of federal labor law we granted certiorari, 379 U. S. 814.

The American Ship Building Company operates four shipyards on the Great Lakes—at Chicago, at Buffalo, and at Toledo and Lorain, Ohio. The company is primarily engaged in the repairing of ships, a highly seasonal business concentrated in the winter months when the freezing of the Great Lakes renders shipping impossible. What limited business is obtained during the shipping season is frequently such that speed of execution is of the utmost importance to minimize immobilization of the ships.

Since 1952 the employer has engaged in collective bargaining with a group of eight unions. Prior to the negotiations here in question, the employer had contracted with the unions on five occasions, each agreement having been preceded by a strike. The particular chapter of the collective bargaining history with which we are concerned opened shortly before May 1, 1961, when the unions notified the company of their intention to seek modification of the current contract, due to expire on August 1.

At the initial bargaining meeting on June 6, 1961, the company took the position that its competitive situation would not allow increased compensation. The unions countered with demands for increased fringe benefits and some unspecified wage increase. Several meetings were held in June and early July during which negotiations focussed upon the fringe benefit questions without any substantial progress. At the last meeting, the parties resolved to call in the Federal Mediation and Concilia-

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[2] Compare *Labor Board* v. *Dalton Brick & Tile Corp.*, 301 F. 2d 886 (C. A. 5th Cir. 1962); *Morand Bros. Beverage Co.* v. *Labor Board*, 190 F. 2d 576 (C. A. 7th Cir. 1951), 204 F. 2d 529 (1953), with *Quaker State Oil Refining Corp.* v. *Labor Board*, 270 F. 2d 40 (C. A. 3d Cir. 1959); *Utah Plumbing & Heating Contractors Assn.* v. *Labor Board*, 294 F. 2d 165 (C. A. 10th Cir. 1961).

tion Service, which set the next meeting for July 19. At this meeting, the unions first unveiled their demand for a 20-cents-an-hour wage increase and proposed a six-month extension of the contract pending continued negotiations. The employer rejected the proposed extension because it would have led to expiration during the peak season.

Further negotiations narrowed the dispute to five or six issues, all involving substantial economic differences. On July 31, the eve of the contract's expiration, the employer made a proposal; the unions countered with another, revived their proposal for a six-month extension, and proposed in the alternative that the existing contract, with its no-strike clause, be extended indefinitely with the terms of the new contract to be made retroactive to August 1.[3] After rejection of the proposed extensions, the employer's proposal was submitted to the unions' membership; on August 8 the unions announced that this proposal had been overwhelmingly rejected. The following day, the employer made another proposal which the unions refused to submit to their membership; the unions made no counteroffer and the parties separated without setting a date for further meetings, leaving this to the discretion of the conciliator.

Thus on August 9, after extended negotiations, the parties separated without having resolved substantial differences on the central issues dividing them and without having specific plans for further attempts to resolve them—a situation which the trial examiner found was an impasse. Throughout the negotiations, the employer displayed anxiety as to the unions' strike plans, fearing that the unions would call a strike as soon as a ship entered the Chicago yard or delay negotiations into the winter to

[3] The dissenting members of the Board took the view that the indefinite extension would not have afforded the employer enforcible protection against a strike. 142 N. L. R. B., at 1368.

increase strike leverage. The union negotiator consistently insisted that it was his intention to reach an agreement without calling a strike; however, he did concede incomplete control over the workers—a fact borne out by the occurrence of a wildcat strike in February 1961. Because of the danger of an unauthorized strike and the consistent and deliberate use of strikes in prior negotiations, the employer remained apprehensive of the possibility of a work stoppage.

In light of the failure to reach an agreement and the lack of available work, the employer decided to lay off certain of its workers. On August 11 the employees received a notice which read: "Because of the labor dispute which has been unresolved since August 1, 1961, you are laid off until further notice." The Chicago yard was completely shut down and all but two employees laid off at the Toledo yard. A large force was retained at Lorain to complete a major piece of work there and the employees in the Buffalo yard were gradually laid off as miscellaneous tasks were completed. Negotiations were resumed shortly after these layoffs and continued for the following two months until a two-year contract was agreed upon on October 27. The employees were recalled the following day.

Upon claims filed by the unions, the General Counsel of the Board issued a complaint charging the employer with violations of §§ 8 (a)(1), (3), and (5).[4] The trial examiner found that although there had been no work in the Chicago yard since July 19, its closing was not due to lack of work. Despite similarly slack seasons in the past, the employer had for 17 years retained a nucleus crew to do maintenance work and remain ready to take such work as might come in. The examiner went on to find that the employer was reasonably apprehensive

[4] The complaint was limited to the Chicago yard.

of a strike at some point. Although the unions had given assurances that there would be no strike, past bargaining history was thought to justify continuing apprehension that the unions would fail to make good their assurances. It was further found that the employer's primary purpose in locking out its employees was to avert peculiarly harmful economic consequences which would be imposed on it and its customers if a strike were called either while a ship was in the yard during the shipping season or later when the yard was fully occupied. The examiner concluded that the employer:

> "was economically justified and motivated in laying off its employees when it did, and that the fact that its judgment was partially colored by its intention to break the impasse which existed is immaterial in the peculiar and special circumstances of this case. Respondent, by its actions, therefore, did not violate Section 8 (a)(1), (3), and (5) of the Act."

A three-to-two majority of the Board rejected the trial examiner's conclusion that the employer could reasonably anticipate a strike. Finding the unions' assurances sufficient to dispel any such apprehension, the Board was able to find only one purpose underlying the layoff: a desire to bring economic pressure to secure prompt settlement of the dispute on favorable terms. The Board did not question the examiner's finding that the layoffs had not occurred until after a bargaining impasse had been reached. Nor did the Board remotely suggest that the company's decision to lay off its employees was based either on union hostility or on a desire to avoid its bargaining obligations under the Act. The Board concluded that the employer "by curtailing its operations at the South Chicago yard with the consequent layoff of the employees, coerced employees in the exercise of their bargaining rights in violation of Section 8 (a)(1) of the Act,

and discriminated against its employees within the meaning of Section 8 (a)(3) of the Act." [5] 142 N. L. R. B., at 1364–1365.

The difference between the Board and the trial examiner is thus a narrow one turning on their differing assessments of the circumstances which the employer claims gave it reason to anticipate a strike. Both the Board and the examiner assumed, within the established pattern of Board analysis,[6] that if the employer had shut down its yard and laid off its workers solely for the purpose of bringing to bear economic pressure to break an impasse and secure more favorable contract terms, an unfair labor practice would be made out. "The Board has held that, absent special circumstances, an employer may not during bargaining negotiations either threaten to lock out or lock out his employees in aid of his bargaining position. Such conduct the Board has held presumptively infringes upon the collective-bargaining rights of employees in violation of Section 8 (a)(1) and the lockout, with its consequent layoff, amounts to discrimination within the meaning of Section 8 (a)(3). In addition, the Board has held that such conduct subjects the Union and the employees it represents to unwarranted and illegal pressure and creates an atmosphere in which the free opportunity for negotiation contemplated by Section 8 (a)(5)

[5] Although the complaint stated a violation of § 8 (a)(5) as well, the Board made no findings as to this claim, believing that there would have been no point in entering a bargaining order because the parties had long since executed an agreement. The passage quoted below in the text of this opinion from *Labor Board* v. *Insurance Agents' International Union*, 361 U. S. 477 (see pp. 317–318, *infra*), has even more direct application to the § 8 (a)(5) question. See also *Labor Board* v. *Dalton Brick & Tile Corp.*, 301 F. 2d 886, 894–895 (C. A. 5th Cir. 1962).

[6] *E. g., Utah Plumbing & Heating Contractors Assn.*, 126 N. L. R. B. 973; *Quaker State Oil Refining Corp.*, 121 N. L. R. B. 334.

does not exist." *Quaker State Oil Refining Corp.*, 121 N. L. R. B. 334, 337.

The Board has, however, exempted certain classes of lockouts from proscription. "Accordingly, it has held that lockouts are permissible to safeguard against . . . loss where there is reasonable ground for believing that a strike was threatened or imminent." *Ibid.* Developing this distinction in its rulings, the Board has approved lockouts designed to prevent seizure of a plant by a sitdown strike, *Link-Belt Co.*, 26 N. L. R. B. 227; to forestall repetitive disruptions of an integrated operation by "quickie" strikes, *International Shoe Co.*, 93 N. L. R. B. 907; to avoid spoilage of materials which would result from a sudden work stoppage, *Duluth Bottling Assn.*, 48 N. L. R. B. 1335; and to avert the immobilization of automobiles brought in for repair, *Betts Cadillac Olds, Inc.*, 96 N. L. R. B. 268. In another distinct class of cases the Board has sanctioned the use of the lockout by a multiemployer bargaining unit as a response to a whipsaw strike against one of its members. *Buffalo Linen Supply Co.*, 109 N. L. R. B. 447, rev'd *sub nom. Truck Drivers Union* v. *Labor Board*, 231 F. 2d 110, rev'd, 353 U. S. 87.[7]

In analyzing the status of the bargaining lockout under §§ 8 (a)(1) and (3) of the National Labor Relations Act, it is important that the practice with which we are here concerned be distinguished from other forms of temporary separation from employment. No one would deny that an employer is free to shut down his enterprise tem-

[7] The Board's initial view was that such lockouts are unlawful. *Morand Bros. Beverage Co.*, 91 N. L. R. B. 409; *Davis Furniture Co.*, 100 N. L. R. B. 1016. The Board later embraced the contrary view, *Buffalo Linen Supply Co., supra*, a position earlier taken by the Ninth Circuit in reversing the *Davis Furniture* case *sub nom. Leonard* v. *Labor Board*, 205 F. 2d 355 (1953).

porarily for reasons of renovation or lack of profitable work unrelated to his collective bargaining situation. Similarly, we put to one side cases where the Board has concluded on the basis of substantial evidence that the employer has used a lockout as a means to injure a labor organization or to evade his duty to bargain collectively. *Hopwood Retinning Co.*, 4 N. L. R. B. 922; *Scott Paper Box Co.*, 81 N. L. R. B. 535. What we are here concerned with is the use of a temporary layoff of employees solely as a means to bring economic pressure to bear in support of the employer's bargaining position, after an impasse has been reached. This is the only issue before us, and all that we decide.[8]

To establish that this practice is a violation of § 8 (a) (1), it must be shown that the employer has interfered with, restrained, or coerced employees in the exercise of some right protected by § 7 of the Act. The Board's position is premised on the view that the lockout interferes with two of the rights guaranteed by § 7: the right to bargain collectively and the right to strike. In the Board's view, the use of the lockout "punishes" employees for the presentation of and adherence to demands made by their bargaining representatives and so coerces them in the exercise of their right to bargain collectively. It is important to note that there is here no allegation that the employer used the lockout in the service of designs inimical to the process of collective bargaining. There was no evidence and no finding that the employer was hostile to its employees' banding together for collective bargaining or that the lockout was designed to discipline

[8] Contrary to the views expressed in a concurring opinion filed in this case, we intimate no view whatever as to the consequences which would follow had the employer replaced its employees with permanent replacements or even temporary help. Cf. *Labor Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333.

them for doing so. It is therefore inaccurate to say that the employer's intention was to destroy or frustrate the process of collective bargaining. What can be said is that it intended to resist the demands made of it in the negotiations and to secure modification of these demands. We cannot see that this intention is in any way inconsistent with the employees' rights to bargain collectively.

Moreover, there is no indication, either as a general matter or in this specific case, that the lockout will necessarily destroy the unions' capacity for effective and responsible representation. The unions here involved have vigorously represented the employees since 1952, and there is nothing to show that their ability to do so has been impaired by the lockout. Nor is the lockout one of those acts which are demonstrably so destructive of collective bargaining that the Board need not inquire into employer motivation, as might be the case, for example, if an employer permanently discharged his unionized staff and replaced them with employees known to be possessed of a violent antiunion animus. Cf. *Labor Board* v. *Erie Resistor Corp.*, 373 U. S. 221. The lockout may well dissuade employees from adhering to the position which they initially adopted in the bargaining, but the right to bargain collectively does not entail any "right" to insist on one's position free from economic disadvantage. Proper analysis of the problem demands that the simple intention to support the employer's bargaining position as to compensation and the like be distinguished from a hostility to the process of collective bargaining which could suffice to render a lockout unlawful. See *Labor Board* v. *Brown*, *ante*, p. 278.

The Board has taken the complementary view that the lockout interferes with the right to strike protected under

§§ 7 and 13 of the Act [9] in that it allows the employer to pre-empt the possibility of a strike and thus leave the union with "nothing to strike against." Insofar as this means that once employees are locked out, they are deprived of their right to call a strike against the employer because he is already shut down, the argument is wholly specious, for the work stoppage which would have been the object of the strike has in fact occurred.[10] It is true that recognition of the lockout deprives the union of exclusive control of the timing and duration of work stoppages calculated to influence the result of collective bargaining negotiations, but there is nothing in the statute which would imply that the right to strike "carries with it" the right exclusively to determine the timing and duration of all work stoppages. The right to strike as commonly understood is the right to cease work—nothing more. No doubt a union's bargaining power would be enhanced if it possessed not only the simple right to strike but also the power exclusively to determine when work stoppages should occur, but the Act's provisions are not indefinitely elastic, content-free forms to be shaped in whatever manner the Board might think best conforms to the proper balance of bargaining power.

Thus, we cannot see that the employer's use of a lockout solely in support of a legitimate bargaining position is in any way inconsistent with the right to bargain collectively or with the right to strike. Accordingly, we con-

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[9] National Labor Relations Act, as amended, § 13, 61 Stat. 151, 29 U. S. C. § 163 (1958 ed.): "Nothing in this subchapter, 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."

[10] Of course to the extent that the employer-induced work stoppage did not accomplish objectives which could be achieved by ancillary measures, such as picketing, the union would not be precluded from employing those measures.

clude that on the basis of the findings made by the Board in this case, there has been no violation of § 8 (a)(1).

Section 8 (a)(3) prohibits discrimination in regard to tenure or other conditions of employment to discourage union membership. Under the words of the statute there must be both discrimination and a resulting discouragement of union membership. It has long been established that a finding of violation under this section will normally turn on the employer's motivation. See *Labor Board* v. *Brown, ante,* p. 278; *Radio Officers' Union* v. *Labor Board,* 347 U. S. 17, 43; *Labor Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 46. Thus when the employer discharges a union leader who has broken shop rules, the problem posed is to determine whether the employer has acted purely in disinterested defense of shop discipline or has sought to damage employee organization. It is likely that the discharge will naturally tend to discourage union membership in both cases, because of the loss of union leadership and the employees' suspicion of the employer's true intention. But we have consistently construed the section to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership. See, *e. g., Labor Board* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 347. Such a construction of § 8 (a)(3) is essential if due protection is to be accorded the employer's right to manage his enterprise. See *Textile Workers* v. *Darlington Mfg. Co., ante,* p. 263.

This is not to deny that there are some practices which are inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent to discourage union membership or other antiunion animus is required. In some cases, it may be that the employer's conduct carries with it an inference of unlawful intention so compelling that it is

justifiable to disbelieve the employer's protestations of innocent purpose. *Radio Officers' Union* v. *Labor Board, supra,* at 44–45; *Labor Board* v. *Erie Resistor Corp., supra.* Thus where many have broken a shop rule, but only union leaders have been discharged, the Board need not listen too long to the plea that shop discipline was simply being enforced. In other situations, we have described the process as the "far more delicate task . . . of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner . . . ." *Labor Board* v. *Erie Resistor Corp., supra,* at 229.

But this lockout does not fall into that category of cases arising under § 8 (a)(3) in which the Board may truncate its inquiry into employer motivation. As this case well shows, use of the lockout does not carry with it any necessary implication that the employer acted to discourage union membership or otherwise discriminate against union members as such. The purpose and effect of the lockout were only to bring pressure upon the union to modify its demands. Similarly, it does not appear that the natural tendency of the lockout is severely to discourage union membership while serving no significant employer interest. In fact, it is difficult to understand what tendency to discourage union membership or otherwise discriminate against union members was perceived by the Board. There is no claim that the employer locked out only union members, or locked out any employee simply because he was a union member; nor is it alleged that the employer conditioned rehiring upon resignation from the union. It is true that the employees suffered economic disadvantage because of their union's insistence on demands unacceptable to the employer, but this is also true of many steps which an employer may take during a bargaining conflict, and the existence of an arguable possibility that someone may feel himself

discouraged in his union membership or discriminated against by reason of that membership cannot suffice to label them violations of § 8 (a)(3) absent some unlawful intention. The employer's permanent replacement of strikers (*Labor Board* v. *Mackay Radio & Telegraph Co., supra*), his unilateral imposition of terms (*Labor Board* v. *Tex-Tan, Inc.,* 318 F. 2d 472, 479–482), or his simple refusal to make a concession which would terminate a strike—all impose economic disadvantage during a bargaining conflict, but none is necessarily a violation of § 8 (a)(3).

To find a violation of § 8 (a)(3), then, the Board must find that the employer acted for a proscribed purpose. Indeed, the Board itself has always recognized that certain "operative" or "economic" purposes would justify a lockout. But the Board has erred in ruling that only these purposes will remove a lockout from the ambit of § 8 (a)(3), for that section requires an intention to discourage union membership or otherwise discriminate against the union. There was not the slightest evidence and there was no finding that the employer was actuated by a desire to discourage membership in the union as distinguished from a desire to affect the outcome of the particular negotiations in which it was involved. We recognize that the "union membership" which is not to be discouraged refers to more than the payment of dues and that measures taken to discourage participation in protected union activities may be found to come within the proscription. *Radio Officers' Union* v. *Labor Board, supra,* at 39–40. However, there is nothing in the Act which gives employees the right to insist on their contract demands, free from the sort of economic disadvantage which frequently attends bargaining disputes. Therefore, we conclude that where the intention proven is merely to bring about a settlement of a labor dispute on favorable terms, no violation of § 8 (a)(3) is shown.

The conclusions which we draw from analysis of §§ 8 (a)(1) and (3) are consonant with what little of relevance can be drawn from the balance of the statute and its legislative history. In the original version of the Act, the predecessor of § 8 (a)(1) declared it an unfair labor practice "[t]o attempt, by interference, influence, restraint, favor, coercion, or lockout, or by any other means, to impair the right of employees guaranteed in section 4." [11] Prominent in the criticism leveled at the bill in the Senate Committee hearings was the charge that it did not accord even-handed treatment to employers and employees because it prohibited the lockout while protecting the strike.[12] In the face of such criticism, the Committee added a provision prohibiting employee interference with employer bargaining activities [13] and deleted the reference to the lockout.[14] A plausible inference to be drawn from this history is that the language was de-

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[11] 1 Legislative History of the National Labor Relations Act, 1935, 3 (hereafter Leg. Hist.). Section 4 of the bill provided:

"Employees shall have the right to organize and join labor organizations, and to engage in concerted activities, either in labor organizations or otherwise, for the purposes of organizing and bargaining collectively through representatives of their own choosing or for other purposes of mutual aid or protection." *Ibid.*

[12] 1 Leg. Hist. 406, 545, 570, 946.

[13] S. 2926, § 3 (2):

"It shall be an unfair labor practice [f]or employees to attempt, by interference or coercion, to impair the exercise by employers of the right to join or form employer organizations and to designate representatives of their own choosing for the purpose of collective bargaining." 1 Leg. Hist. 1087.

[14] S. 2926, § 3 (1):

"It shall be an unfair labor practice [f]or an employer to attempt, by interference or coercion, to impair the exercise by employees of the right to form or join labor organizations, to designate representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Ibid.*

leted to mollify those who saw in the bill an inequitable denial of resort to the lockout, and to remove any language which might give rise to fears that the lockout was being proscribed *per se*. It is in any event clear that the Committee was concerned with the status of the lockout and that the bill, as reported and as finally enacted, contained no prohibition on the use of the lockout as such.

Although neither § 8 (a)(1) nor § 8 (a)(3) refers specifically to the lockout, various other provisions of the National Labor Relations Act do refer to the lockout, and these references can be interpreted as a recognition of the legitimacy of the device as a means of applying economic pressure in support of bargaining positions. Thus 29 U. S. C. § 158 (d)(4) (1958 ed.) prohibits the use of a strike or lockout unless requisite notice procedures have been complied with; 29 U. S. C. § 173 (c) (1958 ed.) directs the Federal Mediation and Conciliation Service to seek voluntary resolution of labor disputes without resort to strikes or lockouts; and 29 U. S. C. §§ 176, 178 (1958 ed.), authorize procedures whereby the President can institute a board of inquiry to forestall certain strikes or lockouts. The correlative use of the terms "strike" and "lockout" in these sections contemplates that lockouts will be used in the bargaining process in some fashion. This is not to say that these provisions serve to define the permissible scope of a lockout by an employer. That, in the context of the present case, is a question ultimately to be resolved by analysis of §§ 8 (a)(1) and (3).

The Board has justified its ruling in this case and its general approach to the legality of lockouts on the basis of its special competence to weigh the competing interests of employers and employees and to accommodate these interests according to its expert judgment. "The Board has reasonably concluded that the availability of such a weapon would so substantially tip the scales in the employer's favor as to defeat the Congressional purpose of

placing employees on a par with their adversary at the bargaining table." [15] To buttress its decision as to the balance struck in this particular case, the Board points out that the employer has been given other weapons to counterbalance the employees' power of strike. The employer may permanently replace workers who have gone out on strike, or, by stockpiling and subcontracting, maintain his commercial operations while the strikers bear the economic brunt of the work stoppage. Similarly, the employer can institute unilaterally the working conditions which he desires once his contract with the union has expired. Given these economic weapons, it is argued, the employer has been adequately equipped with tools of economic self-help.

There is of course no question that the Board is entitled to the greatest deference in recognition of its special competence in dealing with labor problems. In many areas its evaluation of the competing interests of employer and employee should unquestionably be given conclusive effect in determining the application of §§ 8 (a)(1), (3), and (5). However, we think that the Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management.

While a primary purpose of the National Labor Relations Act was to redress the perceived imbalance of economic power between labor and management, it sought to accomplish that result by conferring certain affirmative rights on employees and by placing certain enumerated restrictions on the activities of employers. The Act prohibited acts which interfered with, restrained, or coerced employees in the exercise of their rights to organize a union, to bargain collectively, and to strike; it proscribed

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[15] Respondent's Brief 17.

discrimination in regard to tenure and other conditions of employment to discourage membership in any labor organization. The central purpose of these provisions was to protect employee self-organization and the process of collective bargaining from disruptive interferences by employers. Having protected employee organization in countervailance to the employers' bargaining power, and having established a system of collective bargaining whereby the newly coequal adversaries might resolve their disputes, the Act also contemplated resort to economic weapons should more peaceful measures not avail. Sections 8 (a)(1) and (3) do not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power. *Labor Board* v. *Brown, ante,* p. 278. In this case the Board has, in essence, denied the use of the bargaining lockout to the employer because of its conviction that use of this device would give the employer "too much power." In so doing, the Board has stretched §§ 8 (a)(1) and (3) far beyond their functions of protecting the rights of employee organization and collective bargaining. What we have recently said in a closely related context is equally applicable here:

> "[W]hen the Board moves in this area . . . it is functioning as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands. It has sought to introduce some standard of properly 'balanced' bargaining power, or some new distinction of justifiable and unjustifiable, proper and 'abusive' economic weapons into . . . the Act. . . . We have expressed our belief that this amounts to the Board's entrance into the substantive aspects of the

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bargaining process to an extent Congress has not countenanced." *Labor Board* v. *Insurance Agents' International Union,* 361 U. S. 477, 497–498.

We are unable to find that any fair construction of the provisions relied on by the Board in this case can support its finding of an unfair labor practice. Indeed, the role assumed by the Board in this area is fundamentally inconsistent with the structure of the Act and the function of the sections relied upon. The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress. Accordingly, we hold that an employer violates neither § 8 (a)(1) nor § 8 (a)(3) when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position.

Reversed.

MR. JUSTICE WHITE, concurring in the result.

The Court today holds that the use of economic weapons by an employer for the purpose of improving his bargaining position can never violate the broad provisions of §§ 8 (a)(1) and (3) of the NLRA and hence a bargaining lockout of employees in resistance to demands of a union is invariably exempt from the proscriptions of the Act. As my Brother GOLDBERG well points out, the Court applies legal standards that cannot be reconciled with decisions of this Court defining the Board's functions in applying these sections of the Act and does so without pausing to ascertain if the Board's factual premises are supported by substantial evidence. I also think the Court, in the process of establishing the legality of a bargaining lockout, overlooks the uncontradicted facts in this

record and the accepted findings of the trial examiner which indicate to me that the employer's closing of the Chicago yard was not a "lockout" for the purpose of bringing economic pressure to break an impasse and to secure more favorable contract terms.

In my view the issue posed in this case is whether an employer who in fact anticipates a strike may inform customers of this belief to protect his commercial relationship with customers and to safeguard their property, thereby discouraging business, and then lay off employees for whom there is no available work. I, like the trial examiner, think he may, and do not think this conduct can be impeached under §§ 8 (a)(1) and (3) by merely asserting that the employer and his customers were erroneous in believing a strike was imminent.

The Board, the Court of Appeals, and presumably this Court, accept all the findings of the trial examiner, except the finding that the employer's honest belief that a strike would occur had a reasonable basis in fact. The examiner found that at the time of the layoffs at the Chicago yard there was no work there and very little at the other yards, which remained open until all available work was completed. During past slack summer seasons a nucleus crew had been retained at the yards to perform emergency repair jobs for Ship Building's 14 or 15 regular customers. Absent a job, these employees also did maintenance work, but the accommodation of these regular customers and retention of their good will was the only reason for remaining open, the operations being otherwise unprofitable. The customers learned of the labor unrest at the yards through newspaper accounts and Ship Building's plant managers, who felt constrained to tell long-standing customers of the possibility of a strike during the course of repair work. The manager of the Buffalo yard was of the opinion that "the owner that brought the boat into the dock would have rocks in his head if he would have

taken the chance." Work was not refused, however. There were few, if any, requests for repairs during that summer, a substantial number of shipowners being reluctant to bring their vessels into the yard. The last job left the Chicago yard three weeks before closing. The examiner found that at the time of closing, Ship Building had "men working on maintenance in the yards, with no work on hand, none anticipated, and customers refusing to send work in." Only those workers for whom there was no work were laid off and no new jobs were taken on. The examiner noted that the employer was not unaware of the union's negotiating strategy and of the possible effect of a closing on this strategy. But in carefully assessing all the testimony he found that at most these considerations partially colored the employer's motivation. The examiner concluded from these facts that "the economic inducements so overshadowed anything improper that they must be considered primary, particularly when the economic factors which supported them arose through no fault of Respondent and anteceded the layoff."

Given the finding that the closing was due to lack of work at the Chicago yard, it is no answer to say, as the Board does, that there was no reasonable basis to anticipate a strike and hence the closing was an offensive bargaining lockout. Whether there was a reasonable basis to fear a strike or not, the fact remains that the employer, and its customers, did fear a strike, and consequently there was no work for the employees. It has long been the law that an employer is free to modify or shut down operations temporarily for business reasons unrelated to the exercise by his employees of statutory rights, and the reasonableness of an employer's response to business exigencies is not ordinarily subject to review. See *Pepsi-Cola Bottling Co.*, 145 N. L. R. B. 785 (1964); *Associated General Contractors of America, Inc.*, 105 N. L. R. B. 767 (1953); cf. *Fibreboard Paper Products* v. *Labor Board*, 379

U. S. 203; *Textile Workers Union* v. *Darlington Mfg. Co.*, decided today, *ante*, p. 263. There is nothing in the decisions of the NLRB, including this case, which would indicate that there are occasions when an employer may not truthfully inform his customers of a labor dispute and his fear of a strike to protect his business and their property and may not lay off employees for lack of work. Indeed, these decisions hold that an employer may shut down in response to such economic conditions, even though these conditions are the result of protected concerted activities, *Pepsi-Cola Bottling Co.*, 145 N. L. R. B. 785 (1964); *Associated General Contractors of America, Inc.*, 105 N. L. R. B. 767 (1953); *H. H. Zimmerli*, 133 N. L. R. B. 1217 (1961), so long as the creation of or alleged reliance on these conditions is not a subterfuge for a lockout, *Ripley Mfg. Co.*, 138 N. L. R. B. 1452 (1962); *Savoy Laundry, Inc.*, 137 N. L. R. B. 306 (1962); *New England Web, Inc.*, 135 N. L. R. B. 1019 (1962). There is no evidence here that the lack of work was a result of the employer's decision or desire to lay off its employees and the Board did not so find. I do not now determine whether a temporary economic shutdown could ever be found to violate the Act. Here the Board has given no reasons, no rationale, to show how this closing violated the Act, except to say the closing was a bargaining lockout. A lockout is the refusal by an employer to furnish available work to his regular employees. It is apparent that the considerations which fault an employer for refusing to furnish available work are quite different from those which would prohibit him from laying off workers for whom there is no work. Hence, reliance on the Board's lockout cases does not explain, no less support, the result reached in this case. The compelling conclusion is that the Board has failed to "disclose the basis of its order" and to "give clear indication that it has exercised the discretion with which Congress has empowered it." *Phelps Dodge Corp.* v. *Labor*

Board, 313 U. S. 177, 197. This is not to say the Board has reached an erroneous balance in regard to the bargaining lockout; it is to say that the bargaining lockout analysis will not suffice to judge the legality of the layoffs in this case.

The Court, like the Board, assimilates the employer's conduct here to the bargaining lockout and restrikes the balance; it dismisses the actual justification for the closing with the assertion that the "examiner found . . . [the] closing was not due to lack of work. Despite similarly slack seasons in the past, the employer had for 17 years retained a nucleus crew to do maintenance work and remain ready to take such work as might come in." *Ante,* at 304. This is puzzling, since the examiner found precisely the contrary, and neither the Board nor the Court of Appeals took issue with these findings. The examiner said that a nucleus crew was maintained in the past only in the expectation of emergency work, the performance of such work being thought necessary to maintain customer good will. Because of the labor uncertainty and the decision that undertaking emergency jobs would jeopardize customer relations, there was no expectation of work during the summer of 1961, unlike past years. Since I think an employer's decision to lay off employees because of lack of work is not ordinarily barred by the Act, and since neither the Board nor the Court properly can ignore this claim, I would reverse the Board's order, but without reaching out to decide an issue not at all presented by this case.

Since the Court does rule on the status of the bargaining lockout under the National Labor Relations Act, I feel constrained to state my views. This Court has long recognized that the Labor Relations Act "did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice," but "left to the Board the

work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms." *Republic Aviation Corp.* v. *Labor Board,* 324 U. S. 793, 798. Thus the legal status of the bargaining lockout, as the Court indicated in *Labor Board* v. *Truck Drivers Union,* 353 U. S. 87, 96, is to be determined by "the balancing of the conflicting legitimate interests."

The Board has balanced these interests here—the value of the lockout as an economic weapon against its impact on protected concerted activities, including the right to strike, for which the Act has special solicitude, *Labor Board* v. *Erie Resistor Corp.,* 373 U. S. 221, 234—and has determined that the employer's interest in obtaining a bargaining victory does not outweigh the damaging consequences of the lockout. It determined that for an employer to deprive employees of their livelihood because of demands made by their representatives and in order to compel submission to the employer's demands, coerces employees in their exercise of the right to bargain collectively and discourages resort to that right. And this interferes with the right to strike, sharply reducing the effectiveness of that weapon and denying the union control over the timing of the economic contest. The Court rejects this reasoning on the ground that the lockout is not conduct "demonstrably so destructive of collective bargaining that the Board need not inquire into employer motivation." *Ante,* at 309. Since the employer's true motive is to bring about settlement of the dispute on favorable terms, there can be no substantial discouragement of union membership or interference with concerted activities. And the right to strike is only the right to cease work, which the lockout only encourages rather than displaces.

This *tour de force* denies the Board's assessment of the impact on employee rights and this truncated definition

of the right to strike, nowhere supported in the Act, is unprecedented. Until today the employer's true motive or sole purpose has not always been determinative of the impact on employee rights. *Republic Aviation Corp.* v. *Labor Board,* 324 U. S. 793; *Radio Officers' Union* v. *Labor Board,* 347 U. S. 17; *Labor Board* v. *Truck Drivers Union,* 353 U. S. 87; *Labor Board* v. *Erie Resistor Corp.,* 373 U. S. 221; *Labor Board* v. *Burnup & Sims, Inc.,* 379 U. S. 21. The importance of the employer's right to hire replacements to continue operations, or of his right to fire employees he has good reason to believe are guilty of gross misconduct was not doubted in *Erie Resistor* and *Burnup & Sims.* Nonetheless the Board was upheld in its determination that the award of superseniority to strike replacements and discharge of the suspected employee were unfair labor practices. Of course, such conduct is taken in the pursuit of legitimate business ends, but nonetheless the "conduct *does* speak for itself . . . it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended." *Erie Resistor,* 373 U. S., at 228. I would have thought it apparent that loss of jobs for an indefinite period, and the threatened loss of jobs, which the Court's decision assuredly sanctions, cf. *Textile Workers Union* v. *Darlington Mfg. Co.,* decided today, *ante,* at 274, n. 20, because of the union's negotiating activity, itself protected conduct under § 7, hardly encourage affiliation with a union.

If the Court means what it says today, an employer may not only lock out after impasse consistent with §§ 8 (a)(1) and (3), but replace his locked-out employees with temporary help, cf. *Labor Board* v. *Brown, ante,* p. 278, or perhaps permanent replacements, and also lock out long before an impasse is reached. Maintaining operations during a labor dispute is at least equally as important an interest as achieving a bargaining victory, see

Labor Board v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, and a shutdown during or before negotiations advances an employer's bargaining position as much as a lockout after impasse. And the hiring of replacements is wholly consistent with the employer's intent "to resist the demands made of it in the negotiations and to secure modification of these demands." *Ante*, at 309. I would also assume that under §§ 8 (a)(1) and (3) he may lock out for the sole purpose of resisting the union's assertion of grievances under a collective bargaining contract, absent a no-lockout clause. Given these legitimate business purposes, there is no antiunion motivation, and absent such motivation, a lockout cannot be deemed destructive of employee rights. "[I]nquiry into employer motivation" may not be truncated. *Ante*, at 312. "Proper analysis of the problem demands that the simple intention to support the employer's bargaining position as to compensation and the like be distinguished from a hostility to the process of collective bargaining which could suffice to render a lockout unlawful." *Ante*, at 309. I think that the Board may assess the impact of a bargaining lockout on protected employee rights, without regard to motivation, and that the Court errs in failing to give due consideration to the Board's conclusions in this regard.

The balance and accommodation of "conflicting legitimate interests" in labor relations does not admit of a simple solution and a myopic focus on the true intent or motive of the employer has not been the determinative standard of the Board or this Court. As the Court points out, there are things an employer may do for business reasons which are inconsistent with a rigid or literal interpretation of employee rights under the Act, such as the right to hire strike replacements. *Labor Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333. But there are just as clearly others which he may not. *Republic*

Aviation, 324 U. S. 793; *Erie Resistor,* 373 U. S. 221; *Burnup & Sims,* 379 U. S. 21. A literal interpretation will not suffice to reconcile these cases, nor to justify the result in the present case. For in saying an employer may lock out all his employees, the Court fully ignores the most explicit statutory right of employees "to refrain from any or all [concerted] activities." Nor can these cases be explained by the Court's test that employer conduct is not proscribed unless it is "inherently so prejudicial to union interests and so devoid of significant economic justification," *ante,* at 311, that true motivation need not be independently shown. The test is clearly one of choosing among several motivations or purposes and weighing the respective interests of employers and employees. And I think that is the standard the Court applies to the bargaining lockout in this case, but without heeding the fact the balance is for the Board to strike in the first instance.

The Board's role in this area is a "delicate task, reflected in part in decisions of this Court, of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner." *Erie Resistor,* 373 U. S., at 229. Its decisions are not immune from attack in this Court. Its findings must be supported by substantial evidence and its explication must fit the case before it, be adequate, and be based upon the policy of the Act and an acceptable reading of industrial realities. I would reverse the Board's decision here because it has not articulated a rational connection between the facts found and the decision made. "This is not to deprecate, but to vindicate (see *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 197), the administrative process, for the purpose of the rule is to avoid 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.' 332 U. S., at 196." *Burlington Truck*

Lines v. *United States,* 371 U. S. 156, 169. It is to ask the Board to show that it has exercised the discretion which it has under the Act. Such insistence on a reasoned decision is a foremost function of judicial review, especially where conflicting significant interests are sought to be accommodated. Compare *Securities & Exchange Comm'n* v. *Chenery Corp.,* 318 U. S. 80, with *Securities & Exchange Comm'n* v. *Chenery Corp.,* 332 U. S. 194. But this function is not to reject the Board's reasoned assessment of the impact of a particular economic weapon on employee rights. It is certainly not to restrike the balance which the Board has reached.

MR. JUSTICE GOLDBERG, with whom THE CHIEF JUSTICE joins, concurring in the result.

I concur in the Court's conclusion that the employer's lockout in this case was not a violation of either § 8 (a)(1) or § 8 (a)(3) of the National Labor Relations Act, 49 Stat. 452, as amended, 29 U. S. C. §§ 158 (a)(1) and (3) (1958 ed.), and I therefore join in the judgment reversing the Court of Appeals. I reach this result not for the Court's reasons, but because, from the plain facts revealed by the record, it is crystal clear that the employer's lockout here was justifiable. The very facts recited by the Court in its opinion show that this employer locked out its employees in the face of a threatened strike under circumstances where, had the choice of timing been left solely to the unions, the employer and its customers would have been subject to economic injury over and beyond the loss of business normally incident to a strike upon the termination of the collective bargaining agreement. A lockout under these circumstances has been recognized by the Board itself to be justifiable and not a violation of the labor statutes. *Betts Cadillac Olds, Inc.,* 96 N. L. R. B. 268; see *Packard Bell Electronics Corp.,* 130 N. L. R. B. 1122; *International Shoe Co.,* 93 N. L. R. B. 907; *Duluth*

Bottling Assn., 48 N. L. R. B. 1335; *Quaker State Oil Refining Corp.*, 121 N. L. R. B. 334, 337.

The trial examiner for the Labor Board found that the employer reasonably and "honestly believed that a strike might take place immediately, or when a vessel was docked, or that bargaining would be delayed until closer to the winter months when Respondent would be more vulnerable," 142 N. L. R. B., at 1382, and that the company "by its actions, therefore, did not violate . . . the Act," 142 N. L. R. B., at 1383. The Board did not dispute the trial examiner's finding that the employer *in fact* believed that a strike was threatened. Nor did it deny that if the employer reasonably believed that "there was a real strike threat," the lockout would be justified. 142 N. L. R. B., at 1364. The Board, however, rejected the ultimate finding of the trial examiner because it disagreed with his conclusion that the employer "had *reasonable grounds* to fear a strike." (Emphasis added.) 142 N. L. R. B., at 1363. The Court of Appeals in a single sentence sustained the Board's holding on this point concluding, without detailed analysis, "that the Board's finding that respondent had no reasonable basis for fearing a strike is not without the requisite record support." 331 F. 2d 839, 840. In my view the Board's conclusion that the employer's admitted fear of a strike was unreasonable is not only without the requisite record support but is at complete variance with "the actualities of industrial relations," *Labor Board* v. *Steelworkers*, 357 U. S. 357, 364, which the Board is to take into account in effectuating the national labor policy.

We do not deal with a case in which the facts are disputed and the Board has resolved testimonial controversies. The facts here are undisputed, and a review of them demonstrates that the employer's fear of a strike at a time strategically selected by the unions to cause

it maximum damage and to give the unions the maximum economic advantage was totally reasonable.

The employer company is primarily engaged in repairing ships and operates four shipyards on the Great Lakes at Buffalo, New York, Lorain and Toledo, Ohio, and South Chicago, Illinois. As the Court points out, the employer's business is highly seasonal, concentrated in the winter months when the Great Lakes are frozen over and shipping is impossible. Speed is of the utmost importance in this business, for the shipping season is short and the tie-up of a ship for several weeks during the season or a delay in a ship's re-entry into service in the spring produces a severe economic impact. A work stoppage while a ship is in the yards can have serious economic consequences both for the employer and for his customers. Customers are justifiably wary of entrusting their ships to the yards at a time when a collective bargaining dispute is unresolved. For this reason the expiration date of a contract in situations such as this is a vital issue in collective bargaining. The employer seeks an expiration date during the slack season; the union seeks an expiration date during the busy season. In this case as a result of past bargaining, the employer's contract expired on August 1, rather than during the busy season.

From 1952 until 1961, when the negotiations now under consideration began, the employer had negotiated five times with the eight unions here involved, and it had experienced exactly one strike per negotiation. The strikes in 1952, 1953, 1955, and 1956 lasted about three weeks each, and the 1958 strike continued for 10 weeks. In 1955 employees had engaged in a slowdown before the agreement expired and thereby caught an $8,000,000 ship in the yard, the use of which was lost to the customer for four weeks during its busiest season. In February 1961, at the height of the busy season, wildcat work stoppages occurred in Chicago and Buffalo.

Shortly before May 1961 the unions notified the employer that they wished to modify the contract due to expire on August 1. At the first bargaining meeting on June 6, 1961, the employer spokesman maintained that competitive conditions prevented any increase in wages or benefits. The unions took an opposite view and asked for a substantial increase in pension and other benefits. The parties met on numerous occasions throughout June and July. As the negotiations progressed, the employer receded from its original position and offered improved wages and benefits; the unions receded from some of their demands, but a meeting of the minds was not reached. On July 20 and subsequently, with the August 1 expiration date approaching, the unions proposed a six-month extension of the current contract. This would have given the unions an expiration date at a time most advantageous to them; the employer rejected this proposal on the grounds that the contract would then expire on February 1, 1962, the very height of its busy season, and that no customer would risk its ships by putting them in the company's yards knowing that the labor contract was about to expire. On July 28 the unions' negotiator informed the employer that the union members had voted "overwhelmingly to take a strike if necessary." On July 31 the employer made a new and increased offer on wages and benefits, asked that its proposals be submitted to the employees for a vote and offered to extend the contract for the limited period sufficient to enable this vote to be taken. The unions in turn asked that the labor agreement be extended indefinitely until a new agreement was reached. The employer refused to agree to an indefinite extension of its present contract on the ground that it could then be struck at any time of the unions' choosing.[1]

Although the contract expired on August 1, the unions did not call a strike on that date but continued to work

[1] See note 4, *infra*.

on a day-to-day basis and submitted the employer's revised offer to a vote of the membership. On August 8 the unions informed the employer that its proposals had been "overwhelmingly" rejected by the employees. On August 9 the employer made a new package offer on many issues. The union negotiators rejected this new offer, refused to take it to the employees for a vote, and made no counteroffer. Negotiations were broken off without any definite plans for further meetings between the parties. Future meetings were left to the call of a federal mediator.

Faced with the situation of an expired contract and the unions free to strike at any time, in particular at a time of their own choosing during the busy season, or whenever the yard was filled with ships, the employer decided to shut down the Chicago yard completely and lay off all but two employees at Toledo. Notices were issued to employees at Chicago, Toledo, and to some in Buffalo, which stated, "Because of the labor dispute which has been unresolved since August 1, 1961, you are laid off until further notice." Negotiations were resumed after this lockout and continued until agreement was reached on October 27. The laid off employees were then recalled to work. Since then the parties have engaged in other negotiations and have agreed upon contracts without either strike or lockout.

On this record the trial examiner held that the employer reasonably feared that the unions would strike when the time was ripe. He found that the employer reasonably believed that:

> "[t]he Unions' strategy was:
>
> "Keep working at Lorain, keep the nonproductive men on the payroll as long as possible at the other yards until one of two things occurred: (a) A shipowner would send a ship into one of the yards, and then by striking, the Respondent would be forced to his knees in effecting a labor settlement satisfactory to the Union, and if this didn't occur, then, (b) con-

> tinue to bargain, into the winter months, and then execute an agreement effective in November, December, January, or February, and in this way, when the agreement was reopened, Respondent would be sure to have ships in its docks, and a strike at such a time would bring the Respondent to his knees in effecting an agreement." 142 N. L. R. B., at 1381.

Accordingly the trial examiner held that no unfair labor practice was committed. This holding followed settled Board doctrine that "lockouts are permissible to safeguard against unusual operational problems or hazards or economic loss where there is reasonable ground for believing that a strike [is] . . . threatened or imminent." *Quaker State Oil Refining Corp., supra,* at 337.

The Board overturned the trial examiner's ultimate holding, reaching what, on this record, is a totally unsupportable conclusion—that the employer's fear of a strike was unreasonable. The Board rested its conclusion upon the grounds that "the Unions made every effort to convey to the Respondent their intention not to strike; and they also gave assurances that if a strike were called, any work brought into Respondent's yard before the strike would be completed. The Unions further offered to extend the existing contract [which contained a no-strike provision] for 6 months, or indefinitely, until contract terms were reached . . . ." 142 N. L. R. B., at 1364. Upon analysis it is clear that none of these grounds will support the Board's conclusion that the employer had no reasonable basis to fear a strike.

The Board's finding that "the Unions made every effort to convey to the Respondent their intention not to strike" is based upon statements made by union negotiators during the course of the negotiations. The chief negotiator for the unions testified that on the first day of negotiations, "I stated that it was my understanding that

in the past there seemed to have been a strike at every—during every negotiation since World War II from information I had received, and it was our sincere hope that we could negotiate this agreement—go through those negotiations and negotiate a new agreement without any strife, that personally I always had a strong dislike to strike and that I thought if two parties sincerely desired to reach an agreement, one could be reached without strike. The Company . . . stated that the Company concurred in those thoughts, that they too disliked strikes, and it was their hope, also, that an agreement could be reached amicably." [2] The negotiators for the unions expressed this same sentiment on several other occasions during the negotiations.

These statements, which one would normally expect a union agent to make during the course of negotiations as a hopeful augury of their outcome rather than as a binding agreement not to strike, scarcely vitiate the reasonableness of the employer's fear of a strike in light of the long history of past strikes by the same unions. Further, they cannot be deemed to render the employer's fear of a strike unreasonable after the negotiations had reached an impasse, particularly in view of the fact that a strike vote had been taken by the unions' membership, and the membership rather than the union representatives had final authority to determine whether a strike would take place.

The fact that the assistant business managers of Local 85 and Local 374 of the Boilermakers Union "gave assur-

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[2] This same negotiator also testified as follows:

"Q. Did you say that the company was crying about not being able to afford a wage increase and yet did you say that in 1958 the company used the same argument and that a ten or a twelve week strike ensued at the conclusion of which an eight cent an hour increase was granted for each of three years and that the company was still not out of business?

"A. Yes."

ances that if a strike were called, any work brought into Respondent's yard before the strike would be completed" [3] likewise cannot be deemed to offset the unions' threat of a strike and its consequences. These men were officials of locals in only one of the eight separate unions involved. At most they could give assurances as to a few of the men at two of the company's four yards. And even had all of the unions joined in these statements, which was not the case, the employer had been subject to wildcat strikes at a time when the unions were bound by a no-strike clause in their contract. Therefore, without impugning the good faith of these union agents, it surely was not unreasonable for the employer, notwithstanding this assurance, to fear that its employees might not complete work on ships when they were not bound by a no-strike clause.

The Board also relies on the fact that the unions offered a six-month extension of the present contract. As I have already pointed out, this would have caused the contract to expire during the employer's busiest season. The employer had a perfect right to reject this stratagem. Had it agreed, the unions would have achieved one of their important objectives without the necessity of striking. By the same token it is clear that the unions would have agreed not to strike had the employer accepted their proposals for increases in wages and benefits. Surely the employer had every right to reject these proposals, and its rejection of them would not show that it was unreasonable in fearing a strike based upon its failure to accede to the unions' demands.

Finally, the offer of an indefinite extension of the contract is an equally unsupportable basis for the Board's conclusion. An indefinite extension presumably would mean under traditional contract theory that the unions could

[3] There is some evidence in the record that one other local business agent gave a similar assurance.

strike at any time or after giving brief notice.[4] Surely the employer would be reasonable in fearing that such an arrangement would peculiarly place the timing of the strike in the unions' hands.

The sum of all this is that the record does not supply even a scintilla of, let alone any substantial, evidence to support the conclusion of the Board that the employer's fear of a strike was unreasonable, but, rather, this conclusion appears irrational. Cf. *Labor Board* v. *Erie Resistor Corp.*, 373 U. S. 221, at 236. I would therefore hold on this record that the employer's lockout was completely justified.

The fact that the Board held on the undisputed facts that the employer's fear of a strike was unreasonable and that the Court of Appeals has affirmed the Board does not preclude us from reviewing this determination. See *Public Service Comm'n* v. *United States,* 356 U. S. 421. The standard that should have been applied by the Court of Appeals was whether the Board's finding was supported by substantial evidence when the record was viewed as a whole. *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474. See *Burlington Truck Lines, Inc.* v. *United States,* 371 U. S. 156, 168; *Interstate Commerce Comm'n* v. *J–T Transport Co.,* 368 U. S. 81, 93. "The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." *Universal Camera Corp.* v. *Labor Board, supra,* at 490. Indeed, the Board here set aside the report of its trial examiner, and in

[4] See 1 Williston, Contracts §§ 38, 39 (3d ed. 1957); cf. *Pacific Coast Association of Pulp & Paper Manufacturers,* 121 N. L. R. B. 990, 993.

Universal Camera this Court recognized "that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion." 340 U. S., at 496. The Court of Appeals in my view in its summary affirmance on this issue grossly misapplied the standards laid down by *Universal Camera.* This case is properly before us on a substantial legal question, which necessarily involves a review of the entire record. In making such a review, although we give proper weight to what the first reviewing court decides, we cannot ignore our duty to apply the statutory standard that the Board's findings must be supported by substantial evidence. Since the Board's holding was not so supported, but, on the contrary, as the plain facts of the record reveal, was irrational, I would reverse the Court of Appeals on this ground.

My view of this case would make it unnecessary to deal with the broad question of whether an employer may lock out his employees solely to bring economic pressure to bear in support of his bargaining position. The question of which types of lockout are compatible with the labor statute is a complex one as this decision and the other cases decided today illustrate. See *Textile Workers Union* v. *Darlington Mfg. Co., ante,* p. 263; *Labor Board* v. *Brown, ante,* p. 278. This Court has said that the problem of the legality of certain types of strike activity must be "revealed by unfolding variant situations" and requires "an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer." *Electrical Workers* v. *Labor Board,* 366 U. S. 667, 674; see also *Labor Board* v. *Steelworkers, supra,* 362–363. The same is true of lockouts.

The types of situation in which an employer might seek to lock out his employees differ considerably one from

the other. This case presents the situation of an employer with a long history of union recognition and collective bargaining, confronted with a history of past strikes, which locks out only after considerable good-faith negotiation involving agreement and compromise on numerous issues, after a bargaining impasse has been reached, more than a week after the prior contract has expired, and when faced with the threat of a strike at a time when it and the property of its customers can suffer unusual harm. Other cases in which the Board has held a lockout illegal have presented far different situations. For example, in *Quaker State Oil Refining Corp., supra,* an employer locked out its employees the day after its contract with the union expired although no impasse had been reached in the bargaining still in progress, no strike had been threatened by the unions, which had never called a sudden strike during the 13 years they had bargained with the employer, and the unions had offered to resubmit the employer's proposals to its employees for a vote. See also *Utah Plumbing & Heating Contractors Assn.,* 126 N. L. R. B. 973. These decisions of the Labor Board properly take into account, in determining the legality of lockouts under the labor statutes, such factors as the length, character, and history of the collective bargaining relation between the union and the employer, as well as whether a bargaining impasse has been reached. Indeed, the Court itself seems to recognize that there is a difference between locking out before a bargaining impasse has been reached and locking out after collective bargaining has been exhausted, for it limits its holding to lockouts in the latter type of situation without deciding the question of the legality of locking out before bargaining is exhausted. Since the examples of different lockout situations could be multiplied, the logic of the Court's limitation of its holding should lead it to recognize that the problem of lockouts requires "an evolu-

tionary process," not "a quick, definitive formula," for its answer.

The Court should be chary of sweeping generalizations in this complex area. When we deal with the lockout and the strike, we are dealing with weapons of industrial warfare. While the parties generally have their choice of economic weapons, see *Labor Board* v. *Insurance Agents,* 361 U. S. 477, this choice, with respect to both the strike and the lockout, is not unrestricted. While we have recognized "the deference paid the strike weapon by the federal labor laws," *Labor Board* v. *Erie Resistor, supra,* at 235, not all forms of economically motivated strikes are protected or even permissible under the labor statutes [5] or the prior decisions of this Court.[6] Moreover, a lockout prompted by an antiunion motive is plainly illegal under the National Labor Relations Act,[7] though no similar restrictions as to motive operate to limit the legality of a strike. See *Labor Board* v. *Somerset Shoe Co.,* 111 F. 2d 681; *Labor Board* v. *Stremel,* 141 F. 2d 317; *Labor Board* v. *Somerset Classics, Inc.,* 193 F. 2d 613. The varieties of restrictions imposed upon strikes and lockouts reflect the complexities presented by variant factual situations.

The Court not only overlooks the factual diversity among different types of lockout, but its statement of the rules governing unfair labor practices under §§ 8 (a)(1) and (3) does not give proper recognition to the fact that "[t]he ultimate problem [in this area] is the balancing

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[5] See, *e. g.,* the secondary boycott and organizational picketing restrictions. 61 Stat. 141, 29 U. S. C. § 158 (b)(4) (1958 ed.), 73 Stat. 542, 544, 29 U. S. C. §§ 158 (b)(4) and (7) (1958 ed., Supp. V).

[6] See *Automobile Workers* v. *Wisconsin Board,* 336 U. S. 245; *Labor Board* v. *Fansteel Metallurgical Corp.,* 306 U. S. 240.

[7] See *Labor Board* v. *Truck Drivers Union, supra,* at 93; *Textile Workers Union* v. *Darlington Mfg. Co., ante,* p. 263, at 268–269.

of the conflicting legitimate interests." *Labor Board* v. *Truck Drivers Union,* 353 U. S. 87, 96. The Court states that employer conduct, not actually motivated by anti-union bias,[8] does not violate § 8 (a)(1) or § 8 (a)(3) unless it is "demonstrably so destructive of collective bargaining," *ante,* at 309, or "so prejudicial to union interests and so devoid of significant economic justification," *ante,* at 311, that no antiunion animus need be shown. This rule departs substantially from both the letter and the spirit of numerous prior decisions of the Court. See, *e. g., Labor Board* v. *Truck Drivers Union, supra,* at 96; *Republic Aviation Corp.* v. *Labor Board,* 324 U. S. 793; *Labor Board* v. *Babcock & Wilcox Co.,* 351 U. S. 105; *Labor Board* v. *Burnup & Sims, Inc.,* 379 U. S. 21.

These decisions demonstrate that the correct test for determining whether § 8 (a)(1) has been violated in cases not involving an employer antiunion motive is whether the business justification for the employer's action outweighs the interference with § 7 rights involved. In *Republic Aviation Corp.* v. *Labor Board, supra,* for example, the Court affirmed a Board holding that a company "no-solicitation" rule was invalid as applied to prevent solicitation of employees on company property during periods when employees were free to do as they pleased, not because such a rule was "demonstrably . . . destructive of collective bargaining," but simply because there was no significant employer justification for the rule and there was a showing of union interest, though far short of a necessity, in its abolition. See also, *Labor Board* v. *Burnup & Sims, Inc., supra.*

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[8] National Labor Relations Act § 8 (a)(3), 49 Stat. 452, as amended, 29 U. S. C. § 158 (a)(3) provides that it shall be an unfair labor practice "by discrimination . . . to encourage or discourage membership in any labor organization." The only type of discriminatory motive with which we are here concerned is that which discourages membership in a union.

A similar test is applicable in § 8 (a)(3) cases where no antiunion motive is shown. The Court misreads *Radio Officers* v. *Labor Board,* 347 U. S. 17, and *Labor Board* v. *Erie Resistor Corp., supra,* in stating that the test in such cases under § 8 (a)(3) is whether practices "are inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent to discourage union membership or other antiunion animus is required." *Ante,* at 311. *Radio Officers* did not restrict the application of § 8 (a) (3) in cases devoid of antiunion motive to the extreme situations encompassed by the Court's test. Rather, in holding applicable the common-law rule that a man is presumed to intend the foreseeable consequences of his own actions, the Court extended the reach of § 8 (a)(3) to all cases in which a significant antiunion effect is foreseeable regardless of the employer's motive. In such cases the Court, in *Erie Resistor Corp.,* held that conduct might be determined by the Board to violate § 8 (a)(3) where the Board's determination resulted from a reasonable "weighing [of] the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and . . . [from] 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." 373 U. S., at 229.

These cases show that the tests as to whether an employer's conduct violates § 8 (a)(1) or violates § 8 (a)(3) without a showing of antiunion motive come down to substantially the same thing: whether the legitimate economic interests of the employer justify his interference with the rights of his employees—a test involving "the balancing of the conflicting legitimate interests." *Labor Board* v. *Truck Drivers Union, supra,* at 96. As the prior decisions of this Court have held, "[t]he function of striking . . . [such a] balance . . . often a difficult and

delicate responsibility, . . . Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *Ibid.*

This, of course, does not mean that reviewing courts are to abdicate their function of determining whether, giving due deference to the Board, the Board has struck the balance consistently with the language and policy of the Act. See *Labor Board* v. *Brown, supra; Labor Board* v. *Truck Drivers Union, supra.* Nor does it mean that reviewing courts are to rubber-stamp decisions of the Board where the application of principles in a particular case is irrational or not supported by substantial evidence on the record as a whole. Applying these principles to the factual situation here presented, I would accept the Board's carefully limited rule, fashioned by the Board after weighing the "conflicting legitimate interests" of employers and unions, that a lockout does not violate the Act where used to "safeguard against unusual operational problems or hazards or economic loss where there is reasonable ground for believing that a strike [is] . . . threatened or imminent." *Quaker State Oil Refining Corp., supra,* at 337. This rule is consistent with the policies of the Act and based upon the actualities of industrial relations. I would, however, reject the determination of the Board refusing to apply this rule to this case, for the undisputed facts revealed by the record bring this case clearly within the rule.

In view of the necessity for, and the desirability of, weighing the legitimate conflicting interests in variant lockout situations, there is not and cannot be any simple formula which readily demarks the permissible from the impermissible lockout. This being so, I would not reach out in this case to announce principles which are determinative of the legality of all economically motivated lockouts whether before or after a bargaining impasse has

been reached. In my view both the Court and the Board, in reaching their opposite conclusions, have inadvisably and unnecessarily done so here. Rather, I would confine our decision to the simple holding, supported by both the record and the actualities of industrial relations, that the employer's fear of a strike was reasonable, and therefore, under the settled decisions of the Board, which I would approve, the lockout of its employees was justified.

SANSONE *v.* UNITED STATES.

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

No. 365. Argued March 10, 1965.—
Decided March 29, 1965.

Petitioner was indicted for willfully attempting to evade federal income taxes in violation of 26 U. S. C. § 7201. At the end of his trial he requested that the jury be instructed that it could acquit him of that offense, a felony, but could convict him of the lesser-included misdemeanors of willfully filing a fraudulent or false return in violation of § 7207, or willfully failing to pay his taxes when due in violation of § 7203. The request was denied and petitioner was found guilty. The Court of Appeals upheld the conviction. *Held:*

1. Since § 7207 applies to income tax violations, as §§ 7201 and 7203 clearly do, with obvious overlapping among them, the lesser-included offense doctrine would be applicable, in an appropriate case. Pp. 347–349.

2. A lesser-included offense instruction is proper only where the charged greater offense requires that the jury find a disputed factual element which is not a requisite for conviction of the lesser-included offense. *Berra* v. *United States,* 351 U. S. 131, followed. Pp. 349–350.

3. There were here no disputed issues of fact which would justify instructions to the jury that it could find that petitioner had committed all the elements of §§ 7203 and 7207 without having violated § 7201, and so petitioner was not entitled to lesser-included offense instructions. Pp. 350–354.

334 F. 2d 287, affirmed.

Merle L. Silverstein argued the cause for petitioner. With him on the briefs was *Stanley M. Rosenblum.*

Paul Bender, by special leave of Court, argued the cause for the United States *pro hac vice.* With him on the brief were *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph M. Howard.*

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

Petitioner Sansone was indicted for willfully attempting to evade federal income taxes for the year 1957 in violation of § 7201 of the Internal Revenue Code of 1954. Section 7201 provides:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

The following facts were established at trial. In March 1956 petitioner and his wife purchased a tract of land for $22,500 and simultaneously sold a portion of the tract for $20,000. In August 1957 petitioner sold another portion of the tract for $27,000. He did not report the gain on either the 1956 or 1957 sale in his income tax returns for those years.[1] Petitioner conceded that the 1957 transaction was reportable and that, in not reporting it, he understated his tax liability for that year by $2,456.48. He contended, however, that this understatement was not willful since he believed at the time that extensive repairs on a creek adjoining a portion of the tract he retained might be necessary and that the cost of these repairs might wipe out his profit on the 1957 sale.

To counter this defense, the Government introduced the following signed statement made by petitioner during the Treasury investigation of his tax return:

> "I did not report the 1957 sale in our joint income tax return for 1957 because I was burdened with a

[1] Petitioner was charged with a violation of § 7201 for 1956 in addition to the charge for 1957. The jury acquitted him with respect to the 1956 charge, which is consequently not involved in this case.

> number of financial obligations and did not feel I could raise the money to pay any tax due. It was my intention to report all sales in a future year and pay the tax due. I knew that I should have reported the 1957 sale, but my wife did not know that it should have been reported. It was not my intention to evade the payment of our proper taxes and I intended to pay any additional taxes due when I was financially able to do so."

At the conclusion of the trial, petitioner requested that the jury be instructed that it could acquit him of the charged offense of willfully attempting to evade or defeat taxes in violation of § 7201, but still convict him of either or both of the asserted lesser-included offenses of willfully filing a fraudulent or false return, in violation of § 7207,[2] or willfully failing to pay his taxes at the time required by law, in violation of § 7203.[3] Section 7201 is a felony providing for a maximum fine of $10,000 and imprisonment for five years. Both §§ 7203 and 7207 are misdemeanors with maximum prison sentences of one year under each

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[2] Section 7207 of the Internal Revenue Code of 1954 provides:

"Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both."

[3] Section 7203 of the Internal Revenue Code of 1954 provides:

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

section, and maximum fines of $10,000 under § 7203 and $1,000 under § 7207.

The requested instructions were denied.[4] Petitioner was found guilty by the jury of violating § 7201, and was

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[4] The full instructions requested by petitioner were as follows:

No. 1. "Under the law you may find a defendant guilty of a lesser crime than the crimes charged in the indictment.

"A statute upon which a lesser crime is based (Section 7203 of the Internal Revenue Code of 1954), omitting that part of the Act which does not apply in this case, reads as follows:

" 'Any person required under this title to pay any . . . tax, . . . who willfully fails to pay such tax, . . . at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor.'

"and then the statute provides for the penalty.

"Therefore, if you find beyond a reasonable doubt that (with respect to either or both of the counts in this indictment) the defendant willfully failed to pay the correct tax to the United States at the time of the filing of his return, but you further find that the defendant did not willfully attempt to defeat and evade his income taxes by the filing of a false and fraudulent return, you will in your verdict say 'Guilty of violating a lesser-included offense.'

"If you have a reasonable doubt as to whether defendant willfully failed to pay the correct tax when filing his income tax return or returns under any count or counts of this indictment, you will resolve the doubt in favor of the defendant and acquit him of the lesser-included offense as to such count or counts."

No. 2. "As I have said previously, the law permits the jury to find a defendant guilty of any lesser offense which is necessarily included in the crime charged. The offense charged in the indictment here necessarily includes a lesser offense based upon the following statute (Section 7207 of the Internal Revenue Code of 1954), omitting that part of the Act which does not apply in this case; it reads as follows:

" 'Any person who willfully delivers or discloses to the Secretary [of the Treasury] or his delegate any . . . return, . . . or other document known by him to be fraudulent or to be false as to any material matter,'

"and then the statute provides for the penalty.

"Therefore, if you find beyond a reasonable doubt that (with respect to either or both of the counts in this indictment) the defend-

sentenced by the court to pay a fine of $2,000 and to serve 15 months' imprisonment. The conviction was upheld by the Court of Appeals. 334 F. 2d 287. We granted certiorari to consider the applicability of the lesser-included offense doctrine to these federal tax statutes. 379 U. S. 886.

I.

We are faced with the threshold question as to whether or not § 7207, which proscribes the willful filing with a Treasury official of any known false or fraudulent "return," applies to the filing of an income tax return.[5] If § 7207 does not apply to income tax returns, it is obvious that the defendant was not here entitled to a lesser-included offense charge based on that section.

This Court held in *Achilli* v. *United States,* 353 U. S. 373, that § 7207's statutory predecessor, § 3616 (a) of the Internal Revenue Code of 1939, which made it a misdemeanor for any person to deliver to the Collector of Revenue "any false or fraudulent list, return, account, or statement, *with intent to defeat or evade the*

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ant willfully delivered to the District Director of Internal Revenue at St. Louis, Missouri his and his wife's federal joint income tax return or returns for the years 1956 and 1957 which were known by him to be fraudulent or false as to any material matter, but you further find that the defendant did not willfully attempt to defeat and evade his income tax by the filing of a false and fraudulent return, you will in your verdict say 'Guilty of violating a lesser-included offense.'

"If you have a reasonable doubt as to whether defendant willfully so delivered under any count or counts of this indictment his and his wife's federal joint income tax return or returns which were known by him to be fraudulent or false as to a material matter, you will resolve the doubt in favor of the defendant and acquit him of the lesser-included offense as to such count or counts."

[5] This issue divided the Court of Appeals, with two judges holding that § 7207 does not apply to false income tax returns and one judge, concurring in result, dissenting on this point.

valuation, enumeration, or assessment intended to be made . . ." (emphasis added), despite its broad language, was not intended by Congress to apply to income tax returns.

There were two major bases of this Court's conclusion in *Achilli* that § 3616 (a) did not apply to such returns. First, unlike other criminal provisions clearly applicable to income taxes which appeared in the income tax chapter of the 1939 Code and were specifically designed to punish evasion of that tax, § 3616 (a) was placed among the Code's "General Administrative Provisions" and did not specifically refer to income taxes. Second, § 3616 (a) required that the false or fraudulent return be filed "with intent to defeat or evade the valuation, enumeration, or assessment intended to be made." This provision, as the Court had already held in *Berra* v. *United States,* 351 U. S. 131, if applied to income tax returns would have made § 3616 (a) completely co-extensive with the predecessor of § 7201 where the attempt to evade income taxes was accomplished by filing a fraudulent income tax return. It was clear that the predecessor of § 7201 applied to this method of attempting to evade income taxes and the Court was unwilling to presume that Congress intended to enact both felony and misdemeanor provisions which completely overlap in this important area.

Both of these bases of decision were removed by the 1954 Code. Unlike their predecessors in the 1939 Code, §§ 7201, 7203, and 7207, together with other sections clearly applicable to income tax violations, were all placed in the same section (Part I of Chapter 75) of the 1954 Code. Congress specifically stated that it placed all these provisions in the same part of the Code because it wished them to apply to taxes generally, including income taxes. See S. Rep. No. 1622, 83d Cong., 2d Sess., 147; H. R. Rep.

No. 1337, 83d Cong., 2d Sess., 108. In contrast, Part II of Chapter 75 contains provisions applicable only to specified taxes, none of which include income taxes.

Further, Congress, in enacting § 7207 did not re-enact § 3616 (a)'s requirement that the false or fraudulent return be made with "intent to defeat or evade" the tax due. Thus the second basis for the Court's conclusion in *Achilli* that § 3616 (a) did not apply to income taxes was removed. See *Berra* v. *United States, supra,* at 134, n. 5. Finally, in providing that the false or fraudulent return be made "willfully," § 7207 was conformed to the language contained in the other misdemeanor provisions clearly applicable to income taxes. See, *e. g.,* § 7203.

We conclude, therefore, that § 7207 applies to income tax violations. Since there is no doubt that §§ 7201 and 7203 also apply to income tax violations, with obvious overlapping among them, there can be no doubt that the lesser-included offense doctrine applies to these statutes in an appropriate case. See *Spies* v. *United States,* 317 U. S. 492, 495; *Berra* v. *United States, supra.*

II.

The basic principles controlling whether or not a lesser-included offense charge should be given in a particular case have been settled by this Court. Rule 31 (c) of the Federal Rules of Criminal Procedure provides, in relevant part, that the "defendant may be found guilty of an offense necessarily included in the offense charged." Thus, "[i]n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifie[s] it . . . [is] entitled to an instruction which would permit a finding of guilt of the lesser offense." *Berra* v. *United States, supra,* at 134. See *Stevenson* v. *United States,* 162 U. S. 313. But a lesser-offense charge is not proper where, on the

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evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses. *Berra* v. *United States, supra; Sparf* v. *United States,* 156 U. S. 51, 63–64. In other words, the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater. A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense. *Berra* v. *United States, supra; Sparf* v. *United States, supra,* at 63–64.[6] We now apply the principles declared in these cases to the instant case.

III.

The offense here charged was a violation of § 7201, which proscribes willfully attempting in any manner to evade or defeat any tax imposed by the Internal Revenue Code. As this Court has recognized, this felony provision is "the capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of

[6] This Court has long recognized that to hold otherwise would only invite the jury to pick between the felony and the misdemeanor so as to determine the punishment to be imposed, a duty Congress has traditionally left to the judge. See *Sparf* v. *United States, supra,* at 63–64; *Berra* v. *United States, supra,* at 135. This general principle is particularly applicable in this area. In commenting on § 7201, the House Ways and Means Committee expressly stated that minimum penalties were omitted from § 7201 in order to make it "possible for the judges to better fix the penalties to fit the circumstances." H. R. Rep. No. 1337, 83d Cong., 2d Sess., 108. The lack of minimum penalties also, of course, denies to the prosecutor an unbridled discretion as to the penalty to be imposed upon particular defendants by deciding whether, on the same facts, to charge a felony or a misdemeanor.

delinquency." *Spies* v. *United States, supra,* at 497. As such a capstone, § 7201 necessarily includes among its elements actions which, if isolated from the others, constitute lesser offenses in this hierarchical system of sanctions. Therefore, if on the facts of a given case there are disputed issues of fact which would enable the jury rationally to find that, although all the elements of § 7201 have not been proved, all the elements of one or more lesser offenses have been, it is clear that the defendant is entitled to a lesser-included offense charge as to such lesser offenses.

As has been held by this Court, the elements of § 7201 are willfulness; the existence of a tax deficiency, *Lawn* v. *United States,* 355 U. S. 339, 361; *Spies* v. *United States, supra,* at 496; and an affirmative act constituting an evasion or attempted evasion of the tax, *Spies* v. *United States, supra.* In comparison, § 7203 makes it a misdemeanor willfully to fail to perform a number of specified acts at the time required by law—the one here relevant being the failure to pay a tax when due. This misdemeanor requires only willfulness and the omission of the required act—here the payment of the tax when due. As recognized by this Court in *Spies* v. *United States, supra,* at 499, the difference between a mere willful failure to pay a tax (or perform other enumerated actions) when due under § 7203 and a willful attempt to evade or defeat taxes under § 7201 is that the latter felony involves "some willful commission in addition to the willful omissions that make up the list of misdemeanors." Where there is, in a § 7201 prosecution, a disputed issue of fact as to the existence of the requisite affirmative commission in addition to the § 7203 omission, a defendant would, of course, be entitled to a lesser-included offense charge based on § 7203. Cf. *Spies* v. *United States, supra.* In this case, however, it is undisputed that petitioner filed

a tax return and that the petitioner's filing of a false tax return constituted a sufficient affirmative commission to satisfy that requirement of § 7201. The only issue at trial was whether petitioner's act was willful. Given this affirmative commission and the conceded tax deficiency, if petitioner's act was willful, that is, if the jury believed, as it obviously did, that he knew that the capital gain on the sale of the property was reportable in 1957, he was guilty of violating both §§ 7201 and 7203. If his act was not willful, he was not guilty of violating either § 7201 or § 7203. Thus on the facts of this case, §§ 7201 and 7203 "covered precisely the same ground." *Berra* v. *United States, supra,* at 134. This being so, on the authorities cited, it is clear that petitioner was not entitled to a lesser-included offense charge based on § 7203.

Section 7207 requires the willful filing of a document known to be false or fraudulent in any material manner. The elements here involved are willfulness and the commission of the prohibited act. Section 7207 does not, however, require that the act be done as an attempt to evade or defeat taxes. Conduct could therefore violate § 7207 without violating § 7201 where the false statement, though material, does not constitute an attempt to evade or defeat taxation because it does not have the requisite effect of reducing the stated tax liability. This may be the case, for example, where a taxpayer understates his gross receipts and he offsets this by also understating his deductible expenses. In this example, if the Government in a § 7201 case charged tax evasion on the grounds that the defendant had understated his tax by understating his gross receipts, and the defendant contended that this was not so, as the misstatement of gross receipts had been offset by an understatement of deductible expenses, the defendant would be entitled to a lesser-

included offense charge based on § 7207, there being this relevant disputed issue of fact. This would be so, for in such a case, if the jury believed that an understatement of deductible expenses had offset the understatement of gross receipts, while the defendant would have violated § 7207 by willfully making a material false and fraudulent statement on his return, he would not have violated § 7201 as there would not have been the requisite § 7201 element of a tax deficiency. Here, however, there is no dispute that petitioner's material misstatement resulted in a tax deficiency. Thus there is no disputed issue of fact concerning the existence of an element required for conviction of § 7201 but not required for conviction of § 7207. Given petitioner's material misstatement which resulted in a tax deficiency, if, as the jury obviously found, petitioner's act was willful in the sense that he knew that he should have reported more income than he did for the year 1957, he was guilty of violating both §§ 7201 and 7207. If his action was not willful, he was guilty of violating neither. As was true with § 7203, on the facts of this case §§ 7201 and 7207 "covered precisely the same ground," *Berra* v. *United States, supra,* at 134, and thus petitioner was not entitled to a lesser-included offense charge based on § 7207.

Petitioner makes one final contention. He argues that he could have been acquitted of attempting to evade or defeat his 1957 taxes, in violation of § 7201, but still have been convicted for willfully failing to pay his tax when due in violation of § 7203 or willfully filing a fraudulent return in violation of § 7207, if the jury believed his statement contained in the government-introduced affidavit, that, although he knew that profit on the sale in question was reportable for 1957 and that tax was due thereon, he intended to report the sale and pay the 1957 tax at some unspecified future date. The basic premise of this argu-

ment is that, although all three sections require willfulness, on the facts here, the contents of these willfulness requirements differ. The argument is made that while an intent to report and pay the tax in the future does not vitiate the willfulness requirements of §§ 7203 and 7207, it does constitute a defense to a willful attempt "in any manner to evade or defeat any tax imposed by" the Internal Revenue Code, in violation of § 7201. While we agree that the intent to report the income and pay the tax sometime in the future does not vitiate the willfulness required by §§ 7203 and 7207, we cannot agree that it vitiates the willfulness requirement of § 7201.

No defense to a § 7201 evasion charge is made out by showing that the defendant willfully and fraudulently understated his tax liability for the year involved but intended to report the income and pay the tax at some later time. As this Court has recognized, § 7201 includes the offense of willfully attempting to evade or defeat the *assessment* of a tax as well as the offense of willfully attempting to evade or defeat the *payment* of a tax. *Lawn* v. *United States, supra.* The indictment here charged an attempt to evade income taxes by defeating the assessment for 1957. The fact that petitioner stated to a revenue agent that he intended to report his 1957 income in some later year, even if taken at face value, would not detract from the criminality of his willful act defeating the 1957 assessment. That crime was complete as soon as the false and fraudulent understatement of taxes (assuming, of course, that there was in fact a deficiency) was filed. See *United States* v. *Beacon Brass Co.,* 344 U. S. 43, 46. See also *Spies* v. *United States, supra,* at 498–499.

In sum, it is clear here that there were no disputed issues of fact which would justify instructing the jury that it could find that petitioner had committed all the ele-

ments of either or both of the §§ 7203 and 7207 misdemeanors without having committed a violation of the § 7201 felony. This being the case, the petitioner was not entitled to a lesser-included offense charge and the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent, believing that there was evidence sufficient to require the Court to charge the jury, as petitioner requested, that they could acquit him on this felony charge of having willfully attempted to evade or defeat taxes in violation of § 7201 but still convict him of the lesser misdemeanor offenses included in the felony charge. See *Berra* v. *United States,* 351 U. S. 131, 135 (dissenting opinion). Cf. *Achilli* v. *United States,* 353 U. S. 373, 379 (dissenting opinion).

HENRY *v.* COLLINS.

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

No. 89. Decided March 29, 1965.*

After his arrest for disturbing the peace, petitioner stated that it was "the result of a diabolical plot" in which respondents, a County Attorney and a Chief of Police, were implicated. Respondents brought suits for libel and obtained jury verdicts. The judgments are reversed since the jury might well have understood the instructions to permit recovery on a showing of intent to inflict harm, rather than intent to inflict harm through falsehood. The Constitution permits recovery by these public officials only for a false statement made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Garrison* v. *Louisiana*, 379 U. S. 64, and *New York Times Co.* v. *Sullivan*, 376 U. S. 254, followed.

Certiorari granted; — Miss. —, 158 So. 2d 28, and — Miss. —, 158 So. 2d 695, reversed.

Robert L. Carter, Barbara A. Morris, Jack H. Young and *Frank D. Reeves* for petitioner in both cases.

W. O. Luckett for respondents in both cases.

PER CURIAM.

The petitions for certiorari are granted. The judgments are reversed.

After petitioner's arrest on a charge of disturbing the peace, he issued a statement to the effect that this arrest was the result of "a diabolical plot," in which respondents, the County Attorney and Chief of Police of Clarksdale, were implicated. Respondents brought suits for libel and obtained jury verdicts. The Supreme Court of Missis-

*Together with No. 90, *Henry* v. *Pearson*, also on petition for writ of certiorari to the same court.

sippi affirmed. — Miss. —, 158 So. 2d 28; — Miss. —, 158 So. 2d 695.

The following instructions requested by the respondents, approved by the trial judge, were read to the jury:

> "The court instructs the jury for the plaintiff that malice does not necessarily mean hatred or ill will, but that malice may consist merely of culpable recklessness or a wilful and wanton disregard of the rights and interests of the person defamed."

The jury, was also instructed, at respondents' request, that

> ". . . [I]f you believe from the evidence that defendant published a false statement charging that his arrest . . . was the result of a diabolical plot . . . , you may infer malice, as defined in these instructions, from the falsity and libelous nature of the statement, although malice as a legal presumption does not arise from the fact that the statement in question is false and libelous. It is for you to determine as a fact, if you have first determined from the evidence that defendant published the statement in question and that it is false, whether or not the statement in question was actually made with malice."

The jury might well have understood these instructions to allow recovery on a showing of intent to inflict harm, rather than intent to inflict harm through falsehood. See *Garrison* v. *Louisiana,* 379 U. S. 64, 73. "The constitutional guarantees . . . [prohibit] a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made . . . with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 279–280.

For the reasons set out in their respective concurring opinions in *New York Times Co.* v. *Sullivan,* 376 U. S.

254, 293–305, and *Garrison* v. *Louisiana*, 379 U. S. 64, 79–88, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE GOLDBERG concur in reversal of these judgments, not merely for error in the instructions read to the jury, but on the ground that it would violate the First and Fourteenth Amendments to subject petitioner to any libel judgment solely because of his publication of criticisms against respondents' performance of their public duties.

O'KEEFFE, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, U. S. DEPARTMENT OF LABOR *v.* SMITH, HINCHMAN & GRYLLS ASSOCIATES, INC., ET AL.

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

No. 307. Decided March 29, 1965.

An employee of a government contractor at a defense base in Korea drowned during a Saturday outing. His employer considered all employees to be in the course of regular occupation from the time they left the United States until they returned, and expected employees to seek recreation away from the job site. On stipulated facts the Deputy Commissioner, Bureau of Employees' Compensation, found that death arose out of and in the course of employment, and awarded damages pursuant to the Longshoremen's and Harbor Workers' Compensation Act. The District Court affirmed the award, which the Court of Appeals reversed. *Held:* Since the Act provides that the Deputy Commissioner's order may be set aside by a reviewing court only if not in accordance with law and since the Deputy Commissioner correctly applied the standard of *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. 504, that the conditions of employment create the "zone of special danger" out of which the injury arose, his holding cannot be said to be irrational or without substantial evidence and should be upheld.

Certiorari granted; 327 F. 2d 1003, reversed.

Solicitor General Cox, Assistant Attorney General Douglas and *Morton Hollander* for petitioner.

George W. Ericksen for respondents.

PER CURIAM.

Robert C. Ecker drowned during a Saturday outing while boating on a South Korean lake. At the time of his death he was employed at a defense base in South Korea by the respondent, Smith, Hinchman & Grylls Associates, a government contractor.

The decedent had been hired in the United States under an oral contract the terms of which provided that he was to be transported to South Korea at his employer's expense, remain there for two years, and then, at his employer's expense, be transported back to the United States. The employer paid his rent and provided him with a per diem expense allowance for each day of the year, including weekends and holidays, to cover "the necessary living expenditures in the Korean economy." He worked on a "365 day per year basis . . . subject to call to the job site at any time." He "quite often" worked on Saturdays and Sundays and at other times outside the normal work day. The employer considered all its employees to be "in the course of regular occupation from the time they leave the United States until their return." The employer expected the decedent and its other employees to seek recreation away from the job site on weekends and holidays.

Based upon the above stipulated facts, the Deputy Commissioner of the Bureau of Employees' Compensation, United States Department of Labor, petitioner herein, determined "that the accident and the subsequent death of the decedent arose out of and in the course of employment." 222 F. Supp. 4, 6. He therefore awarded death benefits to the decedent's widow and a minor child in accordance with the terms of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.* (1958 ed.), as extended by the Defense Base Act, 55 Stat. 622, as amended, 42 U. S. C. § 1651 *et seq.* (1958 ed.). The employer and its insurance carrier, respondents herein, then brought this action in the United States District Court for the Middle District of Florida to set aside and enjoin the enforcement of this compensation award. The District Court affirmed the compensation award and granted the Deputy Commissioner's motion for summary judgment. 222 F. Supp. 4.

A panel of the Court of Appeals for the Fifth Circuit summarily reversed and set aside the award. 327 F. 2d 1003. But compare the later decision of another panel of the Fifth Circuit in *O'Keeffe* v. *Pan American World Airways, Inc.*, 338 F. 2d 319.

The petition for writ of certiorari is granted and the judgment of the Court of Appeals is reversed. Section 2 (2) of the Act, 33 U. S. C. § 902 (2) (1958 ed.), provides workmen's compensation for any "accidental injury or death arising out of and in the course of employment." Section 19 (a), 33 U. S. C. § 919 (a) (1958 ed.), provides for the filing of a "claim for compensation" and specifies that "the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim." Section 20 (a), 33 U. S. C. § 920 (a) (1958 ed.), provides that "[i]n any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary . . . [t]hat the claim comes within the provisions of this chapter." Finally, § 21 (b), 33 U. S. C. § 921 (b) (1958 ed.), provides that the Deputy Commissioner's compensation order may be suspended and set aside by a reviewing court only "[i]f not in accordance with law."

In cases decided both before and after the passage of the Administrative Procedure Act, 60 Stat. 237, as amended, 5 U. S. C. § 1001 *et seq.* (1958 ed.), the Court has held that the foregoing statutory provisions limit the scope of judicial review of the Deputy Commissioner's determination that a "particular injury arose out of and in the course of employment." *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U. S. 469, 477–478; *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. 504, 507–508.

> "It matters not that the basic facts from which the Deputy Commissioner draws this inference are undisputed rather than controverted. . . . It is like-

> wise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court. . . . Moreover, the fact that the inference of the type here made by the Deputy Commissioner involves an application of a broad statutory term or phrase to a specific set of facts gives rise to no greater scope of judicial review. . . ." *Cardillo* v. *Liberty Mutual Ins. Co., supra,* at 478.

The rule of judicial review has therefore emerged that the inferences drawn by the Deputy Commissioner are to be accepted unless they are irrational or "unsupported by substantial evidence on the record . . . as a whole." *O'Leary* v. *Brown-Pacific-Maxon, Inc., supra,* at 508.

The *Brown-Pacific-Maxon* case held that the standard to be applied by the Deputy Commissioner does not require "a causal relation between the nature of employment of the injured person and the accident. *Thom* v. *Sinclair,* [1917] A. C. 127, 142. Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is that the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose." *Id.,* at 507. And, borrowing from language in *Matter of Waters* v. *Taylor Co.,* 218 N. Y. 248, 252, 112 N. E. 727, 728, the Court in *Brown-Pacific-Maxon* drew the line only at cases where an employee had become "so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment." 340 U. S., at 507. This standard is in accord with the humanitarian nature of the Act as exemplified by the statutory command that "[i]n any proceeding for the enforcement of a claim for compensation under this chap-

ter it shall be presumed, in the absence of substantial evidence to the contrary . . . [t]hat the claim comes within the provisions of this chapter." § 20 (a), 33 U. S. C. § 920 (a).

In this case, the Deputy Commissioner, applying the *Brown-Pacific-Maxon* standard to the undisputed facts, concluded "that the accident and the subsequent death of the decedent arose out of and in the course of employment." 222 F. Supp. 4, 6. The District Court, likewise applying the *Brown-Pacific-Maxon* standard, held "that the Deputy Commissioner was correct in his finding that the conditions of the deceased's employment created a zone where the deceased Ecker had to seek recreation under exacting and unconventional conditions and that therefore the accident and death of the decedent arose out of and in the course of employment." 222 F. Supp., at 9.

We agree that the District Court correctly affirmed the finding of the Deputy Commissioner. While this Court may not have reached the same conclusion as the Deputy Commissioner, it cannot be said that his holding that the decedent's death, in a zone of danger, arose out of and in the course of his employment is irrational or without substantial evidence on the record as a whole. The decedent was hired to work in the exacting and unconventional conditions of Korea. His transportation over and back was to be at the employer's expense, and while there he was considered to be working on a 365-day-per-year basis, subject to call at the job site at any time, and quite often he worked Saturdays and Sundays and at other times outside the working day. The employer considered decedent and all other employees at this hazardous overseas base to be "in the course of regular occupation from the time they leave the United States until their return." Finally, the employer provided neither housing nor recreational activities for its employees, but expected them to live, while necessarily in the country to perform its work,

under the exacting and dangerous conditions of Korea. The employer paid decedent's rent and provided him with a per diem expense allowance for each day of the year, including weekends and holidays, to cover the necessary living expenses in the Korean economy. The accident here occurred on an outing for a short period of time on a lake located only 30 miles from the employer's job site. In the words of the District Court, "It was reasonable to conclude that recreational activities contributed to a higher efficiency of the employer's work and that when conducted in the restricted area of employment, on a work day, so to speak, and in a manner not prohibited by the employer, such activity was an incident of the employment." 222 F. Supp. 4, 9.

The dissent, while giving lip service to the *Brown-Pacific-Maxon* standards, would reverse the determination of the Deputy Commissioner and District Court here, as well as the Deputy Commissioner and the Courts of Appeals in other cases, that the several accidents involved were within the "zone of special danger." As *Brown-Pacific-Maxon* made clear, it is just this type of determination which the statute leaves to the Deputy Commissioner subject only to limited judicial review. Indeed, this type of determination, depending as it does on an analysis of the many factors involved in the area of the employment, would seem to be one peculiarly for the Deputy Commissioner.

The District Court therefore correctly upheld the determination of the Deputy Commissioner and the Court of Appeals erred in summarily reversing its judgment. Cf. *O'Keeffe* v. *Pan American World Airways, Inc.*, 338 F. 2d 319 (C. A. 5th Cir. 1964); *Pan American World Airways, Inc.* v. *O'Hearne*, 335 F. 2d 70 (C. A. 4th Cir. 1964); *Self* v. *Hanson*, 305 F. 2d 699 (C. A. 9th Cir. 1962); *Hastorf-Nettles, Inc.* v. *Pillsbury*, 203 F. 2d 641 (C. A. 9th Cir. 1953).

Since we believe that the Deputy Commissioner and District Court properly applied the *Brown-Pacific-Maxon* standard, and since we deem it necessary to preserve the integrity of the administrative process established by Congress to effectuate the statutory scheme, the judgment of the Court of Appeals is

Reversed.

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

Ecker was employed in Seoul, Korea, as an assistant administrative officer for Smith, Hinchman & Grylls Associates, Inc., an engineering management concern working under contracts with the United States and Korean Governments. His duties were restricted to Seoul where he was responsible for personnel in the stenographic and clerical departments. He was subject to call at the job site at any time, but the usual work week was 44 hours, and employees were accustomed to travel far from the job site on weekends and holidays for recreational purposes. Ecker did not live at the job site; he was given an allowance to live on the economy in Seoul. On his Memorial Day weekend he went to a lake 30 miles east of Seoul where a friend of his (not a co-employee) had a house. Ecker intended to spend the holiday there with his friend and another visitor. Their Saturday afternoon project was to fill in the beach in front of the house with sand, but none was readily available. In order to obtain it the three crossed the lake in a small aluminum boat to a sandy part of the shore. There they filled the boat with a load of sand, intending to transport it back to the house. The return trip, however, put Archimedes' Principle to the test; in the middle of the lake the boat capsized and sank. Two of the three men drowned, including Ecker.

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The Longshoremen's and Harbor Workers' Compensation Act,[1] as extended by the Defense Bases Act,[2] provides workmen's compensation for any

> "accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment." 33 U. S. C. § 902 (2).

The Court holds, *per curiam,* that Ecker died in the course of his employment. I see no meaningful interpretation of the statute which will support this result except a rule that any decision made by a Deputy Commissioner must be upheld (compare *Rogers* v. *Missouri Pac. R. Co.,* 352 U. S. 500). That interpretation, although meaningful, is unsupportable.

O'Leary v. *Brown-Pacific-Maxon, Inc.,* 340 U. S. 504, relied upon by the Court, did not establish such a rule. The Court there upheld a compensation award arising from the accidental death of an employee of a government contractor on the island of Guam. The employer maintained for its employees a recreation center near the shoreline along which ran a very dangerous channel. After spending the afternoon at the employer's recreation center, and while waiting for the employer's bus, the employee heard cries for help from two men in trouble in the channel. He drowned in his attempt to rescue them. Mr. Justice Frankfurter, writing for the Court, stated the standard of coverage as:

> "All that is required is that the 'obligations or conditions' of employment create the 'zone of special

[1] 44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.* (1958 ed.).
[2] 55 Stat. 622, as amended, 42 U. S. C. § 1651 *et seq.* (1958 ed.).

> danger' out of which the injury arose." 340 U. S., at 507.

That language was intended to mean only that where the employer had placed a facility for employees in an especially dangerous location and thus had created a danger of accidents, a "reasonable rescue attempt" could be "one of the risks of the employment." This was made crystal clear by the *caveat:* "We hold only that rescue attempts such as that before us are not necessarily excluded from the coverage of the Act as the kind of conduct that employees engage in as frolics of their own." *Ibid.*

He went on to state that the standard of review to be applied to the Deputy Commissioner's finding that the employee died in the course of his employment was the same as that set out in *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, for review of Labor Board decisions. Mr. Justice Frankfurter wrote both *Universal Camera* and *Brown-Pacific-Maxon,* and delivered the opinions on the same day. Reliance upon *Universal Camera* in *Brown-Pacific-Maxon* shows beyond doubt that the Court was not establishing a rule that *any* compensation award by a Deputy Commissioner would be automatically upheld, for it was the whole purpose of *Universal Camera* to effectuate congressional intent that the courts *expand* their scope of review over administrative decisions. That opinion defined judicial responsibility for examining the whole record in Labor Board cases, and not just those parts of the record which tended to support the Board. It remains today as the leading judicial guide for administrative review, and the most prominent directive to lower courts not to underestimate their responsibilities in this regard. I think it untenable to read a case which purports to apply the *Universal Camera* standard of review as embodying a philosophy of judicial abdication.

I read *Brown-Pacific-Maxon* to mean that some questions of application of "arising out of and in the course of employment" to the facts of a case will be left to the discretion of the administrator, and review of his decision treated as review of a finding of fact. The cases in which this limited review of the administrator's decision is appropriate are those in which one application of the statute to the external facts of the case effectuates the judicially recognizable purpose of the statute as well as another. Dominion over the broad or clear purposes of the statute thus remains firmly in the courts' hands, while within the confines of such statutory purposes, administrators are left discretion to provide the intimate particularizations of statutory application.[3] *Brown-Pacific-Maxon* is illustrative. The employee drowned in a particularly treacherous channel with which his job brought him into proximity. The danger was not great that circumstance would force him to swim in the channel, but the danger existed and was peculiar to the locality to which his job brought him; and it was out of this special danger that the employee's injury arose. This, taken together with the other elements of job connection which the administrator thought relevant, rendered an award in the case consistent with the broad purposes of the compensation statute. Yet had the Deputy Commissioner come out the other way, I think that his decision would have been equally supportable. Although it was true that the injury was related to an especially dangerous channel with which the employee's job brought him into proximity, the administrator could have ruled that the danger, although special, was so remote that the connection between the job and the injury was not sufficient to justify compensation. Either result would have been

[3] See generally, Jaffe, Judicial Review: Question of Law, 69 Harv. L. Rev. 239 (1955).

consistent with the statutory purpose of compensating all job-connected injuries on the actual job site and, additionally, those injuries off the job site which result from the "special" dangers of the employment. In the sense that both results would have been supportable, the review of the choice actually made by the Deputy Commissioner was treated as review of a finding of fact.

In the case before us, the Deputy Commissioner's ruling is not consistent with the statutory purpose. The injury did not take place on the actual job site, and it did not arise out of any special danger created by the job. In no sense can it be said that Ecker's job created any "special" danger of his drowning in a lake, or more particularly, of his loading a small boat with sand and capsizing it. Nothing indicates that the lake was rougher, the boat tippier, or the sand heavier than their counterparts in the United States. If there were "exacting and unconventional conditions" in Korea it does not appear that the lake, boat, or sand was one of them. There is nothing more than a "but for" relationship between the accident and the employment. To permit the award of compensation to stand reads the "job-connected" emphasis right out of the statute, an emphasis which is clearly there. Only injuries "arising out of" the employment are compensated. A disease or infection is covered if it arises "naturally out of such employment." Injuries willfully inflicted by third persons upon an employee are covered only if inflicted "because of his employment." A "but for" relationship between the injury and the employment should not in itself be sufficient to bring about coverage.

Whether the injury is compensable should depend to some degree on the cause of the injury as well as the time of day, location, and momentary activity of the employee at the time of the accident. I would distinguish between

a case in which Ecker smashed his hand in a filing cabinet while at the office and one in which he tripped over a pebble while off on a weekend hike. In the first case Ecker's injury would have arisen out of and in the course of his employment, whereas the statute would not apply to the second case unless the injury were traceable to some special danger peculiar to the employment, which was clearly not the case. Thus, if while off on that same weekend hike Ecker stepped on a mine left over from the Korean conflict, a different result could follow.

This view of the statute makes far more sense to me than the view adopted by the Court as indicated by the result in this case and its approving citation of such cases as *Self* v. *Hanson,* 305 F. 2d 699, and *Pan American World Airways, Inc.* v. *O'Hearne,* 335 F. 2d 70, cert. denied today. It is difficult to determine just what such cases stand for. In *Self* v. *Hanson,* for instance, Miss Williams was in the company of a gentleman in a pick-up truck parked at the end of a breakwater on Guam Island at 11 o'clock in the evening. The gentleman said that he wanted to show her a ship in the harbor. Apparently they had been looking at it for over half an hour when the driver of another vehicle on the breakwater lost control and ran into the pick-up truck, causing Miss Williams spinal injuries. The Ninth Circuit upheld the Deputy Commissioner's ruling that she was injured in the course of her employment as a secretary on a Guam defense project.

To permit compensation for such injuries is to impose absolute liability upon the employer for any and all injuries, whatever their nature, whatever their cause, just so long as the Deputy Commissioner makes an award and the job location is one to which the reviewing judge would not choose to go if he had his choice of vacation spots. Before setting its stamp of approval on such an interpretation of the statute, the Court at the very least should

hear argument and receive briefs on the merits. The Solicitor General has pointed out that "there are several thousands of injury cases reported annually" under this Act.[4] He urged that this question be definitively resolved by this Court. Because of the importance placed by all parties upon resolution of the proper application of the Act to these cases, and because I do not believe *Brown-Pacific-Maxon, supra,* dictates the Court's result, I respectfully dissent from its decision to treat *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, Inc.,* summarily, from its decision on the merits in that case, and from its denial of certiorari in *Pan-American World Airways, Inc.* v. *O'Hearne,* No. 474, and *Pan American World Airways, Inc.* v. *O'Keeffe,* No. 852.

MR. JUSTICE DOUGLAS, *dubitante.*

The problems under this Act should rest mainly with the Courts of Appeals.* What we said in *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, 490, of review by Courts of Appeals of decisions of the National Labor Relations Board, should be applicable here:

> "Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the

[4] Petition for certiorari in No. 307, p. 11.

*These problems are unlike those under the Federal Employers' Liability Act where suits can be brought both in state and in federal courts (45 U. S. C. § 56) and where the law, poorly received by the judiciary, has been severely eroded. See *Wilkerson* v. *McCarthy,* 336 U. S. 53, 68 *et seq.* (concurring opinion).

> Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

Applying that test I would not be inclined to reverse a Court of Appeals that disagreed with a Deputy Commissioner over findings as exotic as we have here.

March 29, 1965.

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.

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

No. 770. Decided March 29, 1965.

233 F. Supp. 381, affirmed.

M. L. Cassell and *Don McDevitt* for appellants.

Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel, Donald L. Hardison, Robert W. Ginnane and *Fritz R. Kahn* for the United States et al. *Alexander B. Hawes* for Waterways Bulk Transportation Council, Inc.; *Nuel D. Belnap* for Federal Barge Lines, Inc., et al.; *Charles J. McCarthy* for Tennessee Valley Authority; *Donald Macleay* for Arrow Transportation Co.; and *John C. Lovett* for Farmers Union Grain Terminal Association et al.

PER CURIAM.

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

FEDERAL TRADE COMMISSION *v.* COLGATE-PALMOLIVE CO. ET AL.

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

No. 62. Argued December 10, 1964.—Decided April 5, 1965.

The Federal Trade Commission charged respondents, an advertiser and an advertising agency, with using commercials that were deceptive within the meaning of § 5 of the Federal Trade Commission Act. The commercials purported to give viewers visual proof that the advertiser's shaving cream could soften "sandpaper," but unknown to viewers the substance that appeared to be sandpaper in the commercials was in fact a simulated prop, or "mock-up," made of plexiglass to which sand had been applied. After a hearing, the Commission issued a cease-and-desist order against respondents that could be interpreted to forbid all use of undisclosed simulations in television commercials. The Court of Appeals set aside the order as too broad. Five months later the Commission issued a revised order prohibiting respondents from presenting advertisements depicting a test, experiment or demonstration represented as actual proof of a product claim but not in fact constituting actual proof because of the undisclosed use of a prop or mock-up. From the court's judgment setting aside that order the Commission petitioned this Court for certiorari. *Held:*

1. The 90-day period allowed for filing a petition for certiorari by 28 U. S. C. § 2101 (c) commenced on the date of the second judgment by the Court of Appeals since the Commission's second order was a good-faith attempt to incorporate the legal principles contained in the court's first mandate and, at the least, the court's second opinion resolved a genuine ambiguity in the first. Pp. 378–384.

2. It is a material deceptive practice to convey to television viewers the false impression that they are seeing an actual test, experiment or demonstration which proves a product claim when they are not because of the undisclosed use of mock-ups. Pp. 384–392.

(a) The FTC's judgment as to what constitutes a deceptive practice is to be accorded great weight by reviewing courts, and

this admonition is especially true with respect to allegedly deceptive advertising since the finding of a § 5 violation in this field rests so heavily on inference and pragmatic judgment. P. 385.

(b) The misrepresentation of any fact so long as it materially induces a purchaser's decision to buy is a deception prohibited by § 5. P. 387.

3. The order issued in this case was well within the Commission's wide discretion to determine the type of order necessary to cope with the unfair practices found. Pp. 392–395.

(a) The crucial terms of the present order are as specific as the circumstances will permit. P. 393.

(b) In borderline situations the respondents can oblige the FTC to advise them whether a contemplated commercial complies with the order. P. 394.

(c) Since the respondents produced three different commercials which employed the same deceptive practice, the Commission had a sufficient basis for believing that the respondents would be inclined to use similar commercials with respect to other products they advertise. P. 395.

326 F. 2d 517, reversed and remanded.

Philip B. Heymann argued the cause for petitioner. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Orrick* and *James McI. Henderson.*

John F. Sonnett argued the cause for respondents. With him on the brief for Colgate-Palmolive Co. was *Arthur Mermin.* On the brief for Ted Bates & Co., Inc., were *H. Thomas Austern* and *William H. Allen.*

Briefs of *amici curiae,* urging affirmance, were filed by *Mahlon F. Perkins, Jr.*, for the American Association of Advertising Agencies, Inc., and by *Gilbert H. Weil* for the Association of National Advertisers, Inc.

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

The basic question before us is whether it is a deceptive trade practice, prohibited by § 5 of the Federal Trade

Commission Act,[1] to represent falsely that a televised test, experiment, or demonstration provides a viewer with visual proof of a product claim, regardless of whether the product claim is itself true.

The case arises out of an attempt by respondent Colgate-Palmolive Company to prove to the television public that its shaving cream, "Rapid Shave," outshaves them all. Respondent Ted Bates & Company, Inc., an advertising agency, prepared for Colgate three one-minute commercials designed to show that Rapid Shave could soften even the toughness of sandpaper. Each of the commercials contained the same "sandpaper test." The announcer informed the audience that, "To prove RAPID SHAVE's super-moisturizing power, we put it right from the can onto this tough, dry sandpaper. It was apply . . . soak . . . and off in a stroke." While the announcer was speaking, Rapid Shave was applied to a substance that appeared to be sandpaper, and immediately thereafter a razor was shown shaving the substance clean.

The Federal Trade Commission issued a complaint against respondents Colgate and Bates charging that the commercials were false and deceptive. The evidence before the hearing examiner disclosed that sandpaper of the type depicted in the commercials could not be shaved immediately following the application of Rapid Shave, but required a substantial soaking period of approximately 80 minutes. The evidence also showed that the substance resembling sandpaper was in fact a simulated prop, or "mock-up," made of plexiglass to which sand had been applied. However, the examiner found that Rapid Shave could shave sandpaper, even though not in the short time represented by the commercials, and that if

[1] 38 Stat. 717, as amended, 52 Stat. 111, 15 U. S. C. § 45 (a)(1) (1958 ed.):

"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

real sandpaper had been used in the commercials the inadequacies of television transmission would have made it appear to viewers to be nothing more than plain, colored paper. The examiner dismissed the complaint because neither misrepresentation—concerning the actual moistening time or the identity of the shaved substance—was in his opinion a material one that would mislead the public.

The Commission, in an opinion dated December 29, 1961, reversed the hearing examiner. It found that since Rapid Shave could not shave sandpaper within the time depicted in the commercials, respondents had misrepresented the product's moisturizing power. Moreover, the Commission found that the undisclosed use of a plexiglass substitute for sandpaper was an additional material misrepresentation that was a deceptive act separate and distinct from the misrepresentation concerning Rapid Shave's underlying qualities. Even if the sandpaper could be shaved just as depicted in the commercials, the Commission found that viewers had been misled into believing they had seen it done with their own eyes. As a result of these findings the Commission entered a cease-and-desist order against the respondents.

An appeal was taken to the Court of Appeals for the First Circuit which rendered an opinion on November 20, 1962. That court sustained the Commission's conclusion that respondents had misrepresented the qualities of Rapid Shave, but it would not accept the Commission's order forbidding the future use of undisclosed simulations in television commercials. It set aside the Commission's order and directed that a new order be entered. On May 7, 1963, the Commission, over the protest of respondents, issued a new order narrowing and clarifying its original order to comply with the court's mandate. The Court of Appeals again found unsatisfactory that portion of the order dealing with simulated props and refused to enforce

it. We granted certiorari, 377 U. S. 942, to consider this aspect of the case and do not have before us any question concerning the misrepresentation that Rapid Shave could shave sandpaper immediately after application, that being conceded.

I.

A threshold question presented is whether the petition for certiorari was filed within 90 days after the entry of the judgment below as required by 28 U. S. C. § 2101 (c) (1958 ed.). Respondents claim that the failure of the Commission to seek certiorari from the judgment of the Court of Appeals rendered on November 20, 1962, barred a subsequent order prohibiting the use of simulated props in commercials that offer visual proof of a product claim.

After a court of appeals has set aside an order of the Commission on a point of law, the Commission may seek certiorari if it disagrees with the court's legal conclusion. Section 5 (i) of the Federal Trade Commission Act [2] contemplates that when the time for filing a petition for certiorari has passed without a petition being filed, the Commission will enter an order in accordance with the mandate of the court of appeals. The Commission may not merely restate its former position in a new order and then apply for certiorari when the court of appeals reit-

[2] 52 Stat. 114, as amended, 15 U. S. C. § 45 (i) (1958 ed.):

"If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected."

erates its previous objection. As was said in *Federal Power Comm'n* v. *Idaho Power Co.*, 344 U. S. 17, 20, "If the court did no more by the second judgment than to restate what it had decided by the first one . . . the 90 days would start to run from the first judgment." To the same effect see *Federal Trade Comm'n* v. *Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206, 211. However, it has also been held that when a reviewing court finds a legal error in an administrative order, the agency is not foreclosed upon the remand of the case from enforcing the legislative policy of the act it administers, provided the new order does not conflict with the reviewing court's mandate.[3]

Obviously, the court which drafted the mandate is normally in the best position to determine whether the Commission's subsequent order is consistent with the mandate, but this Court is never foreclosed from determining the issue for itself.[4] The resolution of this issue in the present case requires a detailed analysis of the various opinions, mandates and orders issued by the Commission and the Court of Appeals.

In its initial opinion, dated December 29, 1961, the Commission commented that the heart of the commercials was the visual "sandpaper test" which was designed to leave the viewer with the impression that he had actually seen such an experiment being performed. The Commission expressed the view that without this visible proof of Rapid Shave's moisturizing ability some viewers might not have been persuaded to buy the product. The Commission then entered into a far-reaching discussion on the

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[3] *Securities & Exchange Comm'n* v. *Chenery Corp.*, 332 U. S. 194, 200; *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 145.

[4] See *Labor Board* v. *Donnelly Garment Co.*, 330 U. S. 219, 227; *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, *supra*, note 3, at 141.

use of mock-ups in television and the relationship between "truth" and "television salesmanship," and finally concluded that the use of the plexiglass prop was a deceptive practice. The Commission's order was as inclusive as its discussion. It ordered both repondents to cease and desist from:

> "Representing, directly or by implication, *in describing, explaining,* or purporting to prove the quality or merits of any product, that pictures, depictions, or demonstrations . . . *are genuine or accurate representations . . . of,* or prove the *quality or merits of, any product,* when such pictures, depictions, or demonstrations are *not in fact genuine or accurate representations . . . of,* or do not prove the quality or merits of, *any such product.*" [5] (Emphasis added.)

The Court of Appeals understandably was concerned with the broad language in the Commission's opinion and order, especially since the Commission was not dealing with an established deceptive practice but was applying the flexible standards of § 5 to a hitherto unexplored area. The breadth of the Commission's order was potentially limitless, apparently establishing a per se rule prohibiting the use of simulated props in all television commercials, since commercials by definition describe "the qualities or merits" of products. The court's impression that the order was "quite ambiguous" was not alleviated when in oral argument counsel for the Commission stated that if a prominent person appeared on television saying "I love Lipsom's iced tea," while drinking something that appeared to be tea but in fact was not, the commercial would be a deceptive practice.

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[5] 59 F. T. C. 1452, 1477–1478.

In light of the Commission's order and its oral argument, the court concluded that it was the Commission's intention to prohibit all simulated props in television commercials. The court could not agree with this position since it believed that "where the only untruth is that the substance [the viewer] sees on the screen is artificial, and the visual appearance is otherwise a correct and accurate representation of the product itself, he is not injured." [6] But, in setting aside the Commission's order, the court gave little specific guidance for the drafting of a new one. It merely criticized the Commission for holding that mock-ups are "illegal per se," [7] and indicated that the Commission's order "may" have been too broad in other respects as well.

Following the decision by the Court of Appeals, the Commission entered a new "proposed final order" on February 18, 1963. This order was accompanied by an explanatory opinion that admitted error in the original disposition of the case and expressed an intention to eliminate the errors found by the Court of Appeals. The Commission explained that its new order was not directed toward the broad prohibition of all undisclosed simulated props in commercials, but merely toward prohibiting respondents from misrepresenting to the public that it was seeing for itself a test, experiment or demonstration which purportedly proved a product claim. According to the Commission, the television commercial in question did not merely tell viewers that the experiment had been or could be performed, but instead told them that they were seeing it for themselves and did not have to take the seller's word for it. This, and not the mere use of a prop, was the misrepresentation found to be a deceptive practice. Over the vigorous objection of respondents, the

[6] 310 F. 2d 89, 94.

[7] *Ibid.*

Commission issued its final order on May 7, 1963. Both respondents were ordered to cease and desist from:

> "Unfairly or deceptively advertising any . . . product by presenting a test, experiment or demonstration that (1) is represented to the public as actual proof of a claim made for the product which is material to inducing its sale, and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop instead of the product, article, or substance represented to be used therein." [8]

Respondents again appealed to the Court of Appeals. Despite the urgings of respondents that it limit its review to a determination whether the Commission's order was consistent with the previous mandate, the court re-examined the Commission's new order on the merits. The court recognized that the new order no longer prohibited the use of all simulated props in commercials, but found that it would be impossible under it to distinguish between commercials which depicted a test, experiment or demonstration, and those which did not. The court held that so long as there is an accurate portrayal of a product's attributes or performance there is no deceit and instructed the Commission, "as we thought we had directed it before," [9] to enter an order merely prohibiting respondents

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[8] *Colgate-Palmolive Co.*, No. 7736, FTC, May 7, 1963. An additional clause was added to the order for the benefit of respondent Bates in recognition of the different positions of clients and advertising agencies, which often do not have all the information about a product that the client has. The clause reads: "provided, however, that it shall be a defense hereunder that respondent neither knew nor had reason to know that the product, article or substance used in the test, experiment or demonstration was a mock-up or prop."

[9] 326 F. 2d 517, 523.

from using mock-ups to demonstrate something which in fact could not be accomplished.

We hold that the Commission's order of May 7, 1963, was not in disregard of the Court of Appeals' first mandate and was a good-faith attempt to incorporate the legal principles contained therein. An examination of the Commission's first order and accompanying opinion shows an overriding emphasis on mock-ups as such and a failure to articulate with precision the actual deceptive practice found. As a result, it is not surprising that the court criticized the order as "ambiguous," interpreted it as prohibiting the substitution of a mock-up for a product in any commercial, and found that it rested on a premise that mock-ups were "illegal per se." It is true that the court also said that viewers are interested in what they see and not in the means by which they see it, but this statement occurred immediately after the court discussed the contention in oral argument that it would be a deceptive practice to represent that a person was drinking "Lipsom's iced tea" when in fact he was not. The only clear directive in the court's mandate was for the Commission to remove the "fundamental error [which] so permeates the order" [10]—*i. e.*, the error that every use of mock-ups is a deceptive practice.

We find it inconceivable that the Commission could have successfully sought certiorari from this judgment. Had it done so, it would have been forced to argue either that every use of mock-ups in commercials is a deceptive practice, an apparently unintended theory, or that this Court should reinstate the Commission's decision on a theory of its own, something the Court said it would not do in *Securities & Exchange Comm'n* v. *Chenery Corp.*, 332 U. S. 194, 196.

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[10] 310 F. 2d 89, 94.

Support is given our conclusion by the refusal of the Court of Appeals to declare that the Commission's subsequent order was inconsistent with the previous mandate. However, even if the first opinion of the Court of Appeals could somehow be construed to hold as a matter of law that it is never a deceptive practice to use undisclosed props in a commercial designed to convince a viewer that he is seeing for himself proof of a seller's claims, we find that the Commission acted reasonably in construing the mandate more narrowly. The Commission's vague first order had spawned a correspondingly vague opinion by the Court of Appeals. If the court meant its first opinion to say more than we have attributed to it, it was not until the second opinion that the court clearly articulated its reasoning. Therefore, at the least the court's second opinion resolved a genuine ambiguity in the first, and the time within which certiorari had to be requested dates from the second judgment. See *Federal Trade Comm'n* v. *Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206, 211.

II.

In reviewing the substantive issues in the case, it is well to remember the respective roles of the Commission and the courts in the administration of the Federal Trade Commission Act. When the Commission was created by Congress in 1914, it was directed by § 5 to prevent "[u]nfair methods of competition in commerce." [11] Congress amended the Act in 1938 to extend the Commission's jurisdiction to include "unfair or deceptive acts or practices in commerce" [12]—a significant amendment showing Congress' concern for consumers as well as for competitors. It is important to note the generality of these

[11] 38 Stat. 719 (1914), as amended, 15 U. S. C. § 45 (a)(1) (1958 ed.).

[12] 52 Stat. 111 (1938), 15 U. S. C. § 45 (a)(1) (1958 ed.).

standards of illegality; the proscriptions in § 5 are flexible, "to be defined with particularity by the myriad of cases from the field of business." *Federal Trade Comm'n* v. *Motion Picture Advertising Service Co.*, 344 U. S. 392, 394.

This statutory scheme necessarily gives the Commission an influential role in interpreting § 5 and in applying it to the facts of particular cases arising out of unprecedented situations. Moreover, as an administrative agency which deals continually with cases in the area, the Commission is often in a better position than are courts to determine when a practice is "deceptive" within the meaning of the Act. This Court has frequently stated that the Commission's judgment is to be given great weight by reviewing courts.[13] This admonition is especially true with respect to allegedly deceptive advertising since the finding of a § 5 violation in this field rests so heavily on inference and pragmatic judgment. Nevertheless, while informed judicial determination is dependent upon enlightenment gained from administrative experience, in the last analysis the words "deceptive practices" set forth a legal standard and they must get their final meaning from judicial construction. Cf. *Federal Trade Comm'n* v. *R. F. Keppel & Bro., Inc.*, 291 U. S. 304, 314.

We are not concerned in this case with the clear misrepresentation in the commercials concerning the speed with which Rapid Shave could shave sandpaper, since the Court of Appeals upheld the Commission's finding on that matter and the respondents have not challenged the finding here. We granted certiorari to consider the Commission's conclusion that even if an advertiser has himself conducted a test, experiment or demonstration which he

[13] See, *e. g.*, *Federal Trade Comm'n* v. *Motion Picture Advertising Service Co.*, 344 U. S. 392, 396; *Federal Trade Comm'n* v. *Raladam Co.*, 316 U. S. 149, 152.

honestly believes will prove a certain product claim, he may not convey to television viewers the false impression that they are seeing the test, experiment or demonstration for themselves, when they are not because of the undisclosed use of mock-ups.

We accept the Commission's determination that the commercials involved in this case contained three representations to the public: (1) that sandpaper could be shaved by Rapid Shave; (2) that an experiment had been conducted which verified this claim; and (3) that the viewer was seeing this experiment for himself. Respondents admit that the first two representations were made, but deny that the third was. The Commission, however, found to the contrary, and, since this is a matter of fact resting on an inference that could reasonably be drawn from the commercials themselves, the Commission's finding should be sustained.[14] For the purposes of our review, we can assume that the first two representations were true; the focus of our consideration is on the third, which was clearly false. The parties agree that § 5 prohibits the intentional misrepresentation of any fact which would constitute a material factor in a purchaser's decision whether to buy.[15] They differ, however, in their conception of what "facts" constitute a "material factor" in a purchaser's decision to buy. Respondents submit, in effect, that the only material facts are those which deal with the substantive qualities of a product.[16] The Com-

[14] See *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, 488; *Federal Trade Comm'n* v. *Pacific States Paper Trade Assn.,* 273 U. S. 52, 63.

[15] Brief for Petitioner, p. 13; Brief for Respondent Colgate, p. 22; Brief for Respondent Bates, p. 14.

[16] Brief for Respondent Colgate, p. 16: "What [the buyer] is interested in is whether the actual product he buys will look and perform the way it appeared on his television set." *Id.,* at 17: "[A] buyer's real concern is with the truth of the substantive claims or

mission, on the other hand, submits that the misrepresentation of *any* fact so long as it materially induces a purchaser's decision to buy is a deception prohibited by § 5.

The Commission's interpretation of what is a deceptive practice seems more in line with the decided cases than that of respondents. This Court said in *Federal Trade Comm'n* v. *Algoma Lumber Co.*, 291 U. S. 67, 78: "[T]he public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance." It has long been considered a deceptive practice to state falsely that a product ordinarily sells for an inflated price but that it is being offered at a special reduced price, even if the offered price represents the actual value of the product and the purchaser is receiving his money's worth.[17] Applying respondents' arguments to these cases, it would appear that so long as buyers paid no more than the product was actually worth and the product contained the qualities advertised, the misstatement of an inflated original price was immaterial.

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promises made to him, not with the means used to make them." *Id.*, at 20: "[T]he Commission's error was to confuse the substantive claim made for a product with the means by which such claim was conveyed."

Brief for Respondent Bates, pp. 2–3: "If the viewer or reader of the advertisement buys the product, and it will do exactly what the portrayal in the advertisement asserts it will do, can there be any unlawful misrepresentation?" *Id.*, at 13–14: "What induces the buyer to purchase is the claim that the product will perform as represented in the portrayed test. That is the material claim." *Id.*, at 25: "It is not a representation in any way relating to the product or to its purchase, so that even if the strained suggestion that there is such an implied representation were realistic, the representation plainly would be immaterial."

[17] *Federal Trade Comm'n* v. *Standard Education Society*, 302 U. S. 112, 115–117; *Kalwajtys* v. *Federal Trade Comm'n*, 237 F. 2d 654, 656 (C. A. 7th Cir. 1956), cert. denied, 352 U. S. 1025.

It has also been held a violation of § 5 for a seller to misrepresent to the public that he is in a certain line of business, even though the misstatement in no way affects the qualities of the product. As was said in *Federal Trade Comm'n* v. *Royal Milling Co.*, 288 U. S. 212, 216:

> "If consumers or dealers prefer to purchase a given article because it was made by a particular manufacturer or class of manufacturers, they have a right to do so, and this right cannot be satisfied by imposing upon them an exactly similar article, or one equally as good, but having a different origin."

The courts of appeals have applied this reasoning to the merchandising of reprocessed products that are as good as new, without a disclosure that they are in fact reprocessed.[18] And it has also been held that it is a deceptive practice to misappropriate the trade name of another.[19]

Respondents claim that all these cases are irrelevant to our decision because they involve misrepresentations related to the product itself and not merely to the manner in which an advertising message is communicated. This distinction misses the mark for two reasons. In the first place, the present case is not concerned with a mode of communication, but with a misrepresentation that viewers have objective proof of a seller's product claim over and above the seller's word. Secondly, all of the above cases, like the present case, deal with methods designed to get a consumer to purchase a product, not with whether the product, when purchased, will perform up to expectations. We find an especially strong similarity between the pres-

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[18] *Kerran* v. *Federal Trade Comm'n*, 265 F. 2d 246 (C. A. 10th Cir. 1959), cert. denied *sub nom. Double Eagle Ref. Co.* v. *Federal Trade Comm'n*, 361 U. S. 818; *Mohawk Ref. Corp.* v. *Federal Trade Comm'n*, 263 F. 2d 818 (C. A. 3d Cir. 1959), cert. denied, 361 U. S. 814.

[19] *E. g., Niresk Industries, Inc.* v. *Federal Trade Comm'n*, 278 F. 2d 337 (C. A. 7th Cir. 1960), cert. denied, 364 U. S. 883.

ent case and those cases in which a seller induces the public to purchase an arguably good product by misrepresenting his line of business, by concealing the fact that the product is reprocessed, or by misappropriating another's trademark. In each the seller has used a misrepresentation to break down what he regards to be an annoying or irrational habit of the buying public—the preference for particular manufacturers or known brands regardless of a product's actual qualities, the prejudice against reprocessed goods, and the desire for verification of a product claim. In each case the seller reasons that when the habit is broken the buyer will be satisfied with the performance of the product he receives. Yet, a misrepresentation has been used to break the habit and, as was stated in *Algoma Lumber,* a misrepresentation for such an end is not permitted.

We need not limit ourselves to the cases already mentioned because there are other situations which also illustrate the correctness of the Commission's finding in the present case. It is generally accepted that it is a deceptive practice to state falsely that a product has received a testimonial from a respected source.[20] In addition, the Commission has consistently acted to prevent sellers from falsely stating that their product claims have been "certified." [21] We find these situations to be indistinguishable from the present case. We can assume that in each the underlying product claim is true and in each the seller actually conducted an experiment sufficient to prove to himself the truth of the claim. But in each the seller has told the public that it could rely on something other than his word concerning both the truth of the claim and

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[20] *E. g., Niresk Industries, Inc.* v. *Federal Trade Comm'n, supra,* note 19; *Howe* v. *Federal Trade Comm'n,* 148 F. 2d 561 (C. A. 9th Cir. 1945), cert. denied, 326 U. S. 741.

[21] See, *e. g.,* Stipulation 9083, 55 F. T. C. 2101 (1958); Stipulation 8966, 54 F. T. C. 1953 (1957).

the validity of his experiment. We find it an immaterial difference that in one case the viewer is told to rely on the word of a celebrity or authority he respects, in another on the word of a testing agency, and in the present case on his own perception of an undisclosed simulation.

Respondents again insist that the present case is not like any of the above, but is more like a case in which a celebrity or independent testing agency has in fact submitted a written verification of an experiment actually observed, but, because of the inability of the camera to transmit accurately an impression of the paper on which the testimonial is written, the seller reproduces it on another substance so that it can be seen by the viewing audience. This analogy ignores the finding of the Commission that in the present case the seller misrepresented to the public that it was being given objective proof of a product claim. In respondents' hypothetical the objective proof of the product claim that is offered, the word of the celebrity or agency that the experiment was actually conducted, does exist; while in the case before us the objective proof offered, the viewer's own perception of an actual experiment, does not exist. Thus, in respondents' hypothetical, unlike the present case, the use of the undisclosed mock-up does not conflict with the seller's claim that there is objective proof.

We agree with the Commission, therefore, that the undisclosed use of plexiglass in the present commercials was a material deceptive practice, independent and separate from the other misrepresentation found. We find unpersuasive respondents' other objections to this conclusion. Respondents claim that it will be impractical to inform the viewing public that it is not seeing an actual test, experiment or demonstration, but we think it inconceivable that the ingenious advertising world will be unable, if it so desires, to conform to the Commission's insistence that the public be not misinformed. If, however, it becomes

impossible or impractical to show simulated demonstrations on television in a truthful manner, this indicates that television is not a medium that lends itself to this type of commercial, not that the commercial must survive at all costs. Similarly unpersuasive is respondents' objection that the Commission's decision discriminates against sellers whose product claims cannot be "verified" on television without the use of simulations. All methods of advertising do not equally favor every seller. If the inherent limitations of a method do not permit its use in the way a seller desires, the seller cannot by material misrepresentation compensate for those limitations.

Respondents also claim that the Commission reached out to decide a question not properly before it and has presented this Court with an abstract question. They argue that since the commercials in the present case misrepresented the time element involved in shaving sandpaper, this Court should not consider the additional misrepresentation that the public had objective proof of the seller's claim. As we have already said, these misrepresentations are separate and distinct, and we fail to see why respondents should be sheltered from a cease-and-desist order with respect to one deceptive practice merely because they also engaged in another.

Respondents finally object to what they consider to be the absence of an adequate record to sustain the Commission's finding. It is true that in its initial stages the case was concerned more with the misrepresentation about the product's underlying qualities than with the misrepresentation that objective proof was being given. Nevertheless, both misrepresentations were in the case from the beginning, and respondents were never prejudicially misled into believing that the second question was not being considered. Nor was it necessary for the Commission to conduct a survey of the viewing public before it could determine that the commercials had a tendency to mis-

lead, for when the Commission finds deception it is also authorized, within the bounds of reason, to infer that the deception will constitute a material factor in a purchaser's decision to buy. See *Federal Trade Comm'n* v. *Raladam Co.*, 316 U. S. 149, 152. We find the record in this case sufficient to support the Commission's findings.

III.

We turn our attention now to the order issued by the Commission. It has been repeatedly held that the Commission has wide discretion in determining the type of order that is necessary to cope with the unfair practices found, *e. g., Jacob Siegel Co.* v. *Federal Trade Comm'n*, 327 U. S. 608, 611, and that Congress has placed the primary responsibility for fashioning orders upon the Commission, *Federal Trade Comm'n* v. *National Lead Co.*, 352 U. S. 419, 429. For these reasons the courts should not "lightly modify" the Commission's orders. *Federal Trade Comm'n* v. *Cement Institute*, 333 U. S. 683, 726. However, this Court has also warned that an order's prohibitions "should be clear and precise in order that they may be understood by those against whom they are directed," *Federal Trade Comm'n* v. *Cement Institute, supra,* at 726, and that "[t]he severity of possible penalties prescribed . . . for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application." *Federal Trade Comm'n* v. *Henry Broch & Co.*, 368 U. S. 360, 367–368.

The Court of Appeals has criticized the reference in the Commission's order to "test, experiment or demonstration" as not capable of practical interpretation. It could find no difference between the Rapid Shave commercial and a commercial which extolled the goodness of ice cream while giving viewers a picture of a scoop of mashed

potatoes appearing to be ice cream. We do not understand this difficulty. In the ice cream case the mashed potato prop is not being used for additional proof of the product claim, while the purpose of the Rapid Shave commercial is to give the viewer objective proof of the claims made. If in the ice cream hypothetical the focus of the commercial becomes the undisclosed potato prop and the viewer is invited, explicitly or by implication, to see for himself the truth of the claims about the ice cream's rich texture and full color, and perhaps compare it to a "rival product," then the commercial has become similar to the one now before us. Clearly, however, a commercial which depicts happy actors delightedly eating ice cream that is in fact mashed potatoes or drinking a product appearing to be coffee but which is in fact some other substance is not covered by the present order.

The crucial terms of the present order—"test, experiment or demonstration . . . represented . . . as actual proof of a claim"—are as specific as the circumstances will permit. If respondents in their subsequent commercials attempt to come as close to the line of misrepresentation as the Commission's order permits, they may without specifically intending to do so cross into the area proscribed by this order. However, it does not seem "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines, Inc.* v. *United States,* 342 U. S. 337, 340. In commercials where the emphasis is on the seller's word, and not on the viewer's own perception, the respondents need not fear that an undisclosed use of props is prohibited by the present order. On the other hand, when the commercial not only makes a claim, but also invites the viewer to rely on his own perception for demonstrative proof of the claim, the respondents will be aware that the use of undisclosed props in strategic places might be a material deception.

We believe that respondents will have no difficulty applying the Commission's order to the vast majority of their contemplated future commercials. If, however, a situation arises in which respondents are sincerely unable to determine whether a proposed course of action would violate the present order, they can, by complying with the Commission's rules,[22] oblige the Commission to give them definitive advice as to whether their proposed action, if pursued, would constitute compliance with the order.

Finally, we find no defect in the provision of the order which prohibits respondents from engaging in similar practices with respect to "any product" they advertise. The propriety of a broad order depends upon the specific circumstances of the case, but the courts will not interfere except where the remedy selected has no reasonable rela-

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[22] The Commission's rules, 16 CFR § 3.26 (1964 Supp.), provide:

"(b) Any respondent subject to a Commission order may request advice from the Commission as to whether a proposed course of action, if pursued by it, will constitute compliance with such order. The request for advice should be submitted in writing to the Secretary of the Commission and should include full and complete information regarding the proposed course of action. On the basis of the facts submitted, as well as other information available to the Commission, the Commission will inform the respondent whether or not the proposed course of action, if pursued, would constitute compliance with its order.

"(c) The Commission may at any time reconsider its approval of any report of compliance or any advice given under this section and, where the public interest requires, rescind or revoke its prior approval or advice. In such event the respondent will be given notice of the Commission's intent to revoke or rescind and will be given an opportunity to submit its views to the Commission. The Commission will not proceed against a respondent for violation of an order with respect to any action which was taken in good faith reliance upon the Commission's approval or advice under this section, where all relevant facts were fully, completely and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval."

tion to the unlawful practices found to exist.[23] In this case the respondents produced three different commercials which employed the same deceptive practice. This we believe gave the Commission a sufficient basis for believing that the respondents would be inclined to use similar commercials with respect to the other products they advertise. We think it reasonable for the Commission to frame its order broadly enough to prevent respondents from engaging in similarly illegal practices in future advertisements. As was said in *Federal Trade Comm'n* v. *Ruberoid Co.*, 343 U. S. 470, 473: "[T]he Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past." Having been caught violating the Act, respondents "must expect some fencing in." *Federal Trade Comm'n* v. *National Lead Co.*, 352 U. S. 419, 431.

The judgment of the Court of Appeals is reversed and the case remanded for the entry of a judgment enforcing the Commission's order.

Reversed and remanded.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting in part.

Under the limited grant of certiorari in this case, the Court must assume that the advertiser can perform the experiment in question and that the demonstration is as simple to execute as it appears on television. The only question here is what techniques the advertiser may use to convey essential truth to the television viewer. If the claim is true and valid, then the technique for projecting that claim, within broad boundaries, falls purely within the advertiser's art. The warrant to the Federal Trade Commission is to police the verity of the claim itself.

[23] *Federal Trade Comm'n* v. *National Lead Co.*, 352 U. S. 419, 429; *Federal Trade Comm'n* v. *Ruberoid Co.*, 343 U. S. 470, 473; *Jacob Siegel Co.* v. *Federal Trade Comm'n*, 327 U. S. 608, 612.

I do not agree that the use of "mock-ups" by the television advertiser is of itself a deceptive trade practice. Further, while there was an independent deceptive element in this commercial, I do not think this record justifies the broad remedial order issued by the Commission. I would remand the case to the Commission for further proceedings.

I.

"MOCK-UPS" AS SUCH.

The faulty prop in the Court's reasoning is that it focuses entirely on what is taking place in the studio rather than on what the viewer is seeing on his screen. That which the viewer sees with his own eyes is not, however, what is taking place in the studio, but an electronic image. If the image he sees on the screen is an accurate reproduction of what he would see with the naked eyes were the experiment performed before him with sandpaper in his home or in the studio, there can hardly be a misrepresentation in any legally significant sense. While the Commission undoubtedly possesses broad authority to give content to the proscriptions of the Act, its discretion, as the Court recognizes, is not unbridled, and "in the last analysis the words 'deceptive practices' set forth a legal standard and they must get their final meaning from judicial construction" (*ante,* p. 385). In this case, assuming that Rapid Shave could soften sandpaper as quickly as it does sand-covered plexiglass, a viewer who wants to entertain his friends by duplicating the actual experiment could do so by buying a can of Rapid Shave and some sandpaper. If he wished to shave himself, and his beard were really as tough as sandpaper, he could perform this part of his morning ablutions with Rapid Shave in the same way as he saw the plexiglass shaved on television.

I do not see how such a commercial can be said to be "deceptive" in any legally acceptable use of that term. The Court attempts to distinguish the case where a "celebrity" has written a testimonial endorsing some product, but the original testimonial cannot be seen over television and a copy is shown over the air by the manufacturer. The Court states of this "hypothetical": "In respondents' hypothetical the objective proof of the product claim that is offered, the word of the celebrity or agency that the experiment was actually conducted, does exist; while in the case before us the objective proof offered, the viewer's own perception of an actual experiment, does not exist." *Ante,* at 390. But in both cases the viewer is told to "see for himself," in the one case that the celebrity has endorsed the product; in the other, that the product can shave sandpaper; in neither case is the viewer actually seeing the proof; and in both cases the objective proof does exist, be it the original testimonial or the sandpaper test actually conducted by the manufacturer. In neither case, however, is there a material misrepresentation, because what the viewer sees *is* an accurate image of the objective proof.

Nor can I readily understand how the accurate portrayal of an experiment by means of a mock-up can be considered more deceptive than the use of mashed potatoes to convey the glamorous qualities of a particular ice cream (*ante,* pp. 392–393); indeed, to a potato-lover "the smile on the face of the tiger" might come more naturally than if he were actually being served ice cream.

It is commonly known that television presents certain distortions in transmission for which the broadcasting industry must compensate. Thus, a white towel will look a dingy gray over television, but a blue towel will look a sparkling white. On the Court's analysis, an advertiser must achieve accuracy in the studio even though it results

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in an inaccurate image being projected on the home screen. This led the Court of Appeals to question whether it would be proper for an advertiser to show a product on television that somehow, because of the medium, looks better on the screen than it does in real life. 310 F. 2d 89, 94; 326 F. 2d 517, 523, n. 16.

A perhaps more commonplace example suggests itself: Would it be proper for respondent Colgate, in advertising a laundry detergent, to "demonstrate" the effectiveness of a major competitor's detergent in washing white sheets; and then "before the viewer's eyes," to wash a white (not a blue) sheet with the competitor's detergent? The studio test would accurately show the quality of the product, but the image on the screen would look as though the sheet had been washed with an ineffective detergent. All that has happened here is the converse: a demonstration has been altered in the studio to compensate for the distortions of the television medium, but in this instance in order to present an accurate picture to the television viewer.

In short, it seems to me that the proper legal test in cases of this kind concerns not what goes on in the broadcasting studio, but whether what is shown on the television screen is an accurate representation of the advertised product and of the claims made for it.

II.

THE COMMISSION'S REMEDY.

The Commission ordered both respondents to cease and desist from using mock-ups in any "test, experiment or demonstration"—in the case of respondent Bates, whether or not relating to Colgate products—as a result of its finding that the use of a plexiglass mock-up in this instance constituted a separate misrepresentation. If that were the only misrepresentation found by the Com-

mission, I would affirm the judgment of the Court of Appeals. The Commission, however, found another misrepresentation, not disputed here, namely, that Rapid Shave would shave sandpaper as quickly as plexiglass, and on this record I cannot say that such finding might not support the Commission's broad order.

In so concluding, some further observations are called for. The Court brings to the support of the Commission's broad order the suggestion that it might be difficult for the Commission to police the reliability of simulated demonstrations, and, further, that the Commission might have cause for concern as to advertisers which have demonstrated a propensity for misrepresentation. The policing factor certainly should not permit the Commission to sweep with the broad brush it has used here, since the same risk of inaccurate reproduction inheres in all commercials, not only those involving tests or experiments. Although the Commission doubtless has wide discretion in fashioning remedies (*ante,* p. 395), I do not believe that an order banning use of all mock-ups can be justified merely on the score of "policing."

There is some indication, however, that the Commission has had troubles with both respondents in the past (see 59 F. T. C. 1452, 1473 and n. 30). If the Commission should find that a pattern of misrepresentations by respondents creates a substantial risk that they will not accurately portray experiments if permitted to continue using mock-ups, the Commission's present order might well be justified. I think the Commission should have an opportunity to make such findings, which were unnecessary under what I believe was its mistaken view of the case.

To that end, I would vacate the judgment of the Court of Appeals and remand the case to the Commission for further proceedings in light of what has been said in this opinion.

POINTER *v.* TEXAS.

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 577. Argued March 15, 1965.—Decided April 5, 1965.

Petitioner was arrested and brought before a state judge for preliminary hearing on a robbery charge. The complaining witness testified but petitioner, who had no counsel, did not cross-examine. Petitioner was later indicted and tried. The witness had moved to another State and the transcript of his testimony at the hearing was introduced over petitioner's objections that he was denied the right of confrontation. He was convicted and the highest state court affirmed. *Held:*

1. The right granted to an accused by the Sixth Amendment to confront the witnesses against him, which includes the right of cross-examination, is a fundamental right essential to a fair trial and is made obligatory on the States by the Fourteenth Amendment. Pp. 403–406.

2. The introduction of the transcript in a federal criminal case would have been a clear denial of the right of confrontation since the statement was made without an adequate opportunity for cross-examination, and the right must be determined by the same standards in a state proceeding. Pp. 406–408.

375 S. W. 2d 293, reversed and remanded.

Orville A. Harlan, by appointment of the Court, 379 U. S. 911, argued the cause and filed a brief for petitioner.

Gilbert J. Pena, Assistant Attorney General of Texas, argued the cause for respondent. With him on the brief were *Waggoner Carr,* Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, *Stanton Stone,* Executive Assistant Attorney General, and *Howard M. Fender* and *Allo B. Crow, Jr.,* Assistant Attorneys General.

MR. JUSTICE BLACK delivered the opinion of the Court.

The Sixth Amendment provides in part that:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the wit-

> nesses against him . . . and to have the Assistance of Counsel for his defence."

Two years ago in *Gideon* v. *Wainwright,* 372 U. S. 335, we held that the Fourteenth Amendment makes the Sixth Amendment's guarantee of right to counsel obligatory upon the States. The question we find necessary to decide in this case is whether the Amendment's guarantee of a defendant's right "to be confronted with the witnesses against him," which has been held to include the right to cross-examine those witnesses, is also made applicable to the States by the Fourteenth Amendment.

The petitioner Pointer and one Dillard were arrested in Texas and taken before a state judge for a preliminary hearing (in Texas called the "examining trial") on a charge of having robbed Kenneth W. Phillips of $375 "by assault, or violence, or by putting in fear of life or bodily injury," in violation of Texas Penal Code Art. 1408. At this hearing an Assistant District Attorney conducted the prosecution and examined witnesses, but neither of the defendants, both of whom were laymen, had a lawyer. Phillips as chief witness for the State gave his version of the alleged robbery in detail, identifying petitioner as the man who had robbed him at gunpoint. Apparently Dillard tried to cross-examine Phillips but Pointer did not, although Pointer was said to have tried to cross-examine some other witnesses at the hearing. Petitioner was subsequently indicted on a charge of having committed the robbery. Some time before the trial was held, Phillips moved to California. After putting in evidence to show that Phillips had moved and did not intend to return to Texas, the State at the trial offered the transcript of Phillips' testimony given at the preliminary hearing as evidence against petitioner. Petitioner's counsel immediately objected to introduction of the transcript, stating, "Your Honor, we will object to that, as it is a denial of the confrontment of the witnesses against the Defendant."

Similar objections were repeatedly made by petitioner's counsel but were overruled by the trial judge, apparently in part because, as the judge viewed it, petitioner had been present at the preliminary hearing and therefore had been "accorded the opportunity of cross examining the witnesses there against him." The Texas Court of Criminal Appeals, the highest state court to which the case could be taken, affirmed petitioner's conviction, rejecting his contention that use of the transcript to convict him denied him rights guaranteed by the Sixth and Fourteenth Amendments. 375 S. W. 2d 293. We granted certiorari to consider the important constitutional question the case involves. 379 U. S. 815.

In this Court we do not find it necessary to decide one aspect of the question petitioner raises, that is, whether failure to appoint counsel to represent him at the preliminary hearing unconstitutionally denied him the assistance of counsel within the meaning of *Gideon* v. *Wainwright, supra.* In making that argument petitioner relies mainly on *White* v. *Maryland,* 373 U. S. 59, in which this Court reversed a conviction based in part upon evidence that the defendant had pleaded guilty to the crime at a preliminary hearing where he was without counsel. Since the preliminary hearing there, as in *Hamilton* v. *Alabama,* 368 U. S. 52, was one in which pleas to the charge could be made, we held in *White* as in *Hamilton* that a preliminary proceeding of that nature was so critical a stage in the prosecution that a defendant at that point was entitled to counsel. But the State informs us that at a Texas preliminary hearing, such as is involved here, pleas of guilty or not guilty are not accepted and that the judge decides only whether the accused should be bound over to the grand jury and if so whether he should be admitted to bail. Because of these significant differences in the procedures of the respective States, we cannot say that the *White* case is necessarily controlling

as to the right to counsel. Whether there might be other circumstances making this Texas preliminary hearing so critical to the defendant as to call for appointment of counsel at that stage we need not decide on this record, and that question we reserve. In this case the objections and arguments in the trial court as well as the arguments in the Court of Criminal Appeals and before us make it clear that petitioner's objection is based not so much on the fact that he had no lawyer when Phillips made his statement at the preliminary hearing, as on the fact that use of the transcript of that statement at the trial denied petitioner any opportunity to have the benefit of counsel's cross-examination of the principal witness against him. It is that latter question which we decide here.

I.

The Sixth Amendment is a part of what is called our Bill of Rights. In *Gideon* v. *Wainwright, supra,* in which this Court held that the Sixth Amendment's right to the assistance of counsel is obligatory upon the States, we did so on the ground that "a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment." 372 U. S., at 342. And last Term in *Malloy* v. *Hogan,* 378 U. S. 1, in holding that the Fifth Amendment's guarantee against self-incrimination was made applicable to the States by the Fourteenth, we reiterated the holding of *Gideon* that the Sixth Amendment's right-to-counsel guarantee is " 'a fundamental right, essential to a fair trial,' " and "thus was made obligatory on the States by the Fourteenth Amendment." 378 U. S., at 6. See also *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52. We hold today that the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment.

It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. See, *e. g.*, 5 Wigmore, Evidence § 1367 (3d ed. 1940). The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution. Moreover, the decisions of this Court and other courts* throughout the years have constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases. This Court in *Kirby* v. *United States,* 174 U. S. 47, 55, 56, referred to the right of confrontation as "[o]ne of the fundamental guarantees of life and liberty," and "a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not of all the States composing the Union." Mr. Justice Stone, writing for the Court in *Alford v. United States,* 282 U. S. 687, 692, declared that the right of cross-examination is "one of the safeguards essential to a fair trial." And in speaking of confrontation and cross-examination this Court said in *Greene* v. *McElroy,* 360 U. S. 474:

> "They have ancient roots. They find expression in the Sixth Amendment which provides that in all

*See state and English cases collected in 5 Wigmore, Evidence §§ 1367, 1395 (3d ed. 1940). State constitutional and statutory provisions similar to the Sixth Amendment are collected in 5 Wigmore, *supra,* § 1397, n. 1.

> criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion." 360 U. S., at 496–497 (footnote omitted).

There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law. In *In re Oliver,* 333 U. S. 257, this Court said:

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." 333 U. S., at 273 (footnote omitted).

And earlier this Term in *Turner* v. *Louisiana,* 379 U. S. 466, 472–473, we held:

> "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."

Compare *Willner* v. *Committee on Character & Fitness,* 373 U. S. 96, 103–104.

We are aware that some cases, particularly *West* v. *Louisiana,* 194 U. S. 258, 264, have stated that the Sixth Amendment's right of confrontation does not apply to trials in state courts, on the ground that the entire Sixth Amendment does not so apply. See also *Stein* v. *New York,* 346 U. S. 156, 195–196. But of course since *Gideon* v. *Wainwright, supra,* it no longer can broadly be said that the Sixth Amendment does not apply to state courts. And as this Court said in *Malloy* v. *Hogan, supra,* "The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme." 378 U. S., at 5. In the light of *Gideon, Malloy,* and other cases cited in those opinions holding various provisions of the Bill of Rights applicable to the States by virtue of the Fourteenth Amendment, the statements made in *West* and similar cases generally declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law. We hold that petitioner was entitled to be tried in accordance with the protection of the confrontation guarantee of the Sixth Amendment, and that that guarantee, like the right against compelled self-incrimination, is "to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Malloy* v. *Hogan, supra,* 378 U. S., at 10.

II.

Under this Court's prior decisions, the Sixth Amendment's guarantee of confrontation and cross-examination was unquestionably denied petitioner in this case. As has been pointed out, a major reason underlying the

constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him. See, *e. g., Dowdell* v. *United States,* 221 U. S. 325, 330; *Motes* v. *United States,* 178 U. S. 458, 474; *Kirby* v. *United States,* 174 U. S. 47, 55–56; *Mattox* v. *United States,* 156 U. S. 237, 242–243. Cf. *Hopt* v. *Utah,* 110 U. S. 574, 581; *Queen* v. *Hepburn,* 7 Cranch 290, 295. This Court has recognized the admissibility against an accused of dying declarations, *Mattox* v. *United States,* 146 U. S. 140, 151, and of testimony of a deceased witness who has testified at a former trial, *Mattox* v. *United States,* 156 U. S. 237, 240–244. See also *Dowdell* v. *United States, supra,* 221 U. S., at 330; *Kirby* v. *United States, supra,* 174 U. S., at 61. Nothing we hold here is to the contrary. The case before us would be quite a different one had Phillips' statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine. Compare *Motes* v. *United States, supra,* 178 U. S., at 474. There are other analogous situations which might not fall within the scope of the constitutional rule requiring confrontation of witnesses. The case before us, however, does not present any situation like those mentioned above or others analogous to them. Because the transcript of Phillips' statement offered against petitioner at his trial had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross-examine Phillips, its introduction in a federal court in a criminal case against Pointer would have amounted to denial of the privilege of confrontation guaranteed by the Sixth Amendment. Since we hold that the right of an accused to be confronted with the witnesses against him must be determined by the same standards whether the right is denied in a federal or state proceed-

ing, it follows that use of the transcript to convict petitioner denied him a constitutional right, and that his conviction must be reversed.

Reversed and remanded.

MR. JUSTICE HARLAN, concurring in the result.

I agree that in the circumstances the admission of the statement in question deprived the petitioner of a right of "confrontation" assured by the Fourteenth Amendment. I cannot subscribe, however, to the constitutional reasoning of the Court.

The Court holds that the right of confrontation guaranteed by the Sixth Amendment in federal criminal trials is carried into state criminal cases by the Fourteenth Amendment. This is another step in the onward march of the long-since discredited "incorporation" doctrine (see, *e. g.*, Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949); Frankfurter, Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment, 78 Harv. L. Rev. 746 (1965)), which for some reason that I have not yet been able to fathom has come into the sunlight in recent years. See, *e. g.*, *Mapp* v. *Ohio,* 367 U. S. 643; *Ker* v. *California,* 374 U. S. 23; *Malloy* v. *Hogan,* 378 U. S. 1.

For me this state judgment must be reversed because a right of confrontation is "implicit in the concept of ordered liberty," *Palko* v. *Connecticut,* 302 U. S. 319, 325, reflected in the Due Process Clause of the Fourteenth Amendment independently of the Sixth.

While either of these constitutional approaches brings one to the same end result in this particular case, there is a basic difference between the two in the kind of future constitutional development they portend. The concept of Fourteenth Amendment due process embodied in *Palko*

and a host of other thoughtful past decisions now rapidly falling into discard, recognizes that our Constitution tolerates, indeed encourages, differences between the methods used to effectuate legitimate federal and state concerns, subject to the requirements of fundamental fairness "implicit in the concept of ordered liberty." The philosophy of "incorporation," on the other hand, subordinates all such state differences to the particular requirements of the Federal Bill of Rights (but see *Ker* v. *California, supra,* at 34) and increasingly subjects state legal processes to enveloping federal judicial authority. "Selective" incorporation or "absorption" amounts to little more than a diluted form of the full incorporation theory. Whereas it rejects full incorporation because of recognition that not all of the guarantees of the Bill of Rights should be deemed "fundamental," it at the same time ignores the possibility that not all phases of any given guaranty described in the Bill of Rights are necessarily fundamental.

It is too often forgotten in these times that the American federal system is itself constitutionally ordained, that it embodies values profoundly making for lasting liberties in this country, and that its legitimate requirements demand continuing solid recognition in all phases of the work of this Court. The "incorporation" doctrines, whether full blown or selective, are both historically and constitutionally unsound and incompatible with the maintenance of our federal system on even course.

MR. JUSTICE STEWART, concurring in the result.

I join in the judgment reversing this conviction, for the reason that the petitioner was denied the opportunity to cross-examine, through counsel, the chief witness for the prosecution. But I do not join in the Court's pronouncement which makes "the Sixth Amendment's right of an accused to confront the witnesses against him . . . oblig-

atory on the States." That questionable *tour de force* seems to me entirely unnecessary to the decision of this case, which I think is directly controlled by the Fourteenth Amendment's guarantee that no State shall "deprive any person of life, liberty, or property, without due process of law."

The right of defense counsel in a criminal case to cross-examine the prosecutor's living witnesses is "[o]ne of the fundamental guarantees of life and liberty," [1] and "one of the safeguards essential to a fair trial." [2] It is, I think, as indispensable an ingredient as the "right to be tried in a courtroom presided over by a judge." [3] Indeed, this Court has said so this very Term. *Turner* v. *Louisiana,* 379 U. S. 466, 472–473.[4]

Here that right was completely denied. Therefore, as the Court correctly points out, we need not consider the case which could be presented if Phillips' statement had been taken at a hearing at which the petitioner's counsel was given a full opportunity to cross-examine. See *West* v. *Louisiana,* 194 U. S. 258.

MR. JUSTICE GOLDBERG, concurring.

I agree with the holding of the Court that "the Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment." *Ante,* at 403. I therefore join in the opinion and judgment of the Court. My Brother HARLAN, while agreeing with the result reached by the Court, deplores the Court's

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[1] *Kirby* v. *United States,* 174 U. S. 47, 55.

[2] *Alford* v. *United States,* 282 U. S. 687, 692.

[3] *Rideau* v. *Louisiana,* 373 U. S. 723, 727.

[4] See also *In re Murchison,* 349 U. S. 133, where the Court said that "due process requires as a minimum that an accused be given a public trial after reasonable notice of the charges, have a right to examine witnesses against him, call witnesses on his own behalf, and be represented by counsel." 349 U. S., at 134.

reasoning as "another step in the onward march of the long-since discredited 'incorporation' doctrine," *ante,* at 408. Since I was not on the Court when the incorporation issue was joined, see *Adamson* v. *California,* 332 U. S. 46, I deem it appropriate to set forth briefly my view on this subject.

I need not recapitulate the arguments for or against incorporation whether "total" or "selective." They have been set forth adequately elsewhere.[1] My Brother BLACK'S view of incorporation has never commanded a majority of the Court, though in *Adamson* it was assented to by four Justices. The Court in its decisions has followed a course whereby certain guarantees "have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment," *Palko* v. *Connecticut,* 302 U. S. 319, 326, by a process which might aptly be described as "a process of absorption." *Ibid.* See *Cohen* v. *Hurley,* 366 U. S. 117, 154 (dissenting opinion of MR. JUSTICE BRENNAN); Brennan, The Bill of Rights and the States, 36 N. Y. U. L. Rev. 761 (1961). Thus the Court has held that the Fourteenth

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[1] See *Adamson* v. *California, supra,* at 59 (concurring opinion of Mr. Justice Frankfurter); *id.,* at 68 (dissenting opinion of MR. JUSTICE BLACK); *Malloy* v. *Hogan,* 378 U. S. 1; *id.,* at 14 (dissenting opinion of MR. JUSTICE HARLAN); *Gideon* v. *Wainwright,* 372 U. S. 335, 345 (concurring opinion of MR. JUSTICE DOUGLAS); *id.,* at 349 (concurring opinion of MR. JUSTICE HARLAN); *Poe* v. *Ullman,* 367 U. S. 497, 509 (dissenting opinion of MR. JUSTICE DOUGLAS); Frankfurter, Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment, 78 Harv. L. Rev. 746; Black, The Bill of Rights, 35 N. Y. U. L. Rev. 865 (1960); Brennan, The Bill of Rights and the States, 36 N. Y. U. L. Rev. 761 (1961); Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949); Green, The Bill of Rights, the Fourteenth Amendment and the Supreme Court, 46 Mich. L. Rev. 869 (1948); Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 Yale L. J. 74 (1963).

Amendment guarantees against infringement by the States the liberties of the First Amendment,[2] the Fourth Amendment,[3] the Just Compensation Clause of the Fifth Amendment,[4] the Fifth Amendment's privilege against self-incrimination,[5] the Eighth Amendment's prohibition of cruel and unusual punishments,[6] and the Sixth Amendment's guarantee of the assistance of counsel for an accused in a criminal prosecution.[7]

With all deference to my Brother HARLAN, I cannot agree that this process has "come into the sunlight in recent years." *Ante*, at 408. Rather, I believe that it has its origins at least as far back as *Twining* v. *New Jersey*, 211 U. S. 78, 99, where the Court stated that "it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226." This passage and the authority cited make clear that what is protected by the Fourteenth Amendment are "rights," which apply in every case, not solely in those cases where it seems "fair" to a majority of the Court to afford the protection. Later cases reaffirm that the process of "absorption" is one of extending "rights." See *Ker* v. *California*, 374 U. S. 23; *Malloy* v. *Hogan*, 378 U. S. 1, and cases cited by MR. JUSTICE BRENNAN in his dissenting opinion in *Cohen* v. *Hurley*, *supra*, at 156. I agree with these decisions, as is apparent from my votes in

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[2] See, *e. g.*, *Gitlow* v. *New York*, 268 U. S. 652, 666; *De Jonge* v. *Oregon*, 299 U. S. 353, 364; *Cantwell* v. *Connecticut*, 310 U. S. 296, 303; *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U. S. 293, 296; *New York Times Co.* v. *Sullivan*, 376 U. S. 254.

[3] See *Wolf* v. *Colorado*, 338 U. S. 25; *Mapp* v. *Ohio*, 367 U. S. 643.

[4] *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226.

[5] *Malloy* v. *Hogan*, 378 U. S. 1.

[6] *Robinson* v. *California*, 370 U. S. 660.

[7] *Gideon* v. *Wainwright*, 372 U. S. 335.

Gideon v. *Wainwright,* 372 U. S. 335; *Malloy* v. *Hogan, supra,* and *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, and my concurring opinion in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 297, and I subscribe to the process by which fundamental guarantees of the Bill of Rights are absorbed by the Fourteenth Amendment and thereby applied to the States.

Furthermore, I do not agree with my Brother HARLAN that once a provision of the Bill of Rights has been held applicable to the States by the Fourteenth Amendment, it does not apply to the States in full strength. Such a view would have the Fourteenth Amendment apply to the States "only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'" *Malloy* v. *Hogan, supra,* at 10–11. It would allow the States greater latitude than the Federal Government to abridge concededly fundamental liberties protected by the Constitution. While I quite agree with Mr. Justice Brandeis that "[i]t is one of the happy incidents of the federal system that a . . . State may . . . serve as a laboratory; and try novel social and economic experiments," *New State Ice Co.* v. *Liebmann,* 285 U. S. 262, 280, 311 (dissenting opinion), I do not believe that this includes the power to experiment with the fundamental liberties of citizens safeguarded by the Bill of Rights. My Brother HARLAN'S view would also require this Court to make the extremely subjective and excessively discretionary determination as to whether a practice, forbidden the Federal Government by a fundamental constitutional guarantee, is, as viewed in the factual circumstances surrounding each individual case, sufficiently repugnant to the notion of due process as to be forbidden the States.

Finally, I do not see that my Brother HARLAN'S view would further any legitimate interests of federalism. It would require this Court to intervene in the state judicial process with considerable lack of predictability and with

a consequent likelihood of considerable friction. This is well illustrated by the difficulties which were faced and were articulated by the state courts attempting to apply this Court's now discarded rule of *Betts* v. *Brady,* 316 U. S. 455. See Green, The Bill of Rights, the Fourteenth Amendment and the Supreme Court, 46 Mich. L. Rev. 869, 897–898. These difficulties led the Attorneys General of 22 States to urge that this Court overrule *Betts* v. *Brady* and apply fully the Sixth Amendment's guarantee of right to counsel to the States through the Fourteenth Amendment. See *Gideon* v. *Wainwright, supra,* at 336. And, to deny to the States the power to impair a fundamental constitutional right is not to increase federal power, but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual. In my view this promotes rather than undermines the basic policy of avoiding excess concentration of power in government, federal or state, which underlies our concepts of federalism.

I adhere to and support the process of absorption by means of which the Court holds that certain fundamental guarantees of the Bill of Rights are made obligatory on the States through the Fourteenth Amendment. Although, as this case illustrates, there are differences among members of the Court as to the theory by which the Fourteenth Amendment protects the fundamental liberties of individual citizens, it is noteworthy that there is a large area of agreement, both here and in other cases, that certain basic rights are fundamental—not to be denied the individual by either the state or federal governments under the Constitution. See, *e. g., Cantwell* v. *Connecticut,* 310 U. S. 296; *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449; *Gideon* v. *Wainwright, supra; New York Times Co.* v. *Sullivan, supra; Turner* v. *Louisiana,* 379 U. S. 466.

DOUGLAS *v.* ALABAMA.

CERTIORARI TO THE COURT OF APPEALS OF ALABAMA.

No. 313. Argued March 9–10, 1965.—Decided April 5, 1965.

Petitioner and an alleged accomplice were tried separately in state court for assault with intent to murder. The alleged accomplice was called as a state witness in petitioner's trial but repeatedly refused on self-incrimination grounds to testify. Under the guise of cross-examining the accomplice as a hostile witness, the prosecutor, over petitioner's objections and despite the accomplice's continuing refusal to answer, read in the presence of the jury the latter's purported confession which implicated the petitioner. Three law enforcement officers then identified the document as the confession signed by the accomplice though it was not offered in evidence. The jury found petitioner guilty. *Held:*

1. Petitioner's inability to cross-examine the alleged accomplice about the purported confession, the prosecutor's reading of which may well have been treated by the jury as substantial and cogent evidence of guilt, denied petitioner the right of cross-examination secured by the Confrontation Clause of the Sixth Amendment which is made applicable to the States by the Fourteenth. *Pointer* v. *Texas, ante,* p. 400, followed. Pp. 418–420.

2. The opportunity to cross-examine the law enforcement officers did not redress denial of petitioner's right of confrontation. Pp. 419–420.

3. Petitioner's objections to the reading of the purported confession adequately preserved his claim of denial of a federal constitutional right regardless of their adequacy under state law as construed by the state appellate court. Pp. 420–423.

42 Ala. App. 314, 163 So. 2d 477, reversed and remanded.

Charles Cleveland argued the cause for petitioner. With him on the brief were *Bryan A. Chancey* and *Robert S. Gordon.*

Paul T. Gish, Jr., Assistant Attorney General of Alabama, argued the cause for respondent. With him on the brief was *Richmond M. Flowers,* Attorney General of Alabama.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The petitioner and one Loyd were tried separately in Alabama's Circuit Court on charges of assault with intent to murder. Loyd was tried first and was found guilty. The State then called Loyd as a witness at petitioner's trial. Because Loyd planned to appeal his conviction, his lawyer, who also represented petitioner, advised Loyd to rely on the privilege against self-incrimination and not to answer any questions. When Loyd was sworn, the lawyer objected, on self-incrimination grounds, "to this witness appearing on the stand," but the objection was overruled. Loyd gave his name and address but, invoking the privilege, refused to answer any questions concerning the alleged crime. The trial judge ruled that Loyd could not rely on the privilege because of his conviction, and ordered him to answer, but Loyd persisted in his refusal.[1] The judge thereupon granted the State Solicitor's motion "to declare [Loyd] a hostile witness and give me the privilege of cross-examination." The Solicitor then produced a document said to be a confession signed by Loyd. Under the guise of cross-examination to refresh Loyd's recollection, the Solicitor purported to read from the document, pausing after every few sentences to ask Loyd, in the presence of the jury, "Did you make that statement?" Each time, Loyd asserted the privilege and refused to answer, but the Solicitor continued this form of questioning until the entire docu-

[1] Loyd had not been sentenced at the time of petitioner's trial. The trial judge initially threatened to hold Loyd in contempt for persisting in his refusal to answer after the judge had ruled that Loyd could not rely on the privilege since "the jury has already determined your guilt." However, the judge did not proceed with the contempt citation but interrupted petitioner's trial to sentence Loyd to 20 years' imprisonment.

ment had been read.[2] The Solicitor then called three law enforcement officers who identified the document as embodying a confession made and signed by Loyd. Although marked as an exhibit for identification, the document was not offered in evidence.

This procedure, petitioner argues, violated his rights under the Confrontation Clause of the Sixth Amendment as applied to the States. The statements from the document as read by the Solicitor recited in considerable detail the circumstances leading to and surrounding the alleged crime; of crucial importance, they named the petitioner as the person who fired the shotgun blast which wounded the victim.[3] The jury found petitioner guilty.

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[2] There were 21 questions occupying seven pages in the printed record.

[3] Two of the Solicitor's questions were as follows:

"Did you make the further statement, 'We intended to shoot these trucks before they got to Centreville, but when we turned and went back north and passed the trucks again I was unable to bring myself to the point of shooting the trucks. After we passed the trucks this time we turned around and went south again toward Centreville, Alabama. These trucks were both stopped at a truck stop in Centreville where we passed them again and we proceeded on south on No. 5 about twenty miles. We sat alongside of the highway waiting for the trucks to come on and several trucks passed us, so we thought we ought to move before someone recognized us. We went back north again and saw a station wagon that looked suspicious so we turned off No. 5 onto 16. We drove over this route about six or eight miles and pulled in behind a church. We sat there for about five minutes and then heard what sounded like two trucks together going south on No. 5. We thought this was the two trucks and we went back to No. 5. When we got to No. 5 I told Douglas that I would drive and he said that was fine because I knew the car better than he. I drove on until we caught these trucks about five or eight miles above the junction of No. 5 and No. 80 and we passed them proceeding on to the junction where we turned around and headed back north to meet these trucks. Jesse Douglas was in the back seat with the automatic shotgun that belongs to B. F. Jackson and had it loaded with buckshot. He rolled down the window and

The Court of Appeals of Alabama affirmed, 42 Ala. App. 314, 163 So. 2d 477. Although stating that Loyd's alleged confession was inadmissible in evidence against petitioner under state law because "[t]here must be confrontation face to face to allow viva voce cross-examination before the jury," and noting that "it might be claimed that the repeated and cumulative use of the confession might have been an indirect mode of getting the inadmissible confession in evidence," the Court of Appeals affirmed petitioner's conviction on the ground that petitioner's counsel had "stopped objecting" and that in that circumstance, "the failure to object was waiver." 42 Ala. App., at 329, 332, 163 So. 2d, at 493, 495. The Supreme Court of Alabama denied review, 276 Ala. 703, 163 So. 2d 496. We granted certiorari, 379 U. S. 815. We reverse.

I.

We decide today that the Confrontation Clause of the Sixth Amendment is applicable to the States. *Pointer* v. *Texas, ante,* p. 400. Our cases construing the clause hold that a primary interest secured by it is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation. As the Court said in *Mattox* v. *United States,*

> "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner

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when we passed these trucks he shot the lead truck as we passed them heading back north as they were coming south. We then went on to Highway 14, turned left and went into Greensboro, Alabama. We turned left in Greensboro on No. 69, drove south about five miles and realized we were going the wrong direction to go to Tuscaloosa, Alabama. We turned around and went back up to No. 69 to Tuscaloosa.' Did you make that statement?"

"Were you asked the question, 'How many shots were fired at the truck?' And your answer, 'Only one.' Did you say that?"

> in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." 156 U. S. 237, 242–243.

See also 5 Wigmore, Evidence §§ 1365, 1397 (3d ed. 1940); *State* v. *Hester,* 137 S. C. 145, 189, 134 S. E. 885, 900 (1926).

In the circumstances of this case, petitioner's inability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause. Loyd's alleged statement that the petitioner fired the shotgun constituted the only direct evidence that he had done so; coupled with the description of the circumstances surrounding the shooting, this formed a crucial link in the proof both of petitioner's act and of the requisite intent to murder. Although the Solicitor's reading of Loyd's alleged statement, and Loyd's refusals to answer, were not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement; and Loyd's reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true. *Slochower* v. *Board of Higher Education,* 350 U. S. 551, 557–558; *United States* v. *Maloney,* 262 F. 2d 535, 537 (C. A. 2d Cir. 1959). Since the Solicitor was not a witness, the inference from his reading that Loyd made the statement could not be tested by cross-examination. Similarly, Loyd could not be cross-examined on a statement imputed to but not admitted by him. Nor was the opportunity to cross-examine the law en-

forcement officers adequate to redress this denial of the essential right secured by the Confrontation Clause. Indeed, their testimony enhanced the danger that the jury would treat the Solicitor's questioning of Loyd and Loyd's refusal to answer as proving the truth of Loyd's alleged confession. But since their evidence tended to show only that Loyd made the confession, cross-examination of them as to its genuineness could not substitute for cross-examination of Loyd to test the truth of the statement itself. *Motes* v. *United States,* 178 U. S. 458; cf. *Kirby* v. *United States,* 174 U. S. 47.

Hence, effective confrontation of Loyd was possible only if Loyd affirmed the statement as his. However, Loyd did not do so, but relied on his privilege to refuse to answer. We need not decide whether Loyd properly invoked the privilege in light of his conviction. It is sufficient for the purposes of deciding petitioner's claim under the Confrontation Clause that no suggestion is made that Loyd's refusal to answer was procured by the petitioner, see *Motes* v. *United States, supra,* at 471; on this record it appears that Loyd was acting entirely in his own interests in doing so. This case cannot be characterized as one where the prejudice in the denial of the right of cross-examination constituted a mere minor lapse. The alleged statements clearly bore on a fundamental part of the State's case against petitioner. The circumstances are therefore such that "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." *Namet* v. *United States,* 373 U. S. 179, 187. See also *Fletcher* v. *United States,* 118 U. S. App. D. C. 137, 332 F. 2d 724 (1964).

II.

We cannot agree with the Alabama Court of Appeals that petitioner's counsel waived the right to confrontation

through failure to make sufficient objection to the reading of Loyd's alleged confession. The court stated: "There must be a ruling sought and acted on before the trial judge can be put in error. Here there was no ruling asked or invoked as to the questions embracing the alleged confession." 42 Ala. App., at 332, 163 So. 2d, at 495. Yet, as the colloquy set out in the margin shows, petitioner's counsel did object three times to the reading of the confession before the jury.[4] After the second time, the Solic-

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[4] The following occurred:

"Q. Is that your signature (showing witness signature on confession)?

"A. I'm not sure.

"Q. I will ask you if on January 20, 1962—

"Mr. Esco: (Interrupting) If your Honor please, I object to the reading of any document or purported confession,—

"Mr. McLeod: (Interrupting) This is cross-examination.

"The Court: Hostile witness. Overrule.

"Mr. Esco: We except, if you please.

"Q. I will ask you if on the night of January 20, 1962, in Selma, Alabama, in the Dallas County jail if you didn't make the following statement: (reading) 'I, Olen Ray Loyd, make the—'

"Mr. Esco: (Interrupting) I object to this being read in the presence of the jury.

"Mr. McLeod: You've already got an objection in there.

"Mr. Esco: I object to this being read in the presence of the jury.

"The Court: Overrule.

"Mr. Esco: We except."

After the questions were read, defense counsel renewed his objections:

"Mr. Esco: I'd first like to object to the reading of this purported confession on the grounds that it is hearsay evidence, that it was made outside the hearing of this defendant, it was not subject to cross-examination, and we move to exclude it from the evidence.

"The Court: The Court will deny your motion.

"Mr. Esco: We except, if you please. And at this time, your Honor, we make a motion for a mistrial on the grounds that this jury has been so prejudiced from these proceedings, and from the attempts

itor assured him that he already had an objection in—plainly implying that further objection to the reading of the document was unnecessary. The ground for objection to later questions would have been the same, that the confession was being read to the jury. In light of this record it is difficult to understand the Court of Appeals' conclusion; nevertheless, accepting the finding as an authoritative interpretation of Alabama law, we follow our consistent holdings that the adequacy of state procedural bars to the assertion of federal questions is itself a federal question. See *Wright* v. *Georgia,* 373 U. S. 284, 289–291. In determining the sufficiency of objections we have applied the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here. *Davis* v. *Wechsler,* 263 U. S. 22, 24; *Love* v. *Griffith,* 266 U. S. 32, 33–34. No legitimate state interest would have been served by requiring repetition of a patently futile objection, already thrice rejected, in a situation in which repeated objection might well affront the court or prejudice the jury beyond repair. Too, after the confession was read, the defense moved to exclude it; it then moved for a mistrial and for a new

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of the prosecution to use illegal evidence, that no fair and just verdict whatsoever could come from a jury that has been so prejudiced.

"The Court: Motion is denied.

"Mr. Esco: We except, if you please.

. . . . . .

"Mr. Esco: We would like to make a motion for a new trial on the grounds that the proceedings have been very irregular here today and we feel that it has been prejudicial to this defendant.

"The Court: . . . Your objection is overruled.

"Mr. Esco: It is a motion, your Honor.

"The Court: Your motion is overruled.

"Mr. Esco: We except, if you please."

trial; all three motions were denied. After two of the three law enforcement officers had testified, the defense renewed its objections to the hearsay references in Loyd's alleged confession and again was overruled. On these facts, it is clear that the defense brought the objection to the attention of the court at several points, at any of which corrective action could have been taken by stopping the questioning, excusing the jury, or excluding the evidence. To the extent that the Alabama rule requires objection after each and every question in this prolonged series, it is plainly inadequate to bar our review of the federal question presented.

Reversed and remanded.

MR. JUSTICE HARLAN, concurring in the result.

For reasons stated in the opinion of the Court, I agree that petitioner was denied a right of "confrontation" embodied in the concept of ordered liberty. I concur in the judgment of reversal on the premises stated in my opinion concurring in the result in *Pointer* v. *Texas, ante,* p. 408, decided today.

MR. JUSTICE STEWART, concurring in the result.

The Court says that what happened in this case violated the petitioner's "rights under the Confrontation Clause of the Sixth Amendment as applied to the States." I concur in the Court's judgment, because I think the petitioner was deprived of his liberty without due process of law in violation of the Fourteenth Amendment. This difference in view is, of course, far more than a matter of mere semantics. See my opinion concurring in the result in *Pointer* v. *Texas, ante,* p. 409.

BURNETT *v.* NEW YORK CENTRAL RAILROAD CO.

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

No. 437. Argued March 11, 1965.—Decided April 5, 1965.

Petitioner brought an action in an Ohio court with jurisdiction against respondent, who was properly served with process, under the Federal Employers' Liability Act (FELA) only a few days before the expiration of the three-year limitation period provided by the Act. Because under Ohio law venue was improper, the action was dismissed. Eight days later, and after the expiration of the three-year period, petitioner filed the FELA action in the federal court. The District Court dismissed the complaint as untimely and the Court of Appeals affirmed. *Held:* Where a timely FELA action is begun in a state court having jurisdiction, the defendant is served with process, and the case is dismissed for improper venue, the FELA time limitation is tolled during the pendency of the state suit and until the state court order dismissing the action becomes final. Pp. 426–436.

332 F. 2d 529, reversed and remanded.

Douglas G. Cole argued the cause for petitioner. With him on the brief was *Otto F. Putnick.*

Roy W. Short argued the cause and filed a brief for respondent.

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

On March 13, 1963, petitioner, a resident of Kentucky, began an action under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. § 51 *et seq.* (1958 ed.), in the Common Pleas Court of Hamilton County, Ohio. He alleged that he had been injured on March 17, 1960, in Indiana, while in the course of his employment with respondent, the New York Central Railroad. The

Ohio court had jurisdiction of the action, and respondent was properly served with process. The action was dismissed upon respondent's motion, however, because venue was improper. While in Ohio in most transitory actions venue is proper wherever the defendant can be summoned, see Ohio Rev. Code §§ 2307.36, 2307.38, 2307.39, venue is properly laid in actions against railroads to recover for personal injuries only in the county of the plaintiff's residence or the county where the injury occurred.[1] See Ohio Rev. Code § 2307.37, *Loftus* v. *Pennsylvania R. Co.*, 107 Ohio St. 352, 140 N. E. 94. On June 12, 1963, eight days after his state court action was dismissed, petitioner brought an identical action in the Federal District Court for the Southern District of Ohio. The District Court dismissed petitioner's complaint on the ground that although the state suit was brought within the limitations period, the federal action was not timely and was then barred by the limitation provision of the FELA, 35 Stat. 66, as amended, 45 U. S. C. § 56 (1958 ed.), which provides: "That no action shall be maintained under this Act unless commenced within three years from the day the cause of action accrued." 230 F. Supp. 767. The Court of Appeals, rejecting petitioner's argument that his suit in the state court had tolled the FELA limitation provision, affirmed the District Court's dismissal of his suit. 332 F. 2d 529. The Court of Appeals reasoned that since the limitation provision does not limit a common-law right, but, rather, is contained in the same Act which creates the right being limited, the limitation is "substantive" and not "procedural." For this reason, it held, "[f]ailure to bring the action within the time pre-

[1] Counsel for petitioner stated at oral argument that the constitutionality of this special venue provision for actions against railroads was being challenged in other litigation. No constitutional issue was raised in these proceedings, and we express no views upon any such question.

scribed extinguished the cause of action." 332 F. 2d, at 530. We granted certiorari to determine whether petitioner's suit in the Ohio state court tolled the FELA statute of limitations. 379 U. S. 913.

There is no doubt that, as a matter of federal law, the state action here involved was properly "commenced" within the meaning of the federal limitation statute which provides that "no action shall be maintained . . . unless commenced within three years from the day the cause of action accrued." As this Court held in *Herb* v. *Pitcairn*, 325 U. S. 77, 79, "when process has been adequate to bring in the parties and to start the case on a course of judicial handling which may lead to final judgment without issuance of new initial process, it is enough to commence the action within the federal statute." Had Ohio law permitted this state court action simply to be *transferred* to another state court, *Herb* v. *Pitcairn* holds that it would have been timely. The problem here, however, is that the timely state court action was not transferable under Ohio law but, rather, was dismissed, and a new action was brought in a federal court more than three years after the cause of action accrued. Nonetheless, for the reasons set out below, we hold that the principles underlying the Court's decision in *Herb* v. *Pitcairn* lead to the conclusion that petitioner's state court action tolled the federal limitation provision and therefore petitioner's federal court action here was timely.

The basic question to be answered in determining whether, under a given set of facts, a statute of limitations is to be tolled, is one "of legislative intent whether the right shall be enforceable . . . after the prescribed time." *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356, 360. Classification of such a provision as "substantive" rather than "procedural" does not determine whether or under what circumstances the limitation

period may be extended.[2] As this Court has expressly held, the FELA limitation period is not totally inflexible, but, under appropriate circumstances, it may be extended beyond three years. *Glus* v. *Brooklyn Eastern Terminal,* 359 U. S. 231. See *Osbourne* v. *United States,* 164 F. 2d 767 (C. A. 2d Cir.); *Scarborough* v. *Atlantic Coast Line R. Co.,* 178 F. 2d 253 (C. A. 4th Cir.); *Frabutt* v. *New York, C. & St. L. R. Co.,* 84 F. Supp. 460 (D. C. W. D. Pa.). These authorities indicate that the basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances.

In order to determine congressional intent, we must examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act. Such an examination leads us to conclude that it effectuates the basic congressional purposes in enacting this humane and remedial Act,[3] as well as those policies

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[2] The distinction between substantive and procedural statutes of limitations appears to have arisen in cases involving conflicts of laws, see *The Harrisburg,* 119 U. S. 199; *Davis* v. *Mills,* 194 U. S. 451; Restatement of the Law, Conflict of Laws § 605. While the embodiment of a limitation provision in the statute creating the right which it modifies might conceivably indicate a legislative intent that the right and limitation be applied together when the right is sued upon in a foreign forum, the fact that the right and limitation are written into the same statute does not indicate a legislative intent as to whether or when the statute of limitations should be tolled. Thus the "substantive"-"procedural" distinction would seem to be of little help in deciding questions of extending the limitation period. See *Glus* v. *Brooklyn Eastern Terminal,* 359 U. S. 231; Developments in the Law—Statutes of Limitations, 63 Harv. L. Rev. 1177, 1186–1188 (1950); Note, 72 Yale L. J. 600, 604–605 (1963).

[3] See, *e. g., Rogers* v. *Missouri Pac. R. Co.,* 352 U. S. 500, 507. See also Griffith, The Vindication of a National Public Policy under the Federal Employers' Liability Act, 18 Law & Contemp. Prob. 160 (1953).

embodied in the Act's limitation provision, to hold that when a plaintiff begins a timely FELA action in a state court of competent jurisdiction, service of process is made upon the opposing party, and the state court action is later dismissed because of improper venue, the FELA limitation is tolled during the pendency of the state action.

Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, 348–349. Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights.[4]

This policy of repose, designed to protect defendants, is frequently outweighed, however, where the interests of justice require vindication of the plaintiff's rights. Thus, this Court has held that an FELA action is not barred, though brought more than three years after the cause of action accrued, where a defendant misled the plaintiff into believing that he had more than three years in which to bring the action. *Glus* v. *Brooklyn Eastern Terminal, supra.* Moreover, it has been held that the

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[4] See The Act of Limitation with a Proviso, 32 Hen. 8, c. 2 (1540): "Forasmuch as the Time of Limitation appointed for suing . . . extend, and be of so far and long Time past, that it is above the Remembrance of any living Man, truly to try and know the perfect Certainty of such Things, as hath or shall come in Trial . . . to the great Danger of Mens Consciences that have or shall be impanelled in any Jury for the Trial of the same . . . ."

FELA limitation provision is tolled when war has prevented a plaintiff from bringing his suit, even though a defendant in such a case might not know of the plaintiff's disability and might believe that the statute of limitations renders him immune from suit. See *Osbourne* v. *United States, supra; Frabutt* v. *New York, C. & St. L. R. Co., supra.* In such cases a plaintiff has not slept on his rights but, rather, has been prevented from asserting them.

Considerations in favor of tolling the federal statute of limitations in this case are similar to those leading to an extension of the limitation period in the cases mentioned above. Petitioner here did not sleep on his rights but brought an action within the statutory period in a state court of competent jurisdiction. Service of process was made upon the respondent notifying him that petitioner was asserting his cause of action. While venue was improper in the state court, under Ohio law venue objections may be waived by the defendant,[5] and evidently in past cases defendant railroads, including this respondent, had waived objections to venue so that suits by nonresidents of Ohio could proceed in state courts.[6] Petitioner, then, failed to file an FELA action in the federal courts, not because he was disinterested, but solely because he felt that his state action was sufficient. Respondent

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[5] *Skelly* v. *Jefferson State Bank,* 9 Ohio St. 606; *Ohio Southern R. Co.* v. *Morey,* 47 Ohio St. 207, 24 N. E. 269.

[6] Because of the provisions of Ohio Rev. Code § 2307.37, venue in a suit for injuries to person or property against a railroad is proper only in the county where the cause of action arose or where the plaintiff resides. Thus venue in an action by a resident of a foreign state against a railroad arising out of an accident outside the State is not proper anywhere within Ohio. Railroads can agree to venue in an Ohio state court in such a case, however, and evidently they have so agreed, as we were told on oral argument, for cases can be found which involve accidents occurring, and plaintiffs who reside, outside the county where suit was brought. See, *e. g., Woodworth* v. *New York Central R. Co.,* 149 Ohio St. 543, 80 N. E. 2d 142.

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could not have relied upon the policy of repose embodied in the limitation statute, for it was aware that petitioner was actively pursuing his FELA remedy; in fact, respondent appeared specially in the Ohio court to file a motion for dismissal on grounds of improper venue.

Both federal and state jurisdictions have recognized the unfairness of barring a plaintiff's action solely because a prior timely action is dismissed for improper venue after the applicable statute of limitations has run. In both federal and state systems of justice rules have been devised to prevent this from happening. Thus a federal statute, 28 U. S. C. § 1406 (a), allows a district court "of a district in which is filed a case laying venue in the wrong division or district . . . if it be in the interest of justice," to "transfer such case to any district or division in which it could have been brought."[7] Congress thereby recognized that the filing of a lawsuit "itself shows the proper diligence on the part of the plaintiff which . . . statutes of limitation were intended to insure. If by reason of the uncertainties of proper venue a mistake is made . . . 'the interest of justice' may require that the complaint . . . be transferred in order that the plaintiff not be penalized by . . . 'time-consuming and justice-defeating technicalities.'" *Goldlawr, Inc.* v. *Heiman,* 369 U. S. 463, 467. If petitioner in this case had instituted his suit in a federal court where venue was improper, his case could simply have been transferred under § 1406 (a) to a court with proper venue; the statute of limitations would not have barred his action.

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[7] Numerous cases hold that when dismissal of an action for improper venue would terminate rights without a hearing on the merits because plaintiff's action would be barred by a statute of limitations, "the interest of justice" requires that the cause be transferred. See, *e. g., Gold* v. *Griffith,* 190 F. Supp. 482 (D. C. N. D. Ind.); *Dennis* v. *Galvanek,* 171 F. Supp. 115 (D. C. M. D. Pa.); *Schultz* v. *McAfee,* 160 F. Supp. 210 (D. C. D. Me.).

The States have developed two methods for preserving causes of action which would otherwise be barred by the passing of a limitation period after a plaintiff has brought his action in a court with improper venue. The first method is analogous to the congressional statute, 28 U. S. C. § 1406 (a), and permits transfer within the State from a court with improper venue to one where venue is proper.[8] This Court has held that when a timely FELA action is brought in a state court without proper venue and service of process issues, the statute of limitations cannot bar the action when it is later transferred to a proper state court after the limitation period has run. *Herb* v. *Pitcairn, supra.* Thus, if venue for petitioner's action were proper in some other county in Ohio, and if Ohio chose to preserve improper venue actions by means of a "transfer" statute, petitioner's action would not have been barred by the statute of limitations. The second method used by many States to preserve actions brought in a court where venue is improper is a "saving" statute.[9]

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[8] Thirty-one States have transfer-of-venue statutes which appear to be relevant: Alaska Stat. § 22.10.040; Ariz. Rev. Stat. 1956, § 12–404; Deering's Cal. Code Civ. Proc. Ann. 1959, § 396; Colo. Rules Civ. Proc., Rule 98 (f); Conn. Gen. Stat. 1958, § 52–32; Fla. Stat. 1963, § 53.17; Idaho Code 1947, § 5–406; Smith-Hurd's Ill. Ann. Stat. 1956, c. 110, § 10; Burns' Ind. Ann. Stat. 1933, § 2–1401; Kan. Code Civ. Proc. Ann. 1963, § 60–611; Mass. Gen. Laws Ann. 1959, c. 223, § 15; Mich. Stat. Ann. 1962, § 27A.1651; Minn. Stat. Ann. 1947, § 542.10; Miss. Code 1942, § 1441; Mont. Rev. Codes 1947, § 93–2906; Nev. Rev. Stat. § 13.050; N. H. Rev. Stat. Ann. 1955, § 507:11; N. J. Court Rules Rev. 1:27D; McKinney's N. Y. Civ. Prac. Law & Rules 1963, § 510; N. C. Gen. Stat. § 1–25; N. D. Century Code 1960, § 28–04–07; Ore. Rev. Stat. § 14.110; S. C. Code 1962, § 10–310; S. D. Code § 33.0306; Vernon's Tex. Rules Civ. Proc., Rule 257; Utah Code Ann. 1953, § 78–13–8; Va. Code 1950, § 8–157; Wash. Rev. Code § 4.12.030; W. Va. Code 1961, § 5699; Wis. Stat. 1963, § 261.03; Wyo. Stat. 1957, Civ. Proc. Code § 1–53.

[9] Thirty-one States have "saving" statutes which appear to be relevant: Alaska Stat. § 09.10.240 (one year); Ark. Stat. 1947,

Such a statute specifically gives to a plaintiff whose timely action is dismissed for procedural reasons such as improper venue a specified time in which to bring a second action. Ohio has such a statute, Ohio Rev. Code § 2305.19, and, had petitioner's action been one arising under Ohio law, he would have had an additional year in which to file his action in a proper court. State causes of action brought in a court where venue is improper are preserved by one or the other of these two methods in 44 States.[10]

These factors point to the conclusion that Congress did not intend the statute of limitations to bar a plaintiff who brings a timely FELA action in a state court of competent jurisdiction, who serves the defendant with process, and whose action is later dismissed for improper venue. This does not mean that we can accept petitioner's argument that the federal limitation provision

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§ 37–222 (one year); Conn. Gen. Stat. 1958, § 52–592 (one year); Del. Code Ann. 1953, Tit. 10, § 8117 (one year); Ga. Code Ann. § 3–808 (six months); Smith-Hurd's Ill. Ann. Stat. 1956, c. 83, § 24a (one year); Burns' Ind. Ann. Stat. 1933, § 2–608 (five years); Iowa Code Ann. 1950, § 614.10 (six months); Kan. Code Civ. Proc. Ann. 1963, § 60–518 (six months); Ky. Rev. Stat. § 413.270 (90 days); Slovenko's La. Civ. Code 1961, Art. 3555, R. S. 9:5801 (complete tolling); Me. Rev. Stat. 1954, c. 112, § 99 (six months); Mass. Gen. Laws Ann. 1959, c. 260, § 32 (one year); Mich. Stat. Ann. 1962, § 27A.5856 (90 days); Miss. Code 1942, § 744 (one year); Mont. Rev. Codes 1947, § 93–2708 (one year); N. H. Rev. Stat. Ann. 1955, § 508:10 (one year); N. M. Stat. 1953, § 23–1–14 (six months); McKinney's N. Y. Civ. Prac. Law & Rules 1963, § 205 (six months); N. C. Gen. Stat. § 1–25 (one year); Ohio Rev. Code 1954, § 2305.19 (one year); Okla. Stat. Ann., Tit. 12, § 100 (one year); Ore. Rev. Stat. § 12.220 (one year); R. I. Gen. Laws § 9–1–22 (one year); Tenn. Code Ann. 1955, § 28–106 (one year); Vernon's Tex. Civ. Stat. Ann., Tit. 91, Art. 5539a (60 days); Utah Code Ann. 1953, § 78–12–40 (one year); Vt. Stat. Ann. 1958, Tit. 12, § 558 (one year); Va. Code 1950, § 8–34 (one year); W. Va. Code 1961, § 5410 (one year); Wyo. Stat. 1957, § 1–26 (one year).

[10] See notes 8, 9, *supra*, note 12, *infra*.

incorporates the Ohio Saving Statute. To allow the limitation provision to incorporate state saving statutes would produce nonuniform periods of limitation in the several States. The scope of such statutes and the length of additional time they allow vary considerably from State to State.[11] Moreover, not all States have saving statutes.[12] This Court has long recognized that the FELA "has a uniform operation, and neither is nor can be deflected therefrom by local statutes." *Panama R. Co.* v. *Johnson,* 264 U. S. 375, 392; *Second Employers' Liability Cases,* 223 U. S. 1, 51, 55. This Court has also specifically held that "[t]he period of time within which an action may be commenced is a material element in . . . [a] uniformity of operation" which Congress would not wish "to be destroyed by the varying provisions of the state statutes of limitation." *Engel* v. *Davenport,* 271 U. S. 33, 39. The incorporation of variant state saving statutes would defeat the aim of a federal limitation provision designed to produce national uniformity.

On the other hand, to accept respondent's argument that the limitation provision is not tolled under the circumstances present here would do even greater violence to the policies underlying the limitation provision and the Act. It would produce a substantial nonuniformity by creating a procedural anomaly. A plaintiff who brings a timely FELA action in a federal court where venue is improper would not be barred by the subsequent running of the limitation period, 28 U. S. C. § 1406 (a), nor would a plaintiff who brings a timely FELA action in a state

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[11] An additional year is allowed in 20 States, six months in six States, 90 days in two States, 60 days in one State, five years in one State, and one State imposes no definite limitation upon the additional time allowed. See note 9, *supra.*

[12] Nineteen States appear to have no applicable saving statute. Alabama, Hawaii, Maryland, Missouri, Nebraska, and Pennsylvania appear to have neither a saving nor a transfer statute.

court where venue is improper be barred by the subsequent running of the limitation period provided that the State has a "transfer" statute and venue is proper elsewhere in the State. *Herb* v. *Pitcairn, supra.* However, a similar plaintiff in a state court would be barred from further actions by the running of the limitation period if the State relies upon a "saving" statute, rather than a "transfer" statute to preserve similar state actions.[13] Thus, in effect, a nonuniform limitation provision would be produced. Yet, as we have pointed out, a major reason for having a federal limitation provision was to achieve national uniformity. *Engel* v. *Davenport, supra.* Moreover, to accept respondent's position could only discourage FELA actions in the courts of certain States. Yet Congress, in providing for concurrent state and federal court jurisdiction and prohibiting removal of FELA cases to federal courts, has sought to protect the plaintiff's right to bring an FELA action in a state court. See *Great Northern R. Co.* v. *Alexander,* 246 U. S. 276. Cf. Gibson, The Venue Clause and Transportation of Lawsuits, 18 Law & Contemp. Prob. 367 (1953). Further, as we have pointed out, both Congress and the States have made clear, through various procedural statutes, their desire to prevent timely actions brought in courts with improper venue from being time-barred merely because the limitation period expired while the action was in the improper court. Finally, the humanitarian purpose of the FELA makes clear that Congress would not wish a plaintiff deprived of his rights when no policy underlying a statute of limitations is served in doing so.

These considerations thus lead us to conclude that when a plaintiff begins a timely FELA action in a state court having jurisdiction, and serves the defendant with process

[13] This would be true in the 19 States which lack transfer statutes. Of those 19, 13 have saving statutes and six do not. See notes 8, 9, and 11, *supra.*

and plaintiff's case is dismissed for improper venue, the FELA limitation is tolled during the pendency of the state suit. We believe that the interests of uniformity embodied in the Act are best served by holding that this rule, tolling the statute, applies in all States regardless of whether or not a State has a "saving" statute. We further hold, under familiar principles which have been applied to statutes of limitations, that the limitation provision is tolled until the state court order dismissing the state action becomes final by the running of the time during which an appeal may be taken or the entry of a final judgment on appeal.[14] While this rule produces a minor nonuniformity since the time allowed for taking an appeal is not the same in all States, to adopt state "saving" statutes would be far less uniform. The period "saved" under such statutes varies widely among the States, and some States do not have "saving" statutes. Similarly, to toll the federal statute for a "reasonable time" after the state court orders the plaintiff's action dismissed would create uncertainty as to exactly when the limitation period again begins to run. This uncertainty would be compounded by applying the equitable doctrine of "laches" to the federal lawsuit brought after the dismissal of the state court action. Whether laches bars an action in a given case depends upon the circumstances of that case and "is a question primarily addressed to the discretion of the trial court." *Gardner* v. *Panama R. Co.*, 342 U. S. 29, 30. To apply it here would be at variance with the policies of certainty and uniformity underlying this statute of limitations. We conclude that a uniform rule tolling the federal statute for the period of the pendency of the state

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[14] Cf. Clayton Act, as amended, § 5 (b), 69 Stat. 283, 15 U. S. C. § 16 (b) (1958 ed.); *Electric Theater Co.* v. *Twentieth Century-Fox Film Corp.*, 113 F. Supp. 937, 944 (D. C. W. D. Mo.); Subversive Activities Control Act of 1950, § 14, 64 Stat. 1001, 50 U. S. C. § 793 (b) (1958 ed.).

court action and until the state court dismissal order becomes final is fair to both plaintiff and defendant, carries out the purposes of the FELA, and best serves the policies of uniformity and certainty underlying the federal limitation provision.

Applying these principles to the present case, since petitioner brought a timely suit in the Ohio court, served defendant with process, and, after finding the state action dismissed for improper venue, filed his suit in the Federal District Court only eight days after the Ohio court dismissed his action, before his time for appealing from the Ohio order had expired, his federal court action was timely. The Court of Appeals decision affirming the District Court's dismissal of petitioner's action is therefore reversed, and this case is remanded for proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE DOUGLAS, whom MR. JUSTICE BLACK joins, concurring.

The federal question presented is whether this action, timely started in the state court but not timely started if the filing date in the federal court governs, was "commenced within three years from the day the cause of action accrued" within the meaning of 45 U. S. C. § 56. I think it was so "commenced," as much as was the action in *Herb* v. *Pitcairn,* 325 U. S. 77.

In reaching this conclusion I do not find it necessary to rely on the fact that petitioner filed in the federal court "before his time for appealing from the Ohio order had expired," *ante,* this page. Instead I rest simply on the ground that "when process has been adequate to bring in the parties and to start the case on a course of judicial handling which *may* lead to final judgment without issuance of new initial process, it is enough to *commence* the action within the federal statute." 325 U. S., at 79.

(Emphasis supplied.) And see *Herb* v. *Pitcairn,* 324 U. S. 117, 132–133 (dissenting opinion of BLACK, J.), setting forth the requirements for commencing an FELA action within the meaning of 45 U. S. C. § 56: (1) a bona fide effort to prosecute the claim, (2) in a court having jurisdiction, (3) resulting in notice to the defendant.

If after dismissal the plaintiff delays inexcusably in refiling his suit in the proper court and the defendant is prejudiced by the delay, the action will of course be barred by laches. *Gardner* v. *Panama R. Co.,* 342 U. S. 29, 30–31. That familiar equitable doctrine provides the defendant with adequate protection against delay. The Court rejects this established doctrine, however, creating a new statute of limitations of its own which makes the timeliness of a federal cause of action depend on state time requirements which were adopted for other, unrelated purposes and which vary from State to State. The long-established federal rule of laches, in contrast, is uncomplicated, uniform, and directly responsive to the problem. Laches, of course, has no application in the instant case, as petitioner filed in the federal court only eight days after his state court action had been dismissed.

NATIONAL LABOR RELATIONS BOARD *v.* METROPOLITAN LIFE INSURANCE CO.

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

No. 98. Argued January 21, 1965.—Decided April 5, 1965.

A union over the protest of respondent company was certified by the National Labor Relations Board (NLRB) under § 9 (c) of the National Labor Relations Act as the bargaining representative of all debit insurance agents at respondent's district office in Woonsocket, R. I. Following respondent's refusal to bargain with the certified unit, the union filed unfair labor practice charges with the NLRB, which, adhering to its determination, directed respondent to bargain with the union. The Court of Appeals refused to enforce the NLRB order, having concluded that, contrary to § 9 (c)(5), the NLRB had regarded as controlling the extent to which the employees had organized. This conclusion was based on the NLRB's failure to articulate reasons for the unit determination in this case; its apparently inconsistent determinations of appropriate units of respondent's employees in other areas; its failure to evaluate the factor there of the extent of union organization; and its consistent certification of the unit requested by the union. *Held:*

1. Under § 9 (c)(5) the extent of union organization may be considered as one factor, but not as the controlling factor, in determining the appropriate bargaining unit. Pp. 441–442.

2. The considerations relied upon by the Court of Appeals did not compel the conclusion that the NLRB had violated § 9 (c)(5). P. 442.

3. The NLRB has, however, failed to articulate reasons for decision in and distinctions among this and other cases in this area. Pp. 442–443.

4. The integrity of the administrative process requires that courts may not accept appellate counsel's *post hoc* rationalizations for agency action. Pp. 443–444.

5. Because of the failure of the NLRB to state the basis of its decision in this and other cases in this area, its action cannot be properly reviewed and thus the judgment of the Court of Appeals

must be vacated and the case remanded to that court with instructions to remand it to the NLRB. P. 444.

327 F. 2d 906, vacated and remanded.

Daniel M. Friedman argued the cause for petitioner. On the briefs were *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Warren M. Davison.*

Burton A. Zorn argued the cause for respondent. With him on the brief were *George G. Gallantz, Thomas F. Delaney* and *Marvin Dicker.*

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

On petition of Insurance Workers International Union, AFL–CIO, and over the protest of respondent, Metropolitan Life Insurance Company, as to the appropriateness of the bargaining unit, the National Labor Relations Board, in a proceeding under § 9 (c) of the National Labor Relations Act, 49 Stat. 453, as amended, 29 U. S. C. § 159 (c) (1958 ed.), certified the union as the bargaining representative of all debit insurance agents, including all canvassing regular and office account agents, at respondent's district office in Woonsocket, Rhode Island.[1] Respondent deliberately refused to bargain with the union in order to challenge the appropriateness of the employee unit certified by the Board. See *Pittsburgh Glass Co.* v. *Labor Board,* 313 U. S. 146. The union thereupon filed unfair labor practice charges with the Board. The Board, adhering to its prior unit determination, held that respondent violated §§ 8 (a)(1) and (5) of the Labor Relations Act, 49 Stat. 452, as amended, 29 U. S. C. §§ 158 (a)(1) and (5) (1958 ed.), and directed respondent to bargain with the union. 142 N. L. R. B. 491. The Court of Appeals for the First Circuit refused to enforce the order on

[1] The Decision and Direction of Election issued by the Board on October 24, 1962, is unreported.

the grounds that in light of the "Board's failure to articulate specific reasons for its unit determination," 327 F. 2d 906, 909, the Board's apparently inconsistent determinations of appropriate units of respondent's employees in other cities or regions, see 138 N. L. R. B. 565 (Delaware); 138 N. L. R. B. 734 (Sioux City); 144 N. L. R. B. 149 (Chicago); 138 N. L. R. B. 512 (Cleveland),[2] its failure to discuss in these cases what weight, if any, it gave to the factor of the extent of union organization, and the fact that in these cases the Board consistently certified the unit requested by the union, the Court of Appeals could "only conclude that the . . . Board . . . has indeed . . . [regarded] the extent of union organization as controlling in violation of § 9 (c)(5) of the Act." 327 F. 2d, at 911. We granted certiorari because

[2] In the Delaware case the Board certified as a unit two of respondent's three district offices in the State; in the Sioux City case the unit certified was respondent's single district office in Sioux City, Iowa, together with two detached offices under its administrative control in Fargo, North Dakota, and Sioux Falls, South Dakota, 284 and 120 miles distant, respectively, from Sioux City; in the Chicago case the unit certified was that of all of the district offices within the city limits of Chicago, although some of the city offices had territories extending into the suburbs and some of the suburban offices' territories extended into the city; in the Cleveland case the certified unit consisted of respondent's six offices in the city as well as three offices in the suburbs; finally, in the instant case the unit certified was respondent's single district office in Woonsocket, Rhode Island, out of the eight offices in the State and the 75 offices in respondent's "New England Territory." In addition to the instant case and the Sioux City case, the Board has certified single district offices in *Western & Southern Life Ins. Co.*, 138 N. L. R. B. 538; *Metropolitan Life Ins. Co.* (Meriden and New London), 147 N. L. R. B. 69; *Metropolitan Life Ins. Co.* (Holyoke), 147 N. L. R. B. 688; *Metropolitan Life Ins. Co.* (Chicago Heights), 148 N. L. R. B. No. 145. See also *Metropolitan Life Ins. Co.* (Detroit), 146 N. L. R. B. 1577; *Metropolitan Life Ins. Co.* (Toledo), 146 N. L. R. B. 967; *Equitable Life Ins. Co.*, 138 N. L. R. B. 529.

of an apparent conflict between this decision and the decisions of the Court of Appeals for the Third Circuit in *Metropolitan Life Ins. Co.* v. *Labor Board,* 328 F. 2d 820, petition for certiorari pending, No. 56 this Term, which sustained the Board's determination in the Delaware case, 138 N. L. R. B. 565, and the Court of Appeals for the Sixth Circuit, *Metropolitan Life Ins. Co.* v. *Labor Board,* 330 F. 2d 62, petition for certiorari pending, No. 229 this Term, which sustained the Board's determination in the Cleveland case, 138 N. L. R. B. 512. See also *Labor Board* v. *Western & Southern Life Ins. Co.,* 328 F. 2d 891 (C. A. 3d Cir.), petition for certiorari pending, No. 91 this Term.

Section 9 (b) of the National Labor Relations Act, 49 Stat. 453, as amended, 29 U. S. C. § 159 (b) (1958 ed.) provides:

> "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ."

This broad delegation of authority, see *Pittsburgh Glass Co.* v. *Labor Board, supra,* was limited in 1947 by the enactment of § 9 (c)(5) of the Act, 61 Stat. 144, 29 U. S. C. § 159 (c)(5) (1958 ed.), which provides that "[i]n determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling."

Although it is clear that in passing this amendment Congress intended to overrule Board decisions where the unit determined could only be supported on the basis of the extent of organization, both the language and legisla-

tive history [3] of § 9 (c)(5) demonstrate that the provision was not intended to prohibit the Board from considering the extent of organization as one factor, though not the controlling factor, in its unit determination.[4]

The Court of Appeals here properly recognized this effect of § 9 (c)(5), but held, in light of the unarticulated bases of decision, and what appeared to it to be inconsistent determinations approving units requested by the union, that the only conclusion that it could reach was that the Board has made the extent of organization the controlling factor, in violation of the congressional mandate. We agree with the Court of Appeals that the enforcing court should not overlook or ignore an evasion of the § 9 (c)(5) command. We further agree that in determining whether or not there has been such an evasion, the results in other recent decisions of the Board are relevant. We cannot, however, agree that the only possible conclusion here is that the Board has violated § 9 (c)(5). Cf. *Metropolitan Life Ins. Co.* v. *Labor Board* (Cleveland), *supra; Metropolitan Life Ins. Co.* v. *Labor Board* (Delaware), *supra.*

On the other hand, due to the Board's lack of articulated reasons for the decisions in and distinctions among these cases,[5] the Board's action here cannot be properly

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[3] See H. R. Rep. No. 245, 80th Cong., 1st Sess., 37–38; H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 48; 93 Cong. Rec. 6444, 6860.

[4] See National Labor Relations Board, Twenty-Eighth Annual Report 51 (1963), which properly states this statutory test: "Although extent of organization may be a factor evaluated, under section 9 (c)(5) it cannot be given controlling weight."

[5] The Board's entire basis of decision on this issue in this case was set forth in the following footnote in its unit determination decision:

"The Employer has eight district offices and two detached offices in Rhode Island, and has only one district office in Woonsocket. The nearest district office is located 12 miles away in Pawtucket. In the prior proceeding in Case No. 4–RC–4865, based on the same record incorporated by reference herein, we found that each of Em-

reviewed. When the Board so exercises the discretion given to it by Congress, it must "disclose the basis of its order" and "give clear indication that it has exercised the discretion with which Congress has empowered it." [6] *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 197. See *Burlington Truck Lines* v. *United States,* 371 U. S. 156, 167–169; *Interstate Commerce Comm'n* v. *J–T Transport Co.,* 368 U. S. 81, 93. Although Board counsel in his brief and argument before this Court has rationalized the different unit determinations in the variant fac-

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ployer's individual district offices was in effect a separate administrative entity through which the Employer conducted its business operations, and therefore was inherently appropriate for purposes of collective bargaining. See *Metropolitan Life Insurance Company,* 138 NLRB . . . [565]. Applying the tests set forth therein, we find that, since there is no recent history of collective bargaining, no union seeking a larger unit, and the district office sought is located in a separate and distinct geographical area, the employees located at the Woonsocket district office constitute an appropriate unit. See also *Metropolitan Life Insurance Company,* . . . [138] NLRB . . . [734]."

The cases cited are the Board's decisions in the Delaware and Sioux City cases discussed *supra.* They do not appear, because of their variant factual circumstances, to be direct authority for decision in this case. Moreover, the Board made no attempt to distinguish other cases, particularly the Chicago and Cleveland cases discussed *supra,* in which it certified different types of units. The unfair labor practice proceeding added nothing to the analysis, as the trial examiner did not review the issue, as he felt "bound by the Board's ruling in the representation proceeding," 142 N. L. R. B., at 492, and the Board affirmed the trial examiner's ruling without discussion, *id.,* at 491.

[6] Of course, the Board may articulate the basis of its order by reference to other decisions or its general policies laid down in its rules and its annual reports, reflecting its "cumulative experience," *Labor Board* v. *Seven-Up Co.,* 344 U. S. 344, 349, so long as the basis of the Board's action, in whatever manner the Board chooses to formulate it, meets the criteria for judicial review. Cf. *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 299, 304; *Radio & TV Local 1264* v. *Broadcast Serv., ante,* p. 255.

tual situations of these cases on criteria other than a controlling effect being given to the extent of organization, the integrity of the administrative process requires that "courts may not accept appellate counsel's *post hoc* rationalizations for agency action . . . ." *Burlington Truck Lines* v. *United States, supra,* at 168; see *Securities & Exchange Comm'n* v. *Chenery Corp.,* 332 U. S. 194, 196. For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would "propel the court into the domain which Congress has set aside exclusively for the administrative agency." *Securities & Exchange Comm'n* v. *Chenery Corp., supra,* at 196.

Accordingly, the judgment of the Court of Appeals is vacated and the case remanded to that court with instructions to remand it to the Board for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

A reading of the Court's opinion reveals the fallacies on which the Board proceeded. The employer sought review of the Board's order, asking that it be set aside. Concededly it should be. But we need not act as *amicus* for the Board, telling it what to do. The Board is powerful and resourceful and can start over again should it wish. How stale this record may be we do not know. Neither of the parties asks for a remand. They are willing to stand or fall on the present record; and we should resolve the controversy in that posture.

JENKINS *v.* UNITED STATES.

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

No. 761. Argued April 1, 1965.—Decided April 5, 1965.

After some deliberation on a two-count indictment, the jury sent a note to the trial judge advising that it was unable to arrive at a verdict "on both counts because of insufficient evidence." In his response the judge stated that the jury had to reach a decision. Thereafter the petitioner was found guilty on one count. *Held:* In its context and under all the circumstances of this case, the judge's statement had a coercive effect on the jury and therefore the conviction must be reversed.

117 U. S. App. D. C. 346, 330 F. 2d 220, reversed and remanded.

H. Thomas Sisk argued the cause for petitioner. With him on the brief were *M. Michael Cramer* and *David B. Isbell.*

Philip B. Heymann argued the cause for the United States. On the brief were *Solicitor General Cox, Assistant Attorney General Miller* and *Philip R. Monahan.*

PER CURIAM.

Petitioner was charged in a two-count indictment in the United States District Court for the District of Columbia with robbing a High's Dairy Products store on December 27, 1962 (count 1), and with assault with intent to rob upon the proprietress of a grocery store on January 24, 1963 (count 2), in violation of §§ 22–2901 and 22–501, respectively, of the District of Columbia Code. Following a trial by jury, he was found guilty on count 1 and not guilty on count 2. He was sentenced to imprisonment for from 3 to 10 years. A divided Court of Appeals affirmed the conviction, 117 U. S. App. D. C. 346, 330 F. 2d 220. A petition for rehearing *en banc* was denied, four judges dissenting.

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Slightly more than two hours after the jury retired to deliberate, the jury sent a note to the trial judge advising that it had been unable to agree upon a verdict "on both counts because of insufficient evidence." The judge thereupon recalled the jury to the courtroom and in the course of his response stated that "You have got to reach a decision in this case." We granted certiorari, 379 U. S. 944, to consider whether in its context and under all the circumstances of this case the statement was coercive. The Solicitor General in his brief in this Court stated:

> "Of course, if this Court should conclude that the judge's statement had the coercive effect attributed to it, the judgment should be reversed and the cause remanded for a new trial; the principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration."

Upon review of the record, we conclude that in its context and under all the circumstances the judge's statement had the coercive effect attributed to it. Accordingly the judgment of the Court of Appeals is reversed and the cause remanded for a new trial. Cf. *Brasfield* v. *United States,* 272 U. S. 448, 450; *Burton* v. *United States,* 196 U. S. 283, 307–308; *United States* v. *Rogers,* 289 F. 2d 433, 435 (C. A. 4th Cir.)

It is so ordered.

Mr. Justice Clark and Mr. Justice Harlan dissent.

ABERNATHY ET AL. *v.* ALABAMA.

CERTIORARI TO THE COURT OF APPEALS OF ALABAMA.

No. 9. Argued October 12–13, 1964.—Decided April 5, 1965.

42 Ala. App. 149, 155 So. 2d 586, reversed.

Louis H. Pollak argued the cause for petitioners. With him on the brief were *Jack Greenberg, Constance Baker Motley, James M. Nabrit III, Fred D. Gray* and *Charles S. Conley.*

Leslie Hall, Assistant Attorney General of Alabama, argued the cause for respondent. With him on the brief was *Richmond M. Flowers,* Attorney General of Alabama.

PER CURIAM.

The judgments are reversed. *Boynton* v. *Virginia,* 364 U. S. 454.

MR. JUSTICE BLACK and MR. JUSTICE WHITE took no part in the consideration or decision of this case.

CHICAGO & NORTH WESTERN RAILWAY CO. *v.* CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. ET AL.

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

No. 21. Argued November 17, 1964.—Decided April 5, 1965.

214 F. Supp. 244, reversed.

John C. Danielson argued the cause for appellant. With him on the briefs was *Jordan Jay Hillman.*

Frank M. Long argued the cause for appellees. With him on the brief were *Philip H. Porter, R. K. Merrill* and *Richard R. Robinson.*

Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Robert W. Ginnane and *Arthur Cerra* filed a memorandum for the United States and the Interstate Commerce Commission.

PER CURIAM.

The judgment is reversed. *Texas & P. R. Co.* v. *Gulf, C. & S. F. R. Co.,* 270 U. S. 266, 278.

McKINNIE ET AL. *v.* TENNESSEE.

CERTIORARI TO THE SUPREME COURT OF TENNESSEE.

No. 148. Argued March 8, 1965.—Decided April 5, 1965.

— Tenn. —, 379 S. W. 2d 214, reversed.

James M. Nabrit III argued the cause for petitioners. With him on the briefs were *Jack Greenberg, Constance Baker Motley, Avon N. Williams, Z. Alexander Looby* and *Charles L. Black, Jr.*

Thomas E. Fox, Assistant Attorney General of Tennessee, argued the cause for respondent. With him on the brief was *George F. McCanless,* Attorney General of Tennessee.

PER CURIAM.

The judgment is reversed. *Hamm* v. *City of Rock Hill* and *Lupper* v. *Arkansas,* 379 U. S. 306.

MR. JUSTICE STEWART would vacate the judgment and remand the case to the Supreme Court of Tennessee for reconsideration in the light of supervening federal legislation, in accordance with the views expressed in his dissenting opinion in *Hamm* v. *City of Rock Hill,* 379 U. S. 306, 326.

MR. JUSTICE BLACK, MR. JUSTICE HARLAN, and MR. JUSTICE WHITE would affirm the judgment of the Supreme Court of Tennessee for the reasons stated in their dissenting opinions in *Hamm* v. *City of Rock Hill,* 379 U. S. 306, 318, 322, 327.

U. S. A. C. TRANSPORT, INC. *v.* UNITED STATES ET AL.

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

No. 856. Decided April 5, 1965.

235 F. Supp. 689, affirmed.

Paul F. Sullivan for appellant.

Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel, Jerry Z. Pruzansky, Robert W. Ginnane and *Betty Jo Christian* for the United States et al.

PER CURIAM.

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

Syllabus.

AMERICAN OIL CO. *v.* NEILL ET AL.

APPEAL FROM THE SUPREME COURT OF IDAHO.

No. 19. Argued January 25–26, 1965.—Decided April 26, 1965.

From its Seattle Regional Office the Government Services Administration (GSA) invited bids to supply motor fuel for use by government agencies in Idaho and other States. Utah Oil Refining Company (Utah Oil) made bids from its Salt Lake City offices including two bids for supplying gasoline to the Atomic Energy Commission (AEC), each bid being made alternatively for delivery f. o. b. Salt Lake City or the AEC site in Idaho. GSA, at Seattle, awarded Utah Oil the contract for delivery of the gasoline at Utah Oil's Salt Lake City bulk plant, where title passed. AEC arranged for transportation of the gasoline to its Idaho site by common carriers. Utah Oil was licensed as a "dealer" in Idaho but its activities there were unrelated to the GSA contract. Appellee Idaho State Tax Collector imposed an excise tax on the transaction under a statute taxing the "dealer" who first "receives" motor fuel in the State, the statute making a licensed dealer the constructive recipient of motor fuel unloaded in Idaho which it sold out-of-state for in-state use to a purchaser without a license. The tax was paid under protest by Utah Oil which appellant, its successor in interest, now seeks to have refunded. The trial court granted appellant summary judgment, holding the tax invalid since applied to a sale outside Idaho. The Idaho Supreme Court reversed. *Held:*

1. The operating incidence of the tax fell on the dealer, who was not required to pass it on to or collect it from the consumer. Pp. 455–457.

2. A State's imposition of an excise tax with respect to an out-of-state transaction upon a dealer entirely dissociated from any in-state activities violates the Due Process Clause. Pp. 457–459.

(a) The vendor's knowledge that the commodity sold was for use in the State would not of itself make the tax on the out-of-state sale permissible. P. 457.

(b) Since every phase of the transaction here occurred outside the taxing State, neither the fact that the dealer was licensed in the State nor that it performed activities in the State suffices to uphold the tax. Pp. 458–459.

86 Idaho 7, 383 P. 2d 350, reversed and remanded.

Frank I. Goodman argued the cause for appellant and for the United States, as *amicus curiae*. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Oberdorfer, I. Henry Kutz* and *Robert A. Bernstein* for the United States, and *Calvin Dworshak* for appellant.

Allan G. Shepard, Attorney General of Idaho, argued the cause for appellees. With him on the brief were *William M. Smith,* Assistant Attorney General, *Faber F. Tway* and *Anton Hohler*.

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

This appeal presents the issue of whether, where a licensed Idaho dealer in motor fuels sells and transfers gasoline outside the State for importation into the State by an agency of the Federal Government, the State of Idaho may constitutionally impose an excise tax upon the transaction on the theory that the dealer constructively "receives" the gasoline in Idaho upon its importation.

On June 26, 1959, invitations for bids were issued by the United States Government from the Regional Office of the General Services Administration (GSA) at Seattle, Washington, covering some 607 separate items—each designed to supply a distinct motor fuel need of a particular government agency at one of a multitude of locations in Idaho, Montana, Oregon, and Washington for the period from November 1, 1959, through October 31, 1960. Bids on each item were to be submitted to the Seattle office and were to be evaluated on their individual merits and accepted or rejected without reference to other items.

Appellant's predecessor in interest, Utah Oil Refining Company (Utah Oil), is a Delaware corporation. Pursuant to the GSA invitation it transmitted bids from its offices in Salt Lake City, Utah, on various items. Included were numbers 63 and 64 dealing with the supply of

approximately 200,000 and 1,000,000 gallons of gasoline, respectively, for the use of the Atomic Energy Commission (AEC) at Idaho Falls, Idaho. Bids on these two items were submitted in alternative form, quoting a price f. o. b. Salt Lake City and a price f. o. b. the AEC activity site in Idaho.[1]

On October 26, 1959, Utah Oil's bids on the two items were accepted in Seattle by the GSA. Under the terms of the contract gasoline was to be sold to the AEC at a designated price f. o. b. Bulk Plant, Salt Lake City. The total price did not include any state tax but provision was made for an increase in the contract price if any such tax was imposed.

In accordance with the contract, the AEC, or its operating agent, Phillips Petroleum Company, periodically ordered some 1,436,355 gallons of gasoline. Delivery was effected by Utah Oil in Salt Lake City. Although the facts subsequent to delivery are in dispute, it appears that thereafter common carriers, selected and paid by the AEC, transported the fuel from Salt Lake City to Idaho Falls where it was placed in AEC-owned storage tanks and used in AEC operations in Idaho.[2]

During the time that Utah Oil was performing the contract, it was authorized to do business in the State of Idaho as a "licensed dealer" as defined by the Idaho Motor Fuels Tax Act, as amended, Idaho Code, Tit. 49, c. 12 (1957). This Act imposes an initial requirement that all motor fuel "dealers" hold a permit issued by the

[1] Although the invitation for bids issued by the GSA proposed the alternative delivery points it was discretionary with each bidder as to whether or not quotations for each point were submitted.

[2] On the ground that the tax was not a "use tax" in the usual sense, the trial judge declined the offer of proof as to what occurred after delivery which was tendered by the State Tax Collector. The Idaho Supreme Court concurred, holding that such evidence was immaterial due to the fact that the status of Phillips Petroleum was only that of a contractor for the AEC.

State Tax Collector. To procure such a permit one need only fill out an application, post bond, and pay a five-dollar filing fee. Securance of a permit is necessary before any dealer can "import, receive, use, sell or distribute any motor fuels" within the State. Idaho Code Ann. § 49–1202 (1957).

A "dealer" is defined by § 49–1201 as any person who first receives motor fuels in the State within the meaning of the word "received." [3] As a dealer, one is required to make monthly reports to the State Tax Collector and pay an excise tax of six cents per gallon on all motor fuels "received" within the ambit of § 49–1201 (g). The Act then provides that the proceeds of the tax are to be placed into a state highway fund.

During its performance of the contracts Utah Oil submitted the required monthly reports. The State Tax Collector thereupon insisted that payment of the six-cent tax be forthcoming pursuant to § 49–1201 (g) due to the fact

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[3] The section provides, *inter alia:* "2. Motor fuel imported into this state other than that placed in storage at refineries or pipe line terminals in this state shall be considered to be received immediately after the same is unloaded and by the person who is the owner thereof at such time if such person is a licensed dealer; otherwise such motor fuel shall be considered to be received by the person who owned such fuel immediately prior to its being unloaded; provided, however, motor fuels shipped or brought into this state by a qualified dealer, which fuel is sold and delivered in this state directly to a person who is not the holder of an uncanceled dealer permit, shall be considered to have been received by the dealer shipping or bringing the same into this state; *further provided that motor fuel which is in any manner supplied, sold or furnished to any person or agency, whatsoever, not the holder of an uncanceled Idaho dealer permit, by an Idaho licensed dealer, for importation into the state of Idaho from a point of origin outside the state, shall be considered to be received by the Idaho licensed dealer so supplying, selling, or furnishing such motor fuel, immediately after the imported motor fuel has been unloaded in the state of Idaho.*" (Emphasis added.) Idaho Code Ann. § 49–1201 (g) (Supp. 1963).

that Utah Oil was a licensed dealer in the State of Idaho which had sold motor fuel to an agency "not the holder of [a] . . . dealer permit . . . for importation into the state . . . from a point of origin outside the state." Taxes totaling $86,181.30 were paid under protest. The instant litigation was then initiated in the District Court of the Third Judicial District of the State of Idaho for refund. Appellant claimed at the threshold that the imposition of the tax on an out-of-state sale to the Federal Government violated the Due Process, Commerce, and Supremacy Clauses of the Constitution.

The trial judge granted summary judgment for the appellant finding that the imposition of the tax violated the Due Process and Commerce Clauses since it was applied to a sale made outside of Idaho. On appeal the Idaho Supreme Court reversed, finding the constitutional objections to be without merit. 86 Idaho 7, 383 P. 2d 350. We noted probable jurisdiction, 377 U. S. 962, because the validity of a state statute had been upheld over an objection that it was repugnant to the Constitution. 28 U. S. C. § 1257 (2) (1958 ed.).

I.

When passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of the tax, that is, substance rather than form. *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 443–444; *Lawrence* v. *State Tax Comm'n,* 286 U. S. 276, 280, and cases cited therein. This approach requires us to determine the ultimate effect of the law as applied and enforced by a State or, in other words, to find the operating incidence of the tax. *Connecticut Gen. Life Ins. Co.* v. *Johnson,* 303 U. S. 77, 80.

When a state court has made its own definitive determination as to the operating incidence, our task is simplified. We give this finding great weight in determining the nat-

ural effect of a statute, and if it is consistent with the statute's reasonable interpretation it will be deemed conclusive.[4] Such a situation is manifest in the instant case.

The trial judge found that the operating incidence of the tax clearly fell on the dealer:

> "[T]he dealer is not in any way required to pass the tax on or collect it from the consumer, and the ultimate purchaser or consumer has no responsibility whatsoever for payment of the tax. While it may be the overall policy of the state to collect a tax of 6¢ per gallon on all gasoline used to propel motor vehicles over Idaho state highways, the taxable event or transaction is not the use by the local consumer or purchaser, but the 'receipt' of the gas by the dealer. It cannot be said under this statute that the licensed dealer is the mere collector of a tax from the purchaser or user . . . ."

This conclusion was further buttressed by finding that the Idaho administrative interpretation of the statute in the past has been to treat it as a privilege tax upon the dealer.[5]

On appeal the Idaho Supreme Court left the trial court's conclusions undisturbed. Moreover, the State Attorney General in his brief before this Court expressly states that the tax "is a privilege tax, the incidence of

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[4] Compare *Railway Express Agency, Inc.* v. *Virginia,* 347 U. S. 359, 369–372 (dissenting opinion), with *Railway Express Agency, Inc.* v. *Virginia,* 358 U. S. 434, 440–441.

[5] Letter from Don J. McClenahan, Assistant Attorney General of the State of Idaho, to Bigelow Boysen, May 9, 1950. The conclusion was reached in this opinion that "the act places the legal incidence of the tax upon the dealer . . . and not on the vendee or consumer." A decision by the Comptroller General also agrees with this conclusion. 24 Comp. Gen. 163 (1944).

which falls on the dealer . . . ." [6] This unanimity between the courts of Idaho and its agencies is to us in accord with the literal interpretation of the Act inasmuch as § 49–1210 clearly states that "each dealer shall pay to the commissioner an excise tax of six cents per gallon on all motor fuels . . ." with no coinciding provision passing the burden of the tax to the purchaser. We therefore give the findings below controlling effect and hold that the incidence of the tax falls on the dealer.

II.

Although the Idaho Supreme Court agreed with the trial judge that the taxed events were the sales of gasoline in Utah, two factors were considered sufficient to bring the transactions within the purview of Idaho's taxing power. First, Utah Oil sold the gasoline with knowledge that it would be imported into and used within Idaho; and, second, Utah Oil had been authorized to do business in Idaho having applied for and received a dealer's permit "authorizing it to enter into the Idaho market as a distributor of motor fuels . . . ." 86 Idaho, at 23, 383 P. 2d, at 360. We conclude that these considerations are insufficient to uphold the tax as against attack under the Due Process Clause.

The mere fact that Utah Oil knew that the gasoline was to be imported into Idaho merits little discussion. More than once this Court has struck down taxes directly imposed on or resulting from out-of-state sales which were held to be insufficiently related to activities within the taxing State, despite the fact that the vendor knew that the goods were destined for use in that State. *Miller Bros. Co.* v. *Maryland,* 347 U. S. 340 (use tax); *Norton Co.* v. *Department of Revenue,* 340 U. S. 534 (gross re-

[6] Brief for the appellee, p. 5.

ceipts tax); *McLeod* v. *J. E. Dilworth Co.*, 322 U. S. 327 (sales tax).

These cases have also firmly established the doctrine that when a tax is imposed on an out-of-state vendor, "nexus" between the taxing State and the taxpayer is the outstanding prerequisite on state power to tax. .Consistent with this requirement there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Bros. Co.* v. *Maryland, supra, at* 344–345. Granted that when a corporation, pursuant to permission given, enters a State and proceeds to do local business the "link" is strong. In such instances there is a strong inference that it exists between the State and transactions which result in economic benefits obtained from a source within the State's territorial limits. The corporation can, however, exempt itself by a clear showing that there are no in-state activities connected with out-of-state sales. In such instances, the transactions are said to be "dissociated from the local business," *Norton Co.* v. *Department of Revenue, supra,* at 537, and therefore may not, consistent with due process, be taxed.

In the present case it is plain that neither Utah Oil's position as a licensed dealer in Idaho nor the fact that it otherwise engaged in business there will suffice to uphold the tax. Utah Oil's transfer of gasoline was unquestionably an out-of-state sale *vis-à-vis* Idaho and entirely unconnected with its business in that State. Each and every phase of the transaction had its locus outside of Idaho: invitations for bids were issued by the Government in Seattle, Washington; Utah Oil submitted its bids from Salt Lake City; the bids were accepted in Seattle; the contract called for delivery of the gasoline f. o. b. Salt Lake City; Utah Oil delivered the gasoline to Salt Lake City, and it was there that title passed. There is no reason to suppose, nor does the record in any way

indicate, that Utah Oil's activities in Idaho contributed in any way to the procurement or performance of the contract. Compare *Norton Co.* v. *Department of Revenue, supra,* with *General Motors Corp.* v. *Washington,* 377 U. S. 436.

The Idaho Supreme Court was fully cognizant of these facts but chose to characterize Utah Oil's dealer's permit as authorizing it "to engage in the very activity it now claims is exempt from the tax." 86 Idaho, at 23, 383 P. 2d, at 360. This statement, however, fails to reflect the clear holding by this Court that the granting by a State "of the privilege of doing business there and its consequent authority to tax the privilege do not withdraw from the protection of the due process clause the privilege" of doing business elsewhere. *Connecticut Gen. Life Ins. Co.* v. *Johnson, supra,* at 82. This is exactly the situation present in the instant case. Under the circumstances we hold the fact that Utah Oil was the holder of an Idaho dealer's permit to be purely fortuitous.

Since we decide that the exacted tax violates the Due Process Clause, there is no need for discussion of constitutionality under the Commerce or Supremacy Clause. The decision of the Idaho Supreme Court is reversed and the case remanded to that court for proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice Black dissents.

HANNA *v.* PLUMER, EXECUTOR.

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

No. 171. Argued January 21, 1965.—Decided April 26, 1965.

In a civil action in a federal court where jurisdiction is based upon diversity of citizenship, service of process shall be made in the manner set forth in Federal Rule of Civil Procedure 4 (d)(1) rather than in the manner prescribed by state law.

(a) Rule 4 (d)(1) is authorized by the Rules Enabling Act. Pp. 464–465.

(b) Even if there were no Federal Rule of Civil Procedure making it clear that in-hand service is not required in diversity actions, it is doubtful that *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, and the line of cases following it would have obligated the District Court to follow the Massachusetts in-hand service procedure. The "outcome-determination" test of *Guaranty Trust Co.* v. *York*, 326 U. S. 99, was never intended to be a talisman, but must be read in light of the policies underlying the *Erie* rule—discouragement of forum-shopping and avoidance of inequitable administration of the laws. Pp. 466–469.

(c) In any event, the rule of *Erie* and its progeny does not constitute the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure. Pp. 469–474.

(d) Rule 4 (d)(1) does not exceed the constitutional bounds to which the *Erie* opinion alluded. The constitutional provision for a federal court system carries with it congressional power to make rules governing the practice and pleading in federal courts. Pp. 471–472.

331 F. 2d 157, reversed.

Albert P. Zabin argued the cause for petitioner, *pro hac vice*, by special leave of Court. With him on the brief was *George Welch*.

James J. Fitzpatrick argued the cause for respondent. On the brief were *Alfred E. LoPresti* and *James T. Connolly*.

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

The question to be decided is whether, in a civil action where the jurisdiction of the United States district court is based upon diversity of citizenship between the parties, service of process shall be made in the manner prescribed by state law or that set forth in Rule 4 (d)(1) of the Federal Rules of Civil Procedure.

On February 6, 1963, petitioner, a citizen of Ohio, filed her complaint in the District Court for the District of Massachusetts, claiming damages in excess of $10,000 for personal injuries resulting from an automobile accident in South Carolina, allegedly caused by the negligence of one Louise Plumer Osgood, a Massachusetts citizen deceased at the time of the filing of the complaint. Respondent, Mrs. Osgood's executor and also a Massachusetts citizen, was named as defendant. On February 8, service was made by leaving copies of the summons and the complaint with respondent's wife at his residence, concededly in compliance with Rule 4 (d)(1), which provides:

> "The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:
>
> "(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein . . . ."

Respondent filed his answer on February 26, alleging, *inter alia*, that the action could not be maintained because it had been brought "contrary to and in violation of the

provisions of Massachusetts General Laws (Ter. Ed.) Chapter 197, Section 9." That section provides:

> "Except as provided in this chapter, an executor or administrator shall not be held to answer to an action by a creditor of the deceased which is not commenced within one year from the time of his giving bond for the performance of his trust, or to such an action which is commenced within said year unless before the expiration thereof the writ in such action has been served by delivery in hand upon such executor or administrator or service thereof accepted by him or a notice stating the name of the estate, the name and address of the creditor, the amount of the claim and the court in which the action has been brought has been filed in the proper registry of probate. . . ." Mass. Gen. Laws Ann., c. 197, § 9 (1958).

On October 17, 1963, the District Court granted respondent's motion for summary judgment, citing *Ragan* v. *Merchants Transfer Co.*, 337 U. S. 530, and *Guaranty Trust Co.* v. *York*, 326 U. S. 99, in support of its conclusion that the adequacy of the service was to be measured by § 9, with which, the court held, petitioner had not complied. On appeal, petitioner admitted noncompliance with § 9, but argued that Rule 4 (d)(1) defines the method by which service of process is to be effected in diversity actions. The Court of Appeals for the First Circuit, finding that "[r]elatively recent amendments [to § 9] evince a clear legislative purpose to require personal notification within the year," [1] concluded that the conflict of state

[1] Section 9 is in part a statute of limitations, providing that an executor need not "answer to an action . . . which is not commenced within one year from the time of his giving bond . . . ." This part of the statute, the purpose of which is to speed the settlement of estates, *Spaulding* v. *McConnell*, 307 Mass. 144, 146, 29 N. E. 2d 713, 715 (1940); *Doyle* v. *Moylan*, 141 F. Supp. 95 (D. C. D. Mass.

and federal rules was over "a substantive rather than a procedural matter," and unanimously affirmed. 331 F. 2d 157. Because of the threat to the goal of uniformity of federal procedure posed by the decision below,[2] we granted certiorari, 379 U. S. 813.

We conclude that the adoption of Rule 4 (d)(1), designed to control service of process in diversity actions,[3]

1956), is not involved in this case, since the action clearly was timely commenced. (Respondent filed bond on March 1, 1962; the complaint was filed February 6, 1963; and the service—the propriety of which is in dispute—was made on February 8, 1963.) 331 F. 2d, at 159. Cf. *Guaranty Trust Co.* v. *York, supra; Ragan* v. *Merchants Transfer Co., supra.*

Section 9 also provides for the manner of service. Generally, service of process must be made by "delivery in hand," although there are two alternatives: acceptance of service by the executor, or filing of a notice of claim, the components of which are set out in the statute, in the appropriate probate court. The purpose of this part of the statute, which *is* involved here, is, as the court below noted, to insure that executors will receive actual notice of claims. *Parker* v. *Rich,* 297 Mass. 111, 113–114, 8 N. E. 2d 345, 347 (1937). Actual notice is of course also the goal of Rule 4 (d)(1); however, the Federal Rule reflects a determination that this goal can be achieved by a method less cumbersome than that prescribed in § 9. In this case the goal seems to have been achieved; although the affidavit filed by respondent in the District Court asserts that he had not been served in hand nor had he accepted service, it does not allege lack of actual notice.

[2] There are a number of state service requirements which would not necessarily be satisfied by compliance with Rule 4 (d)(1). See, *e. g.,* Cal. Civ. Proc. Code § 411 8; Idaho Code Ann. § 5–507 7 (1948); Ill. Rev. Stat., c. 110, § 13.2 (1963); Ky. Rev. Stat., Rules Civ. Proc., Rule 4.04 (1962); Md. Ann. Code, Rules Proc., Rule 104 b (1963); Mich. Rev. Jud. Act § 600.1912 (1961); N. C. Gen. Stat. § 1–94 (1953); S. D. Code § 33.0807 (8) (Supp. 1960); Tenn. Code Ann. § 20–214 (1955).

[3] "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. . . ." Fed. Rules Civ. Proc. 1.

This case does not come within any of the exceptions noted in Rule 81.

neither exceeded the congressional mandate embodied in the Rules Enabling Act nor transgressed constitutional bounds, and that the Rule is therefore the standard against which the District Court should have measured the adequacy of the service. Accordingly, we reverse the decision of the Court of Appeals.

The Rules Enabling Act, 28 U. S. C. § 2072 (1958 ed.), provides, in pertinent part:

> "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.
>
> "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury . . . ."

Under the cases construing the scope of the Enabling Act, Rule 4 (d)(1) clearly passes muster. Prescribing the manner in which a defendant is to be notified that a suit has been instituted against him, it relates to the "practice and procedure of the district courts." Cf. *Insurance Co.* v. *Bangs,* 103 U. S. 435, 439.

> "The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach* v. *Wilson & Co.,* 312 U. S. 1, 14.[4]

In *Mississippi Pub. Corp.* v. *Murphree,* 326 U. S. 438, this Court upheld Rule 4 (f), which permits service of a summons anywhere within the State (and not merely the district) in which a district court sits:

> "We think that Rule 4 (f) is in harmony with the Enabling Act . . . . Undoubtedly most alterations

[4] See also *Schlagenhauf* v. *Holder,* 379 U. S. 104, 112–114.

of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights. *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 11–14. The fact that the application of Rule 4 (f) will operate to subject petitioner's rights to adjudication by the district court for northern Mississippi will undoubtedly affect those rights. But it does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights." *Id.*, at 445–446.

Thus were there no conflicting state procedure, Rule 4(d)(1) would clearly control. *National Rental* v. *Szukhent*, 375 U. S. 311, 316. However, respondent, focusing on the contrary Massachusetts rule, calls to the Court's attention another line of cases, a line which—like the Federal Rules—had its birth in 1938. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, overruling *Swift* v. *Tyson*, 16 Pet. 1, held that federal courts sitting in diversity cases, when deciding questions of "substantive" law, are bound by state court decisions as well as state statutes. The broad command of *Erie* was therefore identical to that of the Enabling Act: federal courts are to apply state substantive law and federal procedural law. However, as subsequent cases sharpened the distinction between substance and procedure, the line of cases following *Erie* diverged markedly from the line construing the Enabling Act. *Guaranty Trust Co.* v. *York*, 326 U. S. 99, made it clear that *Erie*-type problems were not to be solved by

reference to any traditional or common-sense substance-procedure distinction:

> "And so the question is not whether a statute of limitations is deemed a matter of 'procedure' in some sense. The question is . . . does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?" 326 U. S., at 109.[5]

Respondent, by placing primary reliance on *York* and *Ragan,* suggests that the *Erie* doctrine acts as a check on the Federal Rules of Civil Procedure, that despite the clear command of Rule 4 (d)(1), *Erie* and its progeny demand the application of the Massachusetts rule. Reduced to essentials, the argument is: (1) *Erie,* as refined in *York,* demands that federal courts apply state law whenever application of federal law in its stead will alter the outcome of the case. (2) In this case, a determination that the Massachusetts service requirements obtain will result in immediate victory for respondent. If, on the other hand, it should be held that Rule 4 (d)(1) is applicable, the litigation will continue, with possible victory for petitioner. (3) Therefore, *Erie* demands application of the Massachusetts rule. The syllogism possesses an appealing simplicity, but is for several reasons invalid.

In the first place, it is doubtful that, even if there were no Federal Rule making it clear that in-hand service is not required in diversity actions, the *Erie* rule would have obligated the District Court to follow the Massachusetts procedure. "Outcome-determination" analysis was never

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[5] See also *Ragan* v. *Merchants Transfer Co., supra; Woods* v. *Interstate Realty Co.,* 337 U. S. 535; *Bernhardt* v. *Polygraphic Co.,* 350 U. S. 198, 203–204, 207–208; cf. *Byrd* v. *Blue Ridge Cooperative,* 356 U. S. 525.

intended to serve as a talisman. *Byrd* v. *Blue Ridge Cooperative,* 356 U. S. 525, 537. Indeed, the message of *York* itself is that choices between state and federal law are to be made not by application of any automatic, "litmus paper" criterion, but rather by reference to the policies underlying the *Erie* rule. *Guaranty Trust Co.* v. *York, supra,* at 108–112.[6]

The *Erie* rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court.

> "Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. *Swift* v. *Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law." *Erie R. Co.* v. *Tompkins, supra,* at 74–75.[7]

The decision was also in part a reaction to the practice of "forum-shopping" which had grown up in response to the rule of *Swift* v. *Tyson.* 304 U. S., at 73–74.[8] That the *York* test was an attempt to effectuate these policies is demonstrated by the fact that the opinion framed the inquiry in terms of "substantial" variations between state

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[6] See *Iovino* v. *Waterson,* 274 F. 2d 41, 46–47 (C. A. 2d Cir. 1959), cert. denied *sub nom. Carlin* v. *Iovino,* 362 U. S. 949.

[7] See also *Klaxon Co.* v. *Stentor Co.,* 313 U. S. 487, 496; *Woods* v. *Interstate Realty Co., supra,* note 5, at 538.

[8] Cf. *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.,* 276 U. S. 518.

and federal litigation. 326 U. S., at 109. Not only are nonsubstantial, or trivial, variations not likely to raise the sort of equal protection problems which troubled the Court in *Erie;* they are also unlikely to influence the choice of a forum. The "outcome-determination" test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.[9]

The difference between the conclusion that the Massachusetts rule is applicable, and the conclusion that it is not, is of course at this point "outcome-determinative" in the sense that if we hold the state rule to apply, respondent prevails, whereas if we hold that Rule 4(d)(1) governs, the litigation will continue. But in this sense *every* procedural variation is "outcome-determinative." For example, having brought suit in a federal court, a plaintiff cannot then insist on the right to

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[9] The Court of Appeals seemed to frame the inquiry in terms of how "important" § 9 is to the State. In support of its suggestion that § 9 serves some interest the State regards as vital to its citizens, the court noted that something like § 9 has been on the books in Massachusetts a long time, that § 9 has been amended a number of times, and that § 9 is designed to make sure that executors receive actual notice. See note 1, *supra.* The apparent lack of relation among these three observations is not surprising, because it is not clear to what sort of question the Court of Appeals was addressing itself. One cannot meaningfully ask how important something is without first asking "important for what purpose?" *Erie* and its progeny make clear that when a federal court sitting in a diversity case is faced with a question of whether or not to apply state law, the importance of a state rule is indeed relevant, but only in the context of asking whether application of the rule would make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the forum State, or whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court.

file subsequent pleadings in accord with the time limits applicable in the state courts, even though enforcement of the federal timetable will, if he continues to insist that he must meet only the state time limit, result in determination of the controversy against him. So it is here. Though choice of the federal or state rule will at this point have a marked effect upon the outcome of the litigation, the difference between the two rules would be of scant, if any, relevance to the choice of a forum. Petitioner, in choosing her forum, was not presented with a situation where application of the state rule would wholly bar recovery; [10] rather, adherence to the state rule would have resulted only in altering the way in which process was served.[11] Moreover, it is difficult to argue that permitting service of defendant's wife to take the place of in-hand service of defendant himself alters the mode of enforcement of state-created rights in a fashion sufficiently "substantial" to raise the sort of equal protection problems to which the *Erie* opinion alluded.

There is, however, a more fundamental flaw in respondent's syllogism: the incorrect assumption that the rule of *Erie R. Co.* v. *Tompkins* constitutes the appropriate test

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[10] See *Guaranty Trust Co.* v. *York, supra,* at 108–109; *Ragan* v. *Merchants Transfer Co., supra,* at 532; *Woods* v. *Interstate Realty Co., supra,* note 5, at 538.

Similarly, a federal court's refusal to enforce the New Jersey rule involved in *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541, requiring the posting of security by plaintiffs in stockholders' derivative actions, might well impel a stockholder to choose to bring suit in the federal, rather than the state, court.

[11] Cf. *Monarch Insurance Co. of Ohio* v. *Spach,* 281 F. 2d 401, 412 (C. A. 5th Cir. 1960). We cannot seriously entertain the thought that one suing an estate would be led to choose the federal court because of a belief that adherence to Rule 4 (d)(1) is less likely to give the executor actual notice than § 9, and therefore more likely to produce a default judgment. Rule 4 (d)(1) is well designed to give actual notice, as it did in this case. See note 1, *supra.*

of the validity and therefore the applicability of a Federal Rule of Civil Procedure. The *Erie* rule has never been invoked to void a Federal Rule. It is true that there have been cases where this Court has held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each such case was not that *Erie* commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law.

> "Respondent contends, in the first place, that the charge was correct because of the fact that Rule 8 (c) of the Rules of Civil Procedure makes contributory negligence an affirmative defense. We do not agree. Rule 8 (c) covers only the manner of pleading. The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases (*Erie R. Co.* v. *Tompkins,* 304 U. S. 64) must apply." *Palmer* v. *Hoffman,* 318 U. S. 109, 117.[12]

(Here, of course, the clash is unavoidable; Rule 4 (d)(1) says—implicitly, but with unmistakable clarity—that in-hand service is not required in federal courts.) At the same time, in cases adjudicating the validity of Federal Rules, we have not applied the *York* rule or other refinements of *Erie,* but have to this day continued to decide questions concerning the scope of the Enabling Act and the constitutionality of specific Federal Rules in light of

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[12] To the same effect, see *Ragan* v. *Merchants Transfer Co., supra; Cohen* v. *Beneficial Loan Corp., supra,* note 10, at 556; *id.,* at 557 (DOUGLAS, J., dissenting); cf. *Bernhardt* v. *Polygraphic Co., supra,* note 5, at 201–202; see generally *Iovino* v. *Waterson, supra,* note 6, at 47–48.

the distinction set forth in *Sibbach*. *E. g., Schlagenhauf* v. *Holder,* 379 U. S. 104.

Nor has the development of two separate lines of cases been inadvertent. The line between "substance" and "procedure" shifts as the legal context changes. "Each implies different variables depending upon the particular problem for which it is used." *Guaranty Trust Co.* v. *York, supra,* at 108; Cook, The Logical and Legal Bases of the Conflict of Laws, pp. 154–183 (1942). It is true that both the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state "substantive" law and federal "procedural" law, but from that it need not follow that the tests are identical. For they were designed to control very different sorts of decisions. When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.[13]

We are reminded by the *Erie* opinion [14] that neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern

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[13] *Sibbach* v. *Wilson & Co., supra,* at 13–15; see Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U. S. 774; Orders re Rules of Procedure, 302 U. S. 783; Letter of Submittal, 308 U. S. 649; 1A Moore, Federal Practice ¶ 0.501 [2], at 5027–5028 (2d ed. 1961).

[14] *Erie R. Co* v. *Tompkins, supra,* at 77–79; cf. *Bernhardt* v. *Polygraphic Co., supra,* note 5, at 202; *Sibbach* v. *Wilson & Co., supra,* at 10; *Guaranty Trust Co.* v. *York, supra,* at 105.

because there can be no other law. But the opinion in *Erie,* which involved no Federal Rule and dealt with a question which was "substantive" in every traditional sense (whether the railroad owed a duty of care to Tompkins as a trespasser or a licensee), surely neither said nor implied that measures like Rule 4 (d)(1) are unconstitutional. For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either. Cf. *M'Culloch* v. *Maryland,* 4 Wheat. 316, 421. Neither *York* nor the cases following it ever suggested that the rule there laid down for coping with situations where no Federal Rule applies is coextensive with the limitation on Congress to which *Erie* had adverted. Although this Court has never before been confronted with a case where the applicable Federal Rule is in direct collision with the law of the relevant State,[15] courts of appeals faced with such clashes have rightly discerned the implications of our decisions.

> "One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules. This is especially true of matters which relate to the administration of legal proceedings, an area in which federal courts

[15] In *Sibbach* v. *Wilson & Co., supra,* the law of the forum State (Illinois) forbade the sort of order authorized by Rule 35. However, *Sibbach* was decided before *Klaxon Co.* v. *Stentor Co., supra,* note 7, and the *Sibbach* opinion makes clear that the Court was proceeding on the assumption that if the law of any State was relevant, it was the law of the State where the tort occurred (Indiana), which, like Rule 35, made provision for such orders. 312 U. S., at 6–7, 10–11.

> have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules. The purpose of the Erie doctrine, even as extended in York and Ragan, was never to bottle up federal courts with 'outcome-determinative' and 'integral-relations' stoppers—when there are 'affirmative countervailing [federal] considerations' and when there is a Congressional mandate (the Rules) supported by constitutional authority." *Lumbermen's Mutual Casualty Co.* v. *Wright,* 322 F. 2d 759, 764 (C. A. 5th Cir. 1963).[16]

Erie and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules. Cf. *Herron* v. *Southern Pacific Co.,* 283 U. S. 91. "When, because the plaintiff happens to be a non-resident, such a right is enforceable in a federal as well as in a State court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic." *Guaranty Trust Co.* v. *York, supra,* at 108; *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541, 555. Thus, though a court, in measuring a Federal Rule against the standards contained in the Enabling Act and the Constitution, need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts, *Sibbach* v. *Wilson & Co., supra,* at 13–14, it cannot be forgotten that the *Erie* rule, and the guidelines suggested in *York,* were created to serve another purpose altogether. To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to dis-

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[16] To the same effect, see *D'Onofrio Construction Co.* v. *Recon Co.,* 255 F. 2d 904, 909–910 (C. A. 1st Cir. 1958).

embowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act.[17] Rule 4 (d)(1) is valid and controls the instant case.

Reversed.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE HARLAN, concurring.

It is unquestionably true that up to now *Erie* and the cases following it have not succeeded in articulating a workable doctrine governing choice of law in diversity actions. I respect the Court's effort to clarify the situation in today's opinion. However, in doing so I think it has misconceived the constitutional premises of *Erie* and has failed to deal adequately with those past decisions upon which the courts below relied.

Erie was something more than an opinion which worried about "forum-shopping and avoidance of inequitable administration of the laws," *ante,* p. 468, although to be sure these were important elements of the decision. I have always regarded that decision as one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems. *Erie* recognized that there should not be two conflicting systems of law controlling the primary activity of citizens, for such alternative governing authority must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs.[1] And it recognized that the scheme of our Constitution envisions an allocation of law-making functions between state and federal legislative processes which is undercut if the federal judiciary can make substantive law affect-

[17] *Mississippi Pub. Corp.* v. *Murphree, supra,* at 445–446; *Iovino* v. *Waterson, supra,* note 6, at 46.

[1] Since the rules involved in the present case are parallel rather than conflicting, this first rationale does not come into play here.

ing state affairs beyond the bounds of congressional legislative powers in this regard. Thus, in diversity cases *Erie* commands that it be the state law governing primary private activity which prevails.

The shorthand formulations which have appeared in some past decisions are prone to carry untoward results that frequently arise from oversimplification. The Court is quite right in stating that the "outcome-determinative" test of *Guaranty Trust Co.* v. *York,* 326 U. S. 99, if taken literally, proves too much, for any rule, no matter how clearly "procedural," can affect the outcome of litigation if it is not obeyed. In turning from the "outcome" test of *York* back to the unadorned forum-shopping rationale of *Erie,* however, the Court falls prey to like oversimplification, for a simple forum-shopping rule also proves too much; litigants often choose a federal forum merely to obtain what they consider the advantages of the Federal Rules of Civil Procedure or to try their cases before a supposedly more favorable judge. To my mind the proper line of approach in determining whether to apply a state or a federal rule, whether "substantive" or "procedural," is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation.[2] If so, *Erie* and the Constitution require that the state rule prevail, even in the face of a conflicting federal rule.

The Court weakens, if indeed it does not submerge, this basic principle by finding, in effect, a grant of substantive legislative power in the constitutional provision for a fed-

[2] See Hart and Wechsler, The Federal Courts and the Federal System 678.

Byrd v. *Blue Ridge Coop., Inc.,* 356 U. S. 525, 536–540, indicated that state procedures would apply if the State had manifested a particularly strong interest in their employment. Compare *Dice* v. *Akron, C. & Y. R. Co.,* 342 U. S. 359. However, this approach may not be of constitutional proportions.

eral court system (compare *Swift* v. *Tyson,* 16 Pet. 1), and through it, setting up the Federal Rules as a body of law inviolate.

> "[T]he constitutional provision for a federal court system . . . carries with it congressional power . . . to regulate matters which, though falling within the uncertain area between substance and procedure, *are rationally capable of classification as either.*" *Ante,* p. 472. (Emphasis supplied.)

So long as a reasonable man could characterize any duly adopted federal rule as "procedural," the Court, unless I misapprehend what is said, would have it apply no matter how seriously it frustrated a State's substantive regulation of the primary conduct and affairs of its citizens. Since the members of the Advisory Committee, the Judicial Conference, and this Court who formulated the Federal Rules are presumably reasonable men, it follows that the integrity of the Federal Rules is absolute. Whereas the unadulterated outcome and forum-shopping tests may err too far toward honoring state rules, I submit that the Court's "arguably procedural, *ergo* constitutional" test moves too fast and far in the other direction.

The courts below relied upon this Court's decisions in *Ragan* v. *Merchants Transfer Co.,* 337 U. S. 530, and *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541. Those cases deserve more attention than this Court has given them, particularly *Ragan* which, if still good law, would in my opinion call for affirmance of the result reached by the Court of Appeals. Further, a discussion of these two cases will serve to illuminate the "diversity" thesis I am advocating.

In *Ragan* a Kansas statute of limitations provided that an action was deemed commenced when service was made on the defendant. Despite Federal Rule 3 which provides that an action commences with the filing of the com-

plaint, the Court held that for purposes of the Kansas statute of limitations a diversity tort action commenced only when service was made upon the defendant. The effect of this holding was that although the plaintiff had filed his federal complaint within the state period of limitations, his action was barred because the federal marshal did not serve a summons on the defendant until after the limitations period had run. I think that the decision was wrong. At most, application of the Federal Rule would have meant that potential Kansas tort defendants would have to defer for a few days the satisfaction of knowing that they had not been sued within the limitations period. The choice of the Federal Rule would have had no effect on the primary stages of private activity from which torts arise, and only the most minimal effect on behavior following the commission of the tort. In such circumstances the interest of the federal system in proceeding under its own rules should have prevailed.

Cohen v. *Beneficial Loan Corp.* held that a federal diversity court must apply a state statute requiring a small stockholder in a stockholder derivative suit to post a bond securing payment of defense costs as a condition to prosecuting an action. Such a statute is not "outcome determinative"; the plaintiff can win with or without it. The Court now rationalizes the case on the ground that the statute might affect the plaintiff's choice of forum (*ante,* p. 469, n. 10), but as has been pointed out, a simple forum-shopping test proves too much. The proper view of *Cohen* is, in my opinion, that the statute was meant to inhibit small stockholders from instituting "strike suits," and thus it was designed and could be expected to have a substantial impact on private primary activity. Anyone who was at the trial bar during the period when *Cohen* arose can appreciate the strong state policy reflected in the statute. I think it wholly legitimate to view Federal Rule 23 as not purporting to deal

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with the problem. But even had the Federal Rules purported to do so, and in so doing provided a substantially less effective deterrent to strike suits, I think the state rule should still have prevailed. That is where I believe the Court's view differs from mine; for the Court attributes such overriding force to the Federal Rules that it is hard to think of a case where a conflicting state rule would be allowed to operate, even though the state rule reflected policy considerations which, under *Erie*, would lie within the realm of state legislative authority.

It remains to apply what has been said to the present case. The Massachusetts rule provides that an executor need not answer suits unless in-hand service was made upon him or notice of the action was filed in the proper registry of probate within one year of his giving bond. The evident intent of this statute is to permit an executor to distribute the estate which he is administering without fear that further liabilities may be outstanding for which he could be held personally liable. If the Federal District Court in Massachusetts applies Rule 4 (d)(1) of the Federal Rules of Civil Procedure instead of the Massachusetts service rule, what effect would that have on the speed and assurance with which estates are distributed? As I see it, the effect would not be substantial. It would mean simply that an executor would have to check at his own house or the federal courthouse as well as the registry of probate before he could distribute the estate with impunity. As this does not seem enough to give rise to any real impingement on the vitality of the state policy which the Massachusetts rule is intended to serve, I concur in the judgment of the Court.

DOMBROWSKI ET AL. *v.* PFISTER, CHAIRMAN, JOINT LEGISLATIVE COMMITTEE ON UN-AMERICAN ACTIVITIES OF THE LOUISIANA LEGISLATURE, ET AL.

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

No. 52. Argued January 25, 1965.—Decided April 26, 1965.

Appellants, a civil rights organization and its executive director, brought suit in Federal District Court, in which other individuals later joined, for injunctive and declaratory relief to restrain appellees from prosecuting or threatening to prosecute them under Louisiana's Subversive Activities and Communist Control Law and Communist Propaganda Control Law, which they alleged violated their rights of free expression under the First and Fourteenth Amendments. Appellants contended that the statutes were excessively broad and susceptible of application in violation of those rights, and were being used by appellees in bad faith, not to secure valid convictions, but to deter appellants' civil rights efforts. Appellants alleged and offered to prove the arrest of the individual appellants under the statutes, the raiding of their offices and illegal seizure of their records, with continued threats of prosecution after invalidation by a state court of the arrests and seizure of evidence preceding this action. A three-judge District Court dismissed the complaint for failure to state a claim upon which relief could be granted, also holding that abstention was appropriate pending a possible narrowing construction by the state courts which would avoid unnecessary constitutional adjudication. Thereafter, appellants alleged, the individual appellants were indicted under the Subversive Activities and Communist Control Law. They also claimed that there was no prospect of final state adjudications either under those indictments or under threatened additional prosecutions. *Held:*

1. The mere possibility of erroneous initial application of constitutional standards by a state court will not ordinarily constitute irreparable injury warranting federal interference with a good-faith prosecution and the adjudication during its course of constitutional defenses. Pp. 484–485.

2. But equitable relief will be granted to prevent a substantial loss or impairment of freedoms of expression resulting from prosecution under an excessively broad statute regulating expression. Pp. 485–489.

(a) Defense of a criminal prosecution will not generally assure ample vindication of First Amendment rights. *Baggett* v. *Bullitt*, 377 U. S. 360, followed. Pp. 485–486.

(b) A chilling effect upon First Amendment rights might result from such prosecution regardless of its prospects of success or failure, as is indicated by appellants' representations of the actions taken under the statutes. Pp. 487–489.

3. The abstention doctrine is inappropriate where a statute is justifiably attacked on its face, or as applied for the purpose of discouraging protected activities. Pp. 489–491.

(a) The state court's ultimate interpretation of a statute would be irrelevant to meet the claim that it was being applied to discourage civil rights activities. P. 490.

(b) Abstention is inappropriate where a statute regulating speech is properly attacked on its face as being unconstitutionally vague. Pp. 490–491.

(c) Appellants are entitled to an injunction where, as here, no readily apparent construction is available to bring the statute within constitutional confines in a single prosecution, and it is not alleged that their conduct would fall within any conceivable narrowing construction. P. 491.

(d) The State must assume the burden of securing a permissible narrow construction of the statute in a noncriminal proceeding before it may seek modification of the injunction to permit future prosecutions thereunder. P. 491.

4. The statutory definition of "a subversive organization" in § 359 (5) of the Louisiana Subversive Activities and Communist Control Law, incorporated in the offense created by § 364 (4), under which two of the individual appellants were indicted, results in an overly broad regulation of speech, invalid for the same reasons as held in *Baggett* v. *Bullitt*, *supra*, which involved a substantially similar definition. Pp. 493–494.

5. Section 364 (7), creating an offense for failure to register as a member of a "Communist Front Organization," under which each of the individual defendants was indicted, is on its face invalid because of its constitutionally impermissible presumption of such status if the organization had been cited as a Communist front

by designated federal instrumentalities, there being no requirement in the statute of compliance in the process of such citation with procedural safeguards as demanded by *Anti-Fascist Committee* v. *McGrath,* 341 U. S. 123. Pp. 494–496.

6. The District Court shall enjoin prosecution of the pending indictments against the individual appellants, order immediate return of documents seized and prohibit further enforcement of the sections of the Subversive Activities and Communist Control Law here found void on their face. Without abstention, it shall decide what relief appellants may be entitled to on the basis of their attacks on other sections of that statute, their attacks on the Communist Propaganda Control Law, and the remaining issues raised in the complaint. Pp. 497–498.

227 F. Supp. 556, reversed and remanded.

Leon Hubert and *Arthur Kinoy* argued the cause for appellants. With them on the brief were *William M. Kunstler, Michael J. Kunstler* and *A. P. Tureaud.*

John E. Jackson, Jr., Assistant Attorney General of Louisiana, and *Jack N. Rogers* argued the cause for appellees. With them on the brief for appellees Pfister et al. were *Jack P. F. Gremillion,* Attorney General of Louisiana, and *Dorothy D. Wolbrette,* Assistant Attorney General. With *Mr. Rogers* on the brief for appellee Joint Legislative Committee on Un-American Activities was *Robert H. Reiter. Mr. Reiter* also filed a brief for appellee Davis. Appellee *Jim Garrison* filed a brief *pro se.*

Briefs of *amici curiae,* urging reversal, were filed by *Jack Greenberg, Derrick A. Bell, Jr.,* and *Jay H. Topkis* for the NAACP Legal Defense & Educational Fund; by *Louis Lusky* and *Melvin L. Wulf* for the American Civil Liberties Union et al.; and by *Ernest Goodman* and *David Rein* for the National Lawyers Guild.

Mr. Justice Brennan delivered the opinion of the Court.

Appellants filed a complaint in the District Court for the Eastern District of Louisiana, invoking the Civil

Rights Act, Rev. Stat. § 1979, 42 U. S. C. § 1983 (1958 ed.), and seeking declaratory relief and an injunction restraining appellees—the Governor, police and law enforcement officers, and the Chairman of the Legislative Joint Committee on Un-American Activities in Louisiana—from prosecuting or threatening to prosecute appellants for alleged violations of the Louisiana Subversive Activities and Communist Control Law and the Communist Propaganda Control Law.[1] Appellant Southern Conference Educational Fund, Inc. (SCEF), is active in fostering civil rights for Negroes in Louisiana and other States of the South. Appellant Dombrowski is its Executive Director; intervenor Smith, its Treasurer; and intervenor Waltzer, Smith's law partner and an attorney for SCEF. The complaint alleges that the statutes on their face violate the First and Fourteenth Amendment guarantees securing freedom of expression, because overbreadth makes them susceptible of sweeping and improper application abridging those rights. Supported by affidavits and a written offer of proof, the complaint further alleges that the threats to enforce the statutes against appellants are not made with any expectation of securing valid convictions, but rather are part of a plan to employ arrests, seizures, and threats of prosecution under color of the statutes to harass appellants and discourage them and their supporters from asserting and attempting to vindicate the constitutional rights of Negro citizens of Louisiana.

A three-judge district court, convened pursuant to 28 U. S. C. § 2281 (1958 ed.), dismissed the complaint, one judge dissenting, "for failure to state a claim upon which relief can be granted." 227 F. Supp. 556, 564. The ma-

[1] The Subversive Activities and Communist Control Law is La. Rev. Stat. §§ 14:358 through 14:374 (Cum. Supp. 1962). The Communist Propaganda Control Law is La. Rev. Stat. §§ 14:390 through 14:390.8 (Cum. Supp. 1962).

jority were of the view that the allegations, conceded to raise serious constitutional issues, did not present a case of threatened irreparable injury to federal rights which warranted cutting short the normal adjudication of constitutional defenses in the course of state criminal prosecutions; rather, the majority held, this was an appropriate case for abstention, since a possible narrowing construction by the state courts would avoid unnecessary decision of constitutional questions. In accordance with this view the court withdrew its initial determination that the statutes were not unconstitutional on their face. 227 F. Supp., at 562–563. Postponement of consideration of the federal issues until state prosecution and possible review here of adverse state determination was thought to be especially appropriate since the statutes concerned the State's "basic right of self-preservation" and the threatened prosecution was "imbued . . . with an aura of sedition or treason or acts designed to substitute a different form of local government by other than lawful means . . ."; federal court interference with enforcement of such statutes "truly . . . would be a massive emasculation of the last vestige of the dignity of sovereignty." 227 F. Supp., at 559, 560. We noted probable jurisdiction in order to resolve a seeming conflict with our later decision in *Baggett* v. *Bullitt,* 377 U. S. 360, and to settle important questions concerning federal injunctions against state criminal prosecutions threatening constitutionally protected expression. 377 U. S. 976. We reverse.

I.

In *Ex parte Young,* 209 U. S. 123, the fountainhead of federal injunctions against state prosecutions, the Court characterized the power and its proper exercise in broad terms: it would be justified where state officers ". . . threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against par-

ties affected an unconstitutional act, violating the Federal Constitution . . . ." 209 U. S., at 156. Since that decision, however, considerations of federalism have tempered the exercise of equitable power,[2] for the Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application

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[2] 28 U. S. C. § 2283 (1958 ed.) provides that:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The District Court did not suggest that this statute denied power to issue the injunctions sought. This statute and its predecessors do not preclude injunctions against the institution of state court proceedings, but only bar stays of suits already instituted. See *Ex parte Young, supra.* See generally Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345, 366–378 (1930); Note, Federal Power to Enjoin State Court Proceedings, 74 Harv. L. Rev. 726, 728–729 (1961). Since the grand jury was not convened and indictments were not obtained until after the filing of the complaint, which sought interlocutory as well as permanent relief, no state "proceedings" were pending within the intendment of § 2283. To hold otherwise would mean that any threat of prosecution sufficient to justify equitable intervention would also be a "proceeding" for § 2283. Nor are the subsequently obtained indictments "proceedings" against which injunctive relief is precluded by § 2283. The indictments were obtained only because the District Court erroneously dismissed the complaint and dissolved the temporary restraining order issued by Judge Wisdom in aid of the jurisdiction of the District Court properly invoked by the complaint. We therefore find it unnecessary to resolve the question whether suits under 42 U. S. C. § 1983 (1958 ed.) come under the "expressly authorized" exception to § 2283. Compare *Cooper* v. *Hutchinson,* 184 F. 2d 119, 124 (C. A. 3d Cir. 1950), with *Smith* v. *Village of Lansing,* 241 F. 2d 856, 859 (C. A. 7th Cir. 1957). See Note, 74 Harv. L. Rev. 726, 738 (1961).

of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings. In *Douglas* v. *City of Jeannette,* 319 U. S. 157, for example, the Court upheld a district court's refusal to enjoin application of a city ordinance to religious solicitation, even though the ordinance was that very day held unconstitutional as so applied on review of a criminal conviction under it. *Murdock* v. *Pennsylvania,* 319 U. S. 105. Since injunctive relief looks to the future, and it was not alleged that Pennsylvania courts and prosecutors would fail to respect the *Murdock* ruling, the Court found nothing to justify an injunction. And in a variety of other contexts the Court has found no special circumstances to warrant cutting short the normal adjudication of constitutional defenses in the course of a criminal prosecution.[3] In such cases it does not appear that the plaintiffs "have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith, or that a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court." *Douglas* v. *City of Jeannette, supra,* at 164.

But the allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights.

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[3] See, *e. g., Beal* v. *Missouri Pac. R. Co.,* 312 U. S. 45 (mere threat of single prosecution); *Spielman Motor Sales Co., Inc.* v. *Dodge,* 295 U. S. 89 (same); *Watson* v. *Buck,* 313 U. S. 387 (no irreparable injury or constitutional infirmity in statute); *Fenner* v. *Boykin,* 271 U. S. 240 (same). It is difficult to think of a case in which an accused could properly bring a state prosecution to a halt while a federal court decides his claim that certain evidence is rendered inadmissible by the Fourteenth Amendment. Cf. *Cleary* v. *Bolger,* 371 U. S. 392; *Stefanelli* v. *Minard,* 342 U. S. 117.

They suggest that a substantial loss or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury.

A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. See, *e. g., Smith* v. *California,* 361 U. S. 147. When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See *Baggett* v. *Bullitt, supra,* at 379. For "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions. . . ." *NAACP* v. *Button,* 371 U. S. 415, 433. Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser. Cf. *Garrison* v. *Louisiana,* 379 U. S. 64, 74–75. For example, we have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. *Thornhill* v. *Alabama,* 310 U. S. 88, 97–98; *NAACP* v. *Button, supra,* at 432–433; cf. *Aptheker* v. *Secretary of State,* 378 U. S. 500, 515–517; *United States* v. *Raines,* 362 U. S. 17, 21–22. We have fashioned this exception to the usual rules governing standing, see *United States* v. *Raines, supra,* because of

the ". . . danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *NAACP* v. *Button, supra,* at 433. If the rule were otherwise, the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation. Cf. *Ex parte Young, supra,* at 147–148. By permitting determination of the invalidity of these statutes without regard to the permissibility of some regulation on the facts of particular cases, we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure. See *NAACP* v. *Button, supra,* at 432–433; cf. *Baggett* v. *Bullitt, supra,* at 378–379; *Bush* v. *Orleans School Board,* 194 F. Supp. 182, 185, affirmed *sub nom. Tugwell* v. *Bush,* 367 U. S. 907; *Gremillion* v. *United States,* 368 U. S. 11.

Appellants' allegations and offers of proof outline the chilling effect on free expression of prosecutions initiated and threatened in this case. Early in October 1963 appellant Dombrowski and intervenors Smith and Waltzer were arrested by Louisiana state and local police and charged with violations of the two statutes. Their offices were raided and their files and records seized.[4] Later in October a state judge quashed the

[4] The circumstances of the arrests are set forth in Judge Wisdom's dissenting opinion:

"At gunpoint their homes and offices were raided and ransacked by police officers and trustees from the House of Detention acting under the direct supervision of the staff director and the counsel for the State Un-American Activities Committee. The home and office of

arrest warrants as not based on probable cause, and discharged the appellants. Subsequently, the court granted a motion to suppress the seized evidence on the ground that the raid was illegal. Louisiana officials continued, however, to threaten prosecution of the appellants, who thereupon filed this action in November. Shortly after the three-judge court was convened, a grand jury was summoned in the Parish of Orleans to hear evidence looking to indictments of the individual appellants. On appellants' application Judge Wisdom issued a temporary restraining order against prosecutions pending hearing and decision of the case in the District Court. Following a hearing the District Court, over Judge Wisdom's dissent, dissolved the temporary restraining order and, at the same time, handed down an order dismissing the complaint. Thereafter the grand jury returned indictments under the Subversive Activities and Communist Control Law against the individual appellants.[5]

These events, together with repeated announcements by appellees that the appellant organization is a subversive or Communist-front organization, whose members must register or be prosecuted under the Louisiana statutes, have, appellants allege, frightened off potential members and contributors. Cf. *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123. Seizures of documents and records have paralyzed operations and threatened exposure of the

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the director of Southern Conference Educational Fund were also raided. Among the dangerous articles removed was Thoreau's Journal. A truckload of files, membership lists, subscription lists to SCEF's newspaper, correspondence, and records were removed from SCEF's office, destroying its capacity to function. At the time of the arrests, Mr. Pfister, Chairman of the Committee, announced to the press that the raids and arrest resulted from 'racial agitation.'" 227 F. Supp., at 573.

[5] Prosecution under these indictments is awaiting decision of this case.

identity of adherents to a locally unpopular cause. See *NAACP* v. *Alabama,* 357 U. S. 449. Although the particular seizure has been quashed in the state courts, the continuing threat of prosecution portends further arrests and seizures, some of which may be upheld and all of which will cause the organization inconvenience or worse. In *Freedman* v. *Maryland, ante,* p. 51, we struck down a motion picture censorship statute solely because the regulatory scheme did not sufficiently assure exhibitors a prompt judicial resolution of First Amendment claims. The interest in immediate resolution of such claims is surely no less where criminal prosecutions are threatened under statutes allegedly overbroad and seriously inhibiting the exercise of protected freedoms. Not only does the complaint allege far more than an "injury other than that incidental to every criminal proceeding brought lawfully and in good faith," but appellants allege threats to enforce statutory provisions other than those under which indictments have been brought. Since there is no immediate prospect of a final state adjudication as to those other sections—if, indeed, there is any certainty that prosecution of the pending indictments will resolve all constitutional issues presented—a series of state criminal prosecutions will not provide satisfactory resolution of constitutional issues.

It follows that the District Court erred in holding that the complaint fails to allege sufficient irreparable injury to justify equitable relief.

The District Court also erred in holding that it should abstain pending authoritative interpretation of the statutes in the state courts, which might hold that they did not apply to SCEF, or that they were unconstitutional as applied to SCEF. We hold the abstention doctrine is inappropriate for cases such as the present one where, unlike *Douglas* v. *City of Jeannette,* statutes are justifi-

ably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities.

First, appellants have attacked the good faith of the appellees in enforcing the statutes, claiming that they have invoked, and threaten to continue to invoke, criminal process without any hope of ultimate success, but only to discourage appellants' civil rights activities. If these allegations state a claim under the Civil Rights Act, 42 U. S. C. § 1983, as we believe they do, see *Beauregard* v. *Wingard,* 230 F. Supp. 167 (D. C. S. D. Calif. 1964); *Bargainer* v. *Michal,* 233 F. Supp. 270 (D. C. N. D. Ohio 1964), the interpretation ultimately put on the statutes by the state courts is irrelevant. For an interpretation rendering the statute inapplicable to SCEF would merely mean that appellants might ultimately prevail in the state courts. It would not alter the impropriety of appellees' invoking the statute in bad faith to impose continuing harassment in order to discourage appellants' activities, as appellees allegedly are doing and plan to continue to do.

Second, appellants have challenged the statutes as overly broad and vague regulations of expression. We have already seen that where, as here, prosecutions are actually threatened, this challenge, if not clearly frivolous, will establish the threat of irreparable injury required by traditional doctrines of equity. We believe that in this case the same reasons preclude denial of equitable relief pending an acceptable narrowing construction. In considering whether injunctive relief should be granted, a federal district court should consider a statute as of the time its jurisdiction is invoked, rather than some hypothetical future date. The area of proscribed conduct will be adequately defined and the deterrent effect of the statute contained within constitutional limits only by authoritative constructions sufficiently illuminating the

contours of an otherwise vague prohibition. As we observed in *Baggett* v. *Bullitt, supra,* at 378, this cannot be satisfactorily done through a series of criminal prosecutions, dealing as they inevitably must with only a narrow portion of the prohibition at any one time, and not contributing materially to articulation of the statutory standard. We believe that those affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood of obviating similar uncertainty for others. Here, no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution, and appellants are entitled to an injunction. The State must, if it is to invoke the statutes after injunctive relief has been sought, assume the burden of obtaining a permissible narrow construction in a noncriminal proceeding [6] before it may seek modification of the injunction to permit future prosecutions.[7]

On this view of the "vagueness" doctrine, it is readily apparent that abstention serves no legitimate purpose where a statute regulating speech is properly attacked on its face, and where, as here, the conduct charged in the indictments is not within the reach of an acceptable limiting construction readily to be anticipated as the result of a single criminal prosecution and is not the sort of "hard-

[6] Thirty-seven States, including Louisiana, have adopted the Uniform Declaratory Judgments Act. The Louisiana version, La. Civ. Proc. Code Ann., 1960, Arts. 1871–1883, abolishes the former requirement that there be no other adequate remedy.

[7] Our cases indicate that once an acceptable limiting construction is obtained, it may be applied to conduct occurring prior to the construction, see *Poulos* v. *New Hampshire,* 345 U. S. 395; *Cox* v. *New Hampshire,* 312 U. S. 569; *Winters* v. *New York,* 333 U. S. 507, provided such application affords fair warning to the defendants, see *Lanzetta* v. *New Jersey,* 306 U. S. 451; cf. *Harrison* v. *NAACP,* 360 U. S. 167, 179.

core" conduct that would obviously be prohibited under any construction. In these circumstances, to abstain is to subject those affected to the uncertainties and vagaries of criminal prosecution, whereas the reasons for the vagueness doctrine in the area of expression demand no less than freedom from prosecution prior to a construction adequate to save the statute. In such cases, abstention is at war with the purposes of the vagueness doctrine, which demands appropriate federal relief regardless of the prospects for expeditious determination of state criminal prosecutions. Although we hold today that appellants' allegations of threats to prosecute, if upheld, dictate appropriate equitable relief without awaiting declaratory judgments in the state courts, the settled rule of our cases is that district courts retain power to modify injunctions in light of changed circumstances. *System Federation* v. *Wright,* 364 U. S. 642; *Chrysler Corp.* v. *United States,* 316 U. S. 556; *United States* v. *Swift & Co.,* 286 U. S. 106. Our view of the proper operation of the vagueness doctrine does not preclude district courts from modifying injunctions to permit prosecutions in light of subsequent state court interpretation clarifying the application of a statute to particular conduct.

We conclude that on the allegations of the complaint, if true, abstention and the denial of injunctive relief may well result in the denial of any effective safeguards against the loss of protected freedoms of expression, and cannot be justified.

II.

Each of the individual appellants was indicted for violating § 364 (7) [8] of the Subversive Activities and Communist Control Law by failing to register as a member of

[8] Section 364 (7) provides: "It shall be a felony for any person knowingly and wilfully to . . . [f]ail to register as required in R. S. 14:360 or to make any registration which contains any material false statement or omission."

a Communist-front organization. Smith and Waltzer were indicted for failing to register as members "of a Communist front organization known as the National Lawyers Guild, which said organization has been cited by committees and sub-committees of the United States Congress as a Communist front organization . . . ." Dombrowski and Smith were indicted for failing to register as members of "a Communist front organization known as the Southern Conference Educational Fund, which said organization is essentially the same as the Southern Conference for Human Welfare, which said Southern Conference for Human Welfare [has] . . . been cited by the committees of the United States Congress as a Communist front organization . . . ." Dombrowski and Smith were also indicted for violating § 364 (4),[9] by acting as Executive Director and Treasurer respectively "of a subversive organization, to wit, the Southern Conference Educational Fund, said organization being essentially the same as the Southern Conference for Human Welfare, which said organization has been cited by committees of the United States Congress as a Communist front organization . . . ."

The statutory definition of "a subversive organization" in § 359 (5)[10] incorporated in the offense created by

[9] Section 364 (4) provides: "It shall be a felony for any person knowingly and wilfully to . . . [a]ssist in the formation or participate in the management or to contribute to the support of any subversive organization or foreign subversive organization knowing said organization to be a subversive organization or a foreign subversive organization . . . ."

[10] Section 359 (5) provides: " 'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy, or to assist in the overthrow or destruction of the constitutional form of the government of the state of Louisiana, or of any political subdivision thereof by revolution, force, violence or other unlawful means, or any other orga-

§ 364 (4), is substantially identical to that of the Washington statute which we considered in *Baggett* v. *Bullitt, supra,* at 362, 363, n. 1. There the definition was used in a state statute requiring state employees to take an oath as a condition of employment. We held that the definition, as well as the oath based thereon, denied due process because it was unduly vague, uncertain and broad. Where, as here, protected freedoms of expression and association are similarly involved, we see no controlling distinction in the fact that the definition is used to provide a standard of criminality rather than the contents of a test oath. This overly broad statute also creates a "danger zone" within which protected expression may be inhibited. Cf. *Speiser* v. *Randall,* 357 U. S. 513, 526. So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression. *A Quantity of Copies of Books* v. *Kansas,* 378 U. S. 205; *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58; *Marcus* v. *Search Warrant,* 367 U. S. 717; *Speiser* v. *Randall, supra.* Since § 364 (4) is so intimately bound up with a definition invalid under the reasoning of *Baggett* v. *Bullitt,* we hold that it is invalid for the same reasons.

We also find the registration requirement of § 364 (7) invalid. That section creates an offense of failure to register as a member of a Communist-front organization, and, under § 359 (3),[11] "the fact that an organization has

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nization which seeks by unconstitutional or illegal means to overthrow or destroy the government of the state of Louisiana or any political subdivision thereof and to establish in place thereof any form of government not responsible to the people of the state of Louisiana under the Constitution of the state of Louisiana."

[11] Section 359 (3) provides: "'Communist Front Organization' shall, for the purpose of this act include any communist action organization, communist front organization, communist infiltrated orga-

been officially cited or identified by the Attorney General of the United States, the Subversive Activities Control Board of the United States or any committee or subcommittee of the United States Congress as a . . . communist front organization . . . shall be considered presumptive evidence of the factual status of any such organization." There is no requirement that the organization be so cited only after compliance with the procedural safeguards demanded by *Anti-Fascist Committee* v. *McGrath*, *supra*.[12]

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nization or communist controlled organization and the fact that an organization has been officially cited or identified by the Attorney General of the United States, the Subversive Activities Control Board of the United States or any committee or subcommittee of the United States Congress as a communist organization, a communist action organization, a communist front organization, a communist infiltrated organization or has been in any other way officially cited or identified by any of these aforementioned authorities as a communist controlled organization, shall be considered presumptive evidence of the factual status of any such organization."

[12] Although we hold the statute void on its face, its application to the National Lawyers Guild is instructive. In 1953, the Attorney General of the United States proposed to designate the organization as subversive. His proposal was made under revised regulations, promulgated under Executive Order 10450 to comply with *Anti-Fascist Committee*, establishing a notice and hearing procedure prior to such designation of an organization. 18 Fed. Reg. 2619; see 1954 Annual Report of the Attorney General, p. 14. The Guild brought an action in the District Court for the District of Columbia attacking the Executive Order and the procedures. A summary judgment in favor of the Attorney General because of failure to exhaust administrative remedies was sustained on appeal and this Court denied certiorari, *National Lawyers Guild* v. *Brownell*, 96 U. S. App. D. C. 252, 225 F. 2d 552, cert. denied, 351 U. S. 927. After a Hearing Officer determined that certain interrogatories propounded to the Guild should be answered, the Guild brought another action in the District Court, *National Lawyers Guild* v. *Rogers*, Civil Action No. 1738–58, filed July 2, 1958. On September 11, 1958, the Attorney General rescinded the proposal to designate the Guild. 1958 Annual Report of the Attorney General, p. 251. On September 12, 1958, the complaint

A designation resting on such safeguards is a minimum requirement to insure the rationality of the presumptions of the Louisiana statute and, in its absence, the presumptions cast an impermissible burden upon the appellants to show that the organizations are not Communist fronts. "Where the transcendent value of speech is involved, due process certainly requires . . . that the State bear the burden of persuasion to show that the appellants engaged in criminal speech." *Speiser* v. *Randall, supra,* at 526. It follows that § 364 (7), resting on the invalid presumption, is unconstitutional on its face.[13]

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was dismissed as moot at the instance of the Attorney General, who filed a motion reciting the rescission and stating that the Attorney General had "concluded that the evidence that would now be available at a hearing on the merits of the proposed designation fails to meet the strict standards of proof which guide the determination of proceedings of this character." The present federal statutes provide that the Subversive Activities Control Board may not designate an organization as a Communist front without first according the organization the procedural safeguards of notice and hearing. Subversive Activities Control Act of 1950, § 13, 64 Stat. 998, 50 U. S. C. § 792 (1958 ed.). See *Communist Party* v. *SACB,* 367 U. S. 1.

[13] Although we read appellee Garrison's brief as conceding that appellants' files and records were seized in aid of the prosecutions under the Subversive Activities and Communist Control Law, we find no concession that the seizure, as alleged in appellants' offer of proof, was also under color of the Communist Propaganda Control Law. Section 390.6 of that statute authorizes the seizure and destruction on summary process of "[a]ll communist propaganda discovered in the state of Louisiana" in violation of the other provisions of the Act, and § 390.2 makes it a felony to disseminate such material. "Communist propaganda" is defined in § 390.1, which contains a presumption identical to that which we have found to be invalid in § 359 (3) of the Subversive Activities and Communist Control Law. In light of the uncertain state of the record, however, we believe that the appellants' attacks upon the constitutionality, on its face and as applied, of the Communist Propaganda Control Law should await determination by the District Court after considering the sufficiency of threats to enforce the law.

III.

The precise terms and scope of the injunctive relief to which appellants are entitled and the identity of the appellees to be enjoined cannot, of course, be determined until after the District Court conducts the hearing on remand. The record suffices, however, to permit this Court to hold that, without the benefit of limiting construction, the statutory provisions on which the indictments are founded are void on their face; until an acceptable limiting construction is obtained, the provisions cannot be applied to the activities of SCEF, whatever they may be. The brief filed in this Court by appellee Garrison, District Attorney of the Parish of Orleans, the official having immediate responsibility for the indictments, concedes the facts concerning the arrests of the individual appellants, their discharge by the local judge, and the indictments of the individual appellants by the grand jury. In view of our decision on the merits, the District Court on remand need decide only the relief to which appellants may be entitled on the basis of their attacks on other sections of that statute and the Communist Propaganda Control Law, and on their allegations that appellees threaten to enforce both statutes solely to discourage appellants from continuing their civil rights activities. On these issues, abstention will be as inappropriate as on the issues we here decide.

The judgment of the District Court is reversed and the cause is remanded for further proceedings consistent with this opinion. These shall include prompt framing of a decree restraining prosecution of the pending indictments against the individual appellants, ordering immediate return of all papers and documents seized, and prohibiting further acts enforcing the sections of the Subversive Activities and Communist Control Law here found void

on their face. In addition, appellants are entitled to expeditious determination, without abstention, of the remaining issues raised in the complaint.

It is so ordered.

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

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

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

The basic holding in this case marks a significant departure from a wise procedural principle designed to spare our federal system from premature federal judicial interference with state statutes or proceedings challenged on federal constitutional grounds. This decision abolishes the doctrine of federal judicial abstention in all suits attacking state criminal statutes for vagueness on First-Fourteenth Amendment grounds. As one who considers that it is a prime responsibility of this Court to maintain federal-state court relationships in good working order, I cannot subscribe to a holding which displays such insensitivity to the legitimate demands of those relationships under our federal system. I see no such incompatibility between the abstention doctrine and the full vindication of constitutionally protected rights as the Court finds to exist in cases of this kind.

In practical effect the Court's decision means that a State may no longer carry on prosecutions under statutes challengeable for vagueness on "First Amendment" grounds without the prior approval of the federal courts. For if such a statute can be so questioned (and few, at least colorably, cannot) then a state prosecution, if insti-

tuted after the commencement of a federal action,[1] must be halted until the prosecuting authorities obtain in some other state proceeding a narrowing construction, which in turn would presumably be subject to further monitoring by the federal courts before the state prosecution would be allowed to proceed.

For me such a paralyzing of state criminal processes cannot be justified by any of the considerations which the Court's opinion advances in its support. High as the premium placed on First Amendment rights may be, I do not think that the Federal Constitution prevents a State from testing their availability through the medium of criminal proceedings, subject of course to this Court's ultimate review.

Underlying the Court's major premise that criminal enforcement of an overly broad statute affecting rights of speech and association is in itself a deterrent to the free exercise thereof seems to be the unarticulated assumption that state courts will not be as prone as federal courts to vindicate constitutional rights promptly and effectively. Such an assumption should not be indulged in the absence of a showing that such is apt to be so in a given case. No showing of that kind has been made. On the contrary, the Louisiana courts in this very case have already refused to uphold the seizure of appellants' books. *Ante*, pp. 487–488. We should not assume that those courts would not be equally diligent in construing the statutes here in question in accordance with the relevant decisions of this Court.[2]

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[1] If the state criminal prosecution were instituted first, a federal court could not enjoin the state action. 28 U. S. C. § 2283 (1958 ed.).

[2] Moreover, it is not unlikely that the Louisiana courts would construe these statutes so as to obviate the problems of vagueness noted by the Court in *Baggett* v. *Bullitt*, 377 U. S. 360, with regard to a similar Washington statute. Compare *Douglas* v. *City of Jeannette*, 319 U. S. 157, and *Murdock* v. *Pennsylvania*, 319 U. S. 105, *ante*, p. 485.

The Court suggests that "a substantial loss or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination." *Ante,* p. 486. But the possibility of such an impairment is not obviated by traveling the federal route approved here. Even in the federal courts the progress of litigation is not always as swift as one would like to see it. It is true, of course, that appellants would have to show in the state case that the conduct charged falls outside the scope of a criminal statute construed within constitutional limits, whereas in this case they need not allege the particular conduct which they deem to be protected. But the argument that these state prosecutions do not afford an appropriate vehicle for testing appellants' claims respecting freedom of speech and association hardly sits well with the Smith Act cases in which First Amendment claims were at the very core of the federal prosecutions. See *Dennis* v. *United States,* 341 U. S. 494; *Yates* v. *United States,* 354 U. S. 298; *Scales* v. *United States,* 367 U. S. 203.

Baggett v. *Bullitt,* 377 U. S. 360, in which the Court last Term struck down a Washington state statute virtually identical to this one, should not be dispositive of this case. *Baggett* was decided in the context of what amounted to an academic loyalty oath, applicable to college professors with respect to some of whom (those not having tenure) there was at least grave doubt whether a state remedy was available to review the constitutionality of their dismissal by reason of refusal to take the required oath. I would not extend the doctrine of that case to thwart the normal processes of state criminal law enforcement.[3]

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[3] In this case appellants are pursuing a consistent course of conduct, and the only question is whether the Louisiana statutes apply

Had this statute been a federal enactment and had this Court been willing to pass upon its validity in a declaratory judgment or injunction action, I can hardly believe that it would have stricken the statute without first exposing it to the process of narrowing construction in an effort to save as much of it as possible. See, *e. g., Dennis* v. *United States, supra,* at 502. Yet here the Court has not only made no effort to give this state statute a narrowing construction, but has also declined to give the Louisiana courts an opportunity to do so with respect to the acts charged in the pending prosecutions against these appellants. See *Fox* v. *Washington,* 236 U. S. 273; *Poulos* v. *New Hampshire,* 345 U. S. 395. The statute thus *pro tanto* goes to its doom without either state or federal court interpretation, and despite the room which the statute clearly leaves for a narrowing constitutional construction. See *Dennis, Yates,* and *Scales, supra.* This seems to me to be heavy-handed treatment of the first order.

What the Court decides suffers from a further infirmity. Interwoven with the vagueness doctrine is a question of standing. In a criminal prosecution a defendant could not avoid a constitutional application of this statute to his own conduct simply by showing that if applied to others whose conduct was protected it would be unconstitutional.[4] To follow that practice in a federal court which

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to such conduct. Thus, this case comes within the "bulk of abstention cases in this Court . . . [where] the unsettled issue of state law principally concerned the applicability of the challenged statute to a certain person or a defined course of conduct, whose resolution in a particular manner would eliminate the constitutional issue and terminate the litigation." *Baggett* v. *Bullitt, supra,* at 376–377. The present case is indistinguishable from *Harrison* v. *NAACP,* 360 U. S. 167, and *Albertson* v. *Millard,* 345 U. S. 242, as explained in *Baggett, supra,* at 376, n. 13.

[4] See Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 96–104 (1960).

is asked to enjoin a state criminal prosecution would, however, in effect require that the parties try the criminal case in advance in the federal forum, see *Cleary* v. *Bolger*, 371 U. S. 392; *Stefanelli* v. *Minard*, 342 U. S. 117, 123–124, a procedure certainly seriously disruptive of the orderly processes of the state proceedings. The Court seems to recognize that persons whose conduct would be included under even the narrowest reading of the statutes—what might be called "hard-core" conduct—could have been constitutionally prosecuted under the statutes invalidated today, without being able to assert a vagueness defense. *Ante*, n. 7; pp. 491–492. Thus, if persons were conspiring to stage a forcible *coup d'etat* in a State, they could hardly claim in a criminal trial that a statute such as this was vague as applied to them. For all we know, appellants' conduct in fact would fall within even the narrowest reading of the Louisiana Subversive Activities and Communist Control Law, but since appellants were able to reach a federal court before the State instituted criminal proceedings against them, they are now immunized with a federal vaccination from state prosecution. To make standing and criminality turn on which party wins the race to the forum of its own choice is to repudiate the "considerations of federalism" (*ante*, p. 484) to which the Court pays lip service.

While I consider that abstention was called for, I think the District Court erred in dismissing the action. It should have retained jurisdiction for the purpose of affording appellants appropriate relief in the event that the state prosecution did not go forward in a prompt and bona fide manner. See *Harrison* v. *NAACP*, 360 U. S. 167.

AMERICAN COMMITTEE FOR PROTECTION OF FOREIGN BORN *v.* SUBVERSIVE ACTIVITIES CONTROL BOARD.

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

No. 44. Argued December 8–9, 1964.—Decided April 26, 1965.

Since the order of the Subversive Activities Control Board, affirmed by the Court of Appeals, requiring that petitioner register as a "Communist-front" organization was based upon evidence at a hearing which ended in 1955 which related largely to the activities of one individual who died prior to the Board's order, the judgment is vacated and the cause remanded to determine petitioner's current status.

117 U. S. App. D. C. 393, 331 F. 2d 53, vacated and remanded.

Joseph Forer argued the cause for petitioner. With him on the briefs was *David Rein.*

Bruce J. Terris argued the cause for respondent. With him on the brief were *Solicitor General Cox, Assistant Attorney General Yeagley, Kevin T. Maroney, George B. Searls* and *Doris H. Spangenburg.*

Melvin L. Wulf and *Marvin M. Karpatkin* filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

PER CURIAM.

The Court of Appeals for the District of Columbia Circuit affirmed an order of the Subversive Activities Control Board requiring that the petitioner register as a "Communist-front" organization under § 7 of the Subversive Activities Control Act of 1950, as amended, 64 Stat. 993, 50 U. S. C. § 786 (1958 ed.). 117 U. S. App. D. C. 393, 331 F. 2d 53. We granted certiorari. 377 U. S. 915.

Under the statute, a determination that an organization is a Communist front must rest on findings that it "(A) is substantially directed, dominated, or controlled by a Communist-action organization, and (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization . . . ." § 3 (4), 64 Stat. 989, 50 U. S. C. § 782 (4) (1958 ed.). In *Communist Party of the United States* v. *Subversive Activities Control Board,* 367 U. S. 1, this Court sustained the Board's determination that the Communist Party is a "Communist-action organization" within the meaning of § 3 (3) of the Act; in doing so, the Court upheld the registration requirement against First Amendment attack and found an objection based on the Fifth Amendment privilege against self-incrimination not ripe for decision.

In the present case the Board's findings that petitioner is a "Communist front" were based primarily upon evidence taken at a hearing which was concluded in 1955. The findings which support the conclusion that the petitioner is controlled by and primarily operated for the purpose of giving aid and support to the Communist Party rest in substantial measure upon evidence of the activities of Abner Green, found to be a Party member expressly assigned in 1941 to be petitioner's executive secretary. Green died in 1959. The Board's order was filed on June 27, 1960, but the record discloses no findings or evidence concerning petitioner's activities after Green's death.[1] In the circumstances we think that the record

[1] Petitioner raised the point when, on February 11, 1960, the Board heard oral argument on the sufficiency of the evidence. At that time, petitioner's counsel urged as an independent reason for "throwing out this case" that "[t]his case is stale and you ought to throw it out because you can't enter an order under the Act. . . . [The Attorney General] talks about what a devil Abner Green was, or Harriet Barron, the two people he said ran the organization. Well, the fact is that it has been years since Harriet Barron has had any connection with the [petitioner], and Abner Green to my great sor-

should be brought up to date to take account of supervening events. Since a registration order operates prospectively, it is apparent that reasonably current aid and control must be established to justify a registration order. Our *Communist Party* decision on the Communist-action provisions did not necessarily foreclose petitioner's constitutional questions bearing on the Communist-front provisions.[2] Since petitioner's current status is not clear on this record, decision of the serious constitutional questions raised by the order is neither necessary nor appropriate.

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row is now dead. Things have changed, and times have changed . . . you can't conscientiously enter an order in the present in view of the terrific amount of time that has passed and the changes in time. . . ." XVIII Transcript 7492–7493. The Board made no mention of this argument in its report.

[2] That the issues are not plainly foreclosed is illustrated by President Truman's veto message:

"Insofar as the bill would require registration by the Communist Party itself, it does not endanger our traditional liberties. However, the application of the registration requirements to so-called Communist-front organizations can be the greatest danger to freedom of speech, press and assembly, since the alien and sedition laws of 1798. This danger arises out of the criteria or standards to be applied in determining whether an organization is a Communist-front organization.

"[T]he bill would permit such a determination to be based solely upon 'the extent to which the positions taken or advanced by it from time to time on matters of policy do not deviate from those' of the Communist movement.

"This provision could easily be used to classify as a Communist-front organization any organization which is advocating a single policy or objective which is also being urged by the Communist Party or by a Communist foreign government. . . . Thus, an organization which advocates low-cost housing for sincere humanitarian reasons might be classified as a Communist-front organization because the Communists regularly exploit slum conditions as one of their fifth-column techniques." H. R. Doc. No. 708, 81st Cong., 2d Sess., p. 6. See also Note, 74 Yale L. J. 738 (1965).

The judgment of the Court of Appeals is vacated, and the cause remanded for proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE WHITE took no part in the decision of this case.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE HARLAN concur, dissenting.

I dissent from the refusal of the Court to face up to the important constitutional questions squarely presented by this case. The Court's excuse is that Abner Green, the executive secretary, who was prominent in petitioner's affairs, died after the close of the hearings.[1]

[1] The Attorney General began the present proceeding in 1953 for an order requiring the petitioner to register as a Communist-front organization, alleging that the petitioner was controlled by the Communist Party. (Immediately prior to the commencement of this proceeding the Board had issued its report of April 20, 1953, finding the Party to be a Communist-action organization.) Hearings were had before an examiner and concluded sometime in 1956. The examiner's recommended decision was issued on September 10, 1957. While the Board had the case under advisement, the second remand in the Communist Party litigation occurred. (The history of this litigation is set out in full in *Communist Party* v. *Control Board,* 367 U. S. 1, at 19–22.) It was therefore necessary to postpone action in the present case because petitioner here was alleged to be a front for the Communist Party, and the provisions of the Act would not come into play as to petitioner unless the Party were proved to be a Communist-action organization—which was of course the purpose of the Communist Party litigation.

In 1959, after the Board's second modified report in the Communist Party proceeding, the Board reactivated this case and ordered the Attorney General to make available to petitioner certain documents which intervening judicial decisions had suggested were producible. Further proceedings were had in this connection; further oral argument was presented to the Board; and the Board's report and order were filed on June 27, 1960.

On appeal the Court of Appeals on January 8, 1962, remanded the case to the Board to allow petitioner to introduce evidence of alleged

Petitioner has never, so far as appears, alleged any facts indicating that with the death of Abner Green the nature of the Committee underwent any significant change. Yet this suggestion could have been made to the Board prior to its decision; and it could have been made to the Court of Appeals, for the Act in § 14 (a) specifically provides: "If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, the court may order such additional evidence to be taken before the Board and to be adduced upon the proceeding in such manner and upon such terms and conditions as to the court may seem proper." [2]

In determining that petitioner was a Communist-front organization, the Board was directed by the Act to consider other evidence in addition to evidence that petitioner's executive secretary was a member of the Communist Party. Section 13 (f) sets forth four different categories of evidence which must be considered by the Board in deciding whether an organization is a front: (1) the extent to which those who are active in the direction of the alleged front are also active in a Communist-

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perjured testimony. On March 8, 1962, the Board reaffirmed its earlier order. On December 17, 1963, the Court of Appeals affirmed the Board's order. We granted certiorari on April 27, 1964.

[2] On oral argument before the Board on February 11, 1960, counsel for the petitioner did argue in a general way that the case was "stale" simply as the result of the "passage of time." In the course of this argument counsel observed that "Abner Green to my great sorrow is now dead. Things have changed, and times have changed. Standards have changed, and everybody has changed, I think, but the Department of Justice . . . ." This passing reference to Green's death falls far short of a serious effort to show that petitioner was a legally different entity after Green's death: for example, petitioner made no effort to reopen the record for evidence concerning Green's successor, any new policies now in effect, or the like. And, as noted, no effort was made in the Court of Appeals to have the case remanded for the taking of new evidence.

action organization; (2) the extent to which financial or other support is derived from a Communist-action organization; (3) the extent to which the alleged front's funds and personnel are used to promote the objectives of a Communist-action organization; and (4) the extent to which the alleged front's positions on matters of policy do not deviate from the Communist line. Evidence in all four of these categories was adduced.

The Court takes a peculiar view of the evidence when it surmises that the death of petitioner's executive secretary may suddenly have changed the nature of the organization. It forgets what the Court said in the *Communist Party* case: "Where the current character of an organization and the nature of its connections with others is at issue, of course past conduct is pertinent. Institutions, like other organisms, are predominantly what their past has made them. History provides the illuminating context within which the implications of present conduct may be known." 367 U. S. 1, 69.[3]

The Board found that the petitioner had existed in the United States since 1932 or 1933 and that it was eight or nine years later that Green became its executive secretary. The evidence before the Board established that Green was the "top functionary" of petitioner's national organiza-

[3] In that case the Court of Appeals observed:

"[I]t is rarely, if ever, possible to prove present nature by some instantaneous, contemporaneous fact, totally ignoring the whole of the past. Not only is the past clearly pertinent, it may be quite material to a determination of present nature. Whether it is material depends upon whether there is affirmative evidence of a departure from the established past. In the ordinary affairs of life and in ordinary litigation, if a person or an organization is shown to have had over many years a certain policy and program, and no more is shown, the conclusion is clearly indicated that he or it has the same policy and program in the present." 96 U. S. App. D. C. 66, 105, 223 F. 2d 531, 570.

tion and that he was the "most influential official" therein, but he was not the only top official who was found to be a member of the Communist Party. The number two person in the national organization was Harriet Barron, the administrative secretary, who with Green carried on the organization's day-to-day activities. She was found to have been a member of the Communist Party at the time of the hearings and for a number of years prior thereto.

A great deal of the evidence heard by the Board related to the local branches of the petitioner. The Board found: "The management, direction, and supervision of the branches (local committees) have been by Communist Party members such as Ruth Hillsgrove for the New England Committee; Evelyn Abelson and Bess Steinberg for the Western Pennsylvania Committee; Saul Grossman for the Michigan Committee; Marion Kinney for the Northwest Committee; and Delphine Smith for the Los Angeles Committee." This evidence establishes that the petitioner cannot possibly be regarded as a one-man organization. It is true that Green was the leader of the national organization in New York and that he appeared at some meetings of the local committees. But the nature and existence of these local committees, which the Board regarded as "part of" the national organization, indicate clearly that the organization had an existence above and beyond Green himself.

In this regard the genesis of the Northwest Committee is instructive. The Board found that the organization of this branch resulted from discussions in Communist Party meetings in Seattle about the need for a local branch of the American Committee to defend Party members. This was in 1949 when the Party designated member Kinney to head this organization. Green was not present at the meetings which led to the formation of this

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branch, and seems to have had little, if any, part in it. The first mention of Green in connection with this branch seems to be the testimony that in 1952 he made a speech at a meeting that was in some way connected with the activities of the local committee.

The ultimate finding of the Board as to these local organizations was: "We find on the entire record that the American Committee and the various area or local committees are *associated together for joint action* on particular subjects. Together they constitute a voluntary association and one organization within the meaning of the term 'organization' set forth in section 3 (2) of the statute." (Emphasis supplied.) One simply cannot read the record and come to the conclusion that this congeries of individual organizations, loosely united under the aegis of the national committee, was merely Green's *alter ego* and would therefore change upon his death.

A Communist-front organization is one which is controlled by a Communist-action organization *and* which is primarily operated for the purpose of giving aid and support to Communism. To prove this latter part of the definition the Attorney General introduced before the Board evidence showing that the Committee engaged in the legal defense of Party members who were defendants in deportation and denaturalization proceedings. Much of this evidence appears to have concerned the activities of the *local committees*. The Board found, for example, that "the cases of Joe Weber, Refugio Ramon Martinez, and James MacKay [were] handled by the Midwest Committee; the Mexican deportees and a group referred to as the Terminal Island Four [were] handled by the Los Angeles Committee; and the Giacomo Quattrone-Ponzi case [was] handled by the New England Committee." There is no reason to believe that this work of the local committees has been discontinued because of Green's death.

The case is very much alive; and the record is by no means stale. We should face up to the serious issues presented and in no way affected by Abner Green's death.

MR. JUSTICE BLACK, dissenting.†

While I have joined the dissents of MR. JUSTICE DOUGLAS from the Court's action in remanding these cases without deciding the important constitutional questions involved, I have additional reasons for objecting to the remands. In *Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1, 137 (dissenting opinion), I stated at some length my reasons for believing that the Subversive Activities Control Act of 1950, as amended, 64 Stat. 987, 50 U. S. C. §§ 781–826 (1958 ed.), on which the Government's case here rests, violates a number of provisions of our Constitution and Bill of Rights in many respects. See also *Aptheker* v. *Secretary of State,* 378 U. S. 500, 517 (concurring opinion). I think that among other things the Act is a bill of attainder; that it imposes cruel, unusual and savage punishments for thought, speech, writing, petition and assembly; and that it stigmatizes people for their beliefs, associations and views about politics, law, and government. The Act has borrowed the worst features of old laws intended to put shackles on the minds and bodies of men, to make them confess to crime, to make them miserable while in this country, and to make it a crime even to attempt to get out of it.* It is difficult to find laws more thought-stifling

†[This opinion applies also to No. 65, *Veterans of the Abraham Lincoln Brigade* v. *Subversive Activities Control Board, post,* p. 513.]

*In *Aptheker* v. *Secretary of State,* 378 U. S. 500, this Court held unconstitutional on its face the whole of § 6 of the Subversive Activities Control Act of 1950, as amended, 64 Stat. 993, 50 U. S. C. § 785 (1958 ed.), which made it unlawful for any member of an organization registered under the Act "to make application for a passport . . . or . . . to use or attempt to use any such passport."

than this one even in countries considered the most benighted. Previous efforts to have this Court pass on the constitutionality of the various provisions of this freedom-crushing law have met with frustration on one excuse or another. I protest against following this course again. My vote is to hear the case now and hold the law to be what I think it is—a wholesale denial of what I believe to be the constitutional heritage of every freedom-loving American.

Per Curiam.

VETERANS OF THE ABRAHAM LINCOLN BRIGADE *v.* SUBVERSIVE ACTIVITIES CONTROL BOARD.

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

No. 65. Argued December 9, 1964.—Decided April 26, 1965.

Judgment of the Court of Appeals affirming respondent's order that petitioner register as a Communist-front organization is vacated, in view of the staleness of the record in this case.

117 U. S. App. D. C. 404, 331 F. 2d 64, judgment vacated and cause remanded.

Leonard B. Boudin argued the cause for petitioner. With him on the briefs were *Victor Rabinowitz* and *David Rein.*

Kevin T. Maroney and *Bruce J. Terris* argued the cause for respondent. With them on the brief were *Solicitor General Cox, Assistant Attorney General Yeagley* and *Robert L. Keuch.*

Melvin L. Wulf and *Marvin M. Karpatkin* filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

PER CURIAM.

Petitioner was ordered by the Subversive Activities Control Board to register as a Communist-front organization under § 7 of the Subversive Activities Control Act of 1950, as amended, 64 Stat. 993, 50 U. S. C. § 786 (1958 ed.), and the Court of Appeals for the District of Columbia Circuit affirmed. 117 U. S. App. D. C. 404, 331 F. 2d 64. We granted certiorari, 377 U. S. 989. In this case, the order to register was based almost exclusively on events before 1950, and very largely on events before 1940. The hearings themselves were concluded in November 1954, more than 10 years ago. On so stale

a record we do not think it is either necessary or appropriate that we decide the serious constitutional questions raised by the order. See *American Committee for Protection of Foreign Born* v. *Subversive Activities Control Board, ante,* p. 503. The judgment is vacated and the cause remanded for proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE WHITE took no part in the decision of this case.

[For dissenting opinion of MR. JUSTICE BLACK, see *ante,* p. 511.]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE HARLAN concur, dissenting.

I think this case is ripe for decision. The controversy is real, not feigned. All of the relevant facts one needs to know to resolve the constitutional question are exposed in the present record.

This is the famous brigade of Americans who fought in the Spanish Civil War against Franco. Approximately 3,000 American youths were members; and of these only about 1,800 survived. Petitioner was formed in 1939 as an unincorporated association and was incorporated in 1940 under the laws of New York, its charter being forfeited in 1952 for failure to file required reports.

The record is detailed. The Court of Appeals, which sustained the Subversive Activities Control Board in finding that petitioner is a "Communist-front organization" within the meaning of § 3 (4) of the Subversive Activities Control Act of 1950, as amended, 64 Stat. 989, 50 U. S. C. § 782 (4) (117 U. S. App. D. C. 404, 331 F. 2d 64), spoke of "the tremendous volume of the record" and the "almost numberless facets of fact involved." *Id.,* at 413, 331 F. 2d, at 73. The history of the formation of the

Brigade, its relationship with the Communist Party and with Communists, the manner in which international brigades of this kind were employed by Communists, the role of Communists in forming this Brigade, the affiliations of officers of the Brigade, the ideas and program promoted by the Brigade's official organ, *Volunteer for Liberty*, the efforts of the Brigade to get its members employed in unions, offices, or factories where a Communist unit or functionary was located, the extent to which the Brigade responded to Party discipline, and the extent to which the Brigade aided and supported the Party—all were fully explored.

Since 1950 the Brigade's affairs have been run almost entirely by an Executive Secretary and a National Commander. Since 1950 its activities have consisted principally of social affairs, rehabilitating and resettling veterans and getting them employment, making statements in opposition to the Franco regime, supporting its members who were indicted under the Smith Act, and defending itself in this proceeding.

This proceeding started in 1953, when the Attorney General petitioned the Board for an order requiring the Brigade to register as a Communist-front organization. Hearings before the Board commenced May 3, 1954, and ended November 16, 1954. Over a year later the Board issued a registration order against the Brigade, and its report in the case. The final order of the Board is dated December 21, 1955. The opinion of the Court of Appeals comes eight years later* and is dated December 17, 1963.

But no one suggests that there have been any basic changes in the pattern of the Brigade's activities either

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*The finding of the Board that the Communist Party was a Communist-action organization was a product of the litigation which terminated on June 5, 1961, with this Court's decision in *Communist Party* v. *Control Board*, 367 U. S. 1. That litigation was in progress in the years between 1950 and 1961; and since the finding that the

since the Board's order or the Court's judgment. The Court of Appeals found no difficulty in concluding that as of the date of the record the Brigade continued to be what it had been in the past:

> "The events in 1950–1954 were not factually isolated. The Brigade continued to operate after 1950. It had the same officers and occupied the same offices. It continued to publish its magazine. The character and tone of its declarations upon the subjects with which it dealt were the same as those it had always utilized. So that factually, on this record, the post-1950 activities and policies appear as a continued, although diminished, stream, rather than as a separate, new phase of life." 117 U. S. App. D. C., at 412–413, 331 F. 2d, at 72–73.

None of the parties before us has suggested that the record is stale or incomplete; and as noted in my dissenting opinion in *American Committee* v. *Control Board, ante,* p. 507, the Act contains a special provision covering that contingency. None of the parties before us has suggested that we need to know more about the Brigade since the Board's decision in 1955. We are told by counsel that what the Brigade once was, it still is.

There is one way and one way only in which this case is getting stale with the passage of time. And that is that the Brigade's membership is not being renewed but depleted. Its membership, as noted, is made up of Americans who fought in the Spanish War against Franco. The mortality table has caused that list to shrink and it

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Party was a Communist-action organization was necessary to the Board's result in this case, the present case was held by the Court of Appeals pending the outcome of the *Communist Party* litigation. See 117 U. S. App. D. C. 404, at 406, 331 F. 2d 64, at 66. The present case was then argued before the Court of Appeals in October of 1962, and decision was rendered on December 17, 1963.

will continue to shrink. In 1955 there were only 600 survivors of the Brigade, not all of whom were members of petitioner. Hence in some months or years the case will return to us more stale than it is at the present time.

With all due respect, I think it is indefensible not to decide the important constitutional questions tendered here and now.

TEXAS *v.* NEW JERSEY ET AL.

No. 13, Original. Decided February 1, 1965.—Decree entered April 26, 1965.

Decree carrying into effect this Court's opinion of February 1, 1965, 379 U. S. 674.

FINAL DECREE.

This cause having come on to be heard on the Report of the Special Master heretofore appointed by the Court, and the exceptions filed thereto, and having been argued by counsel for the several parties, and this Court having stated its conclusions in its opinion announced on February 1, 1965, 379 U. S. 674, and having considered the positions of the respective parties as to the terms of the decree,

IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Each item of property in question in this case as to which a last-known address of the person entitled thereto is shown on the books and records of defendant Sun Oil Company is subject to escheat or custodial taking only by the State of that last-known address, as shown on the books and records of defendant Sun Oil Company, to the extent of that State's power under its own laws to escheat or to take custodially.

2. Each item of property in question in this case as to which there is no address of the person entitled thereto shown on the books and records of defendant Sun Oil Company is subject to escheat or custodial taking only by New Jersey, the State in which Sun Oil Company was incorporated, to the extent of New Jersey's power under its own laws to escheat or to take custodially, subject to the right of any other State to recover such property from New Jersey upon proof that the last-known address of the creditor was within that other State's borders.

3. Each item of property in question in this case as to which the last-known address of the person entitled thereto as shown on the books and records of defendant Sun Oil Company is in a State, the laws of which do not provide for the escheat of such property, is subject to escheat or custodial taking only by New Jersey, the State in which Sun Oil Company was incorporated, to the extent of New Jersey's power under its own laws to escheat or to take custodially, subject to the right of the State of the last-known address to recover the property from New Jersey if and when the law of the State of the last-known address makes provision for escheat or custodial taking of such property.

4. Any relief prayed for by any party to this action which is not hereby granted is denied.

CALLENDER ET AL. *v.* FLORIDA.

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

No. 58. Decided April 26, 1965.

Certiorari granted and judgments reversed.

Carl Rachlin and *Floyd McKissick* for petitioners.

James W. Kynes, Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, for respondent.

PER CURIAM.

The petition for writ of certiorari is granted and the judgments are reversed. *Boynton* v. *Virginia,* 364 U. S. 454, *Abernathy* v. *Alabama, ante,* p. 447.

GOLD ET AL. *v.* DiCARLO, COMMISSIONER OF LICENSES OF CITY OF NEW YORK, ET AL.

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

No. 901. Decided April 26, 1965.

235 F. Supp. 817, affirmed.

Jesse Moss for appellants.

Leo A. Larkin and *Seymour B. Quel* for DiCarlo, and *Louis J. Lefkowitz,* Attorney General of New York, *pro se, Samuel A. Hirshowitz,* First Assistant Attorney General, and *Lester Esterman,* Assistant Attorney General, for Lefkowitz, appellees.

PER CURIAM.

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

CORPORA *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 934. Decided April 26, 1965.

Appeal dismissed for want of a substantial federal question.

Emanuel Redfield for appellant.

Frank S. Hogan and *H. Richard Uviller* for appellee.

PER CURIAM.

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

CUMBERLAND FARMS NORTHERN, INC. *v.* MAINE MILK COMMISSION.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MAINE.

No. 904. Decided April 26, 1965.

Appeal dismissed for want of a substantial federal question.
Reported below: 160 Me. 367, 205 A. 2d 146.

Sidney W. Wernick for appellant.

Richard J. Dubord, Attorney General of Maine, *George C. West,* Deputy Attorney General, and *John W. Benoit,* 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.

BROWN *v.* CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 194, Misc. Decided April 26, 1965.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

Thomas C. Lynch, Attorney General of California, *William E. James,* Assistant Attorney General, and *Lawrence R. Tapper,* Deputy Attorney General, for appellee.

PER CURIAM.

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

WESTERN & SOUTHERN LIFE INSURANCE CO. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 91. Decided April 26, 1965.

Certiorari granted, judgment vacated and case remanded.
Reported below: 328 F. 2d 891.

John G. Wayman for petitioner.

Solicitor General Cox, Arnold Ordman, Dominick L. Manoli and *Norton J. Come* for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case remanded to that court with instructions to remand it to the National Labor Relations Board for further proceedings consistent with the opinion of this Court in *Labor Board* v. *Metropolitan Ins. Co., ante,* p. 438. The judgment shall issue forthwith.

It is so ordered.

METROPOLITAN LIFE INSURANCE CO. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 56. Decided April 26, 1965.

Certiorari granted, judgment vacated and case remanded. Reported below: 328 F. 2d 820.

Burton A. Zorn, George G. Gallantz, Marvin Dicker and *Thomas F. Delaney* for petitioner.

Solicitor General Cox, Arnold Ordman, Dominick L. Manoli and *Norton J. Come* for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case remanded to that court with instructions to remand it to the National Labor Relations Board for further proceedings consistent with the opinion of this Court in *Labor Board* v. *Metropolitan Ins. Co., ante,* p. 438. The judgment shall issue forthwith.

It is so ordered.

THOMAS ET AL. *v.* MISSISSIPPI.

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

No. 181. Decided April 26, 1965.

Certiorari granted and judgments reversed.

Reported below: See 248 Miss. 850, 160 So. 2d 657, 161 So. 2d 159, 521.

Jack Greenberg, James M. Nabrit III, Derrick A. Bell, Jr., Jack Young, R. Jess Brown, Carl Rachlin and *Michael Meltsner* for petitioners.

Joe T. Patterson, Attorney General of Mississippi, and *John A. Travis* and *Robert G. Nichols, Jr.,* Special Assistant Attorneys General, for respondent.

PER CURIAM.

The petition for writ of certiorari is granted and the judgments are reversed. *Boynton* v. *Virginia,* 364 U. S. 454, *Abernathy* v. *Alabama, ante,* p. 447.

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

METROPOLITAN LIFE INSURANCE CO. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 229. Decided April 26, 1965.

Certiorari granted, judgment vacated and case remanded.
Reported below: 330 F. 2d 62.

Burton A. Zorn, George G. Gallantz, Marvin Dicker and *Thomas F. Delaney* for petitioner.

Solicitor General Cox, Arnold Ordman, Dominick L. Manoli and *Norton J. Come* for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case remanded to that court with instructions to remand it to the National Labor Relations Board for further proceedings consistent with the opinion of this Court in *Labor Board* v. *Metropolitan Ins. Co., ante,* p. 438. The judgment shall issue forthwith.

It is so ordered.

773-301 O-65-38

CAROLINA & NORTHWESTERN RAILWAY CO. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

No. 838. Decided April 26, 1965.

234 F. Supp. 112, affirmed.

W. Graham Claytor, Jr., Henry J. Karison, Hugh B. Cox and *William H. Allen* for appellants.

Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Donald L. Hardison, Robert W. Ginnane and *Arthur J. Cerra* for the United States et al.; and *R. Wray Henriott, W. L. Grubbs, James W. Hoeland, Elbert R. Leigh* and *Joseph L. Lenihan* for Louisville & Nashville Railroad Co., appellees.

PER CURIAM.

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

MURRAY *v.* UNITED STATES.

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

No. 260, Misc. Decided April 26, 1965.

Certiorari granted, judgment vacated and case remanded.
Reported below: 333 F. 2d 409.

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. Upon consideration of the suggestion of the Solicitor General and an examination of the entire record, the judgment is vacated and the case is remanded to the Court of Appeals to consider the validity of the arrest of Henry Murray and of the search for and seizure of the money in question as an incident of such arrest.

HARMAN ET AL. *v.* FORSSENIUS ET AL.

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

No. 360. Argued March 1–2, 1965.—Decided April 27, 1965.

In anticipation of the promulgation of the Twenty-fourth Amendment abolishing the poll tax as a requirement for voting in federal elections, Virginia eliminated the poll tax as an absolute prerequisite to voting in federal elections and in its stead substituted a provision whereby the federal voter could qualify either by paying the customary poll tax or by filing a certificate of residence six months before the election. In suits attacking the constitutionality of the Virginia statutes, the three-judge District Court refused to abstain to afford the Virginia courts an opportunity to pass on underlying issues of state law and to construe the statutes involved. Reaching the merits, the District Court held the certificate of residence requirement invalid as an additional "qualification" imposed solely upon federal voters in violation of Art. I, § 2, and the Seventeenth Amendment. *Held:*

1. The District Court did not abuse its discretion in refusing to abstain: the state statutes are clear and unambiguous, the rights allegedly impaired are the fundamental civil rights of a broad class of citizens, and the immediacy of the problem facing the District Court was evident. Pp. 534–537.

2. The certificate of residence requirement is a material requirement imposed upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax and thus constitutes an abridgment of the right to vote in violation of the Twenty-fourth Amendment. Pp. 538–544.

(a) The poll tax is abolished absolutely as a prerequisite to voting in federal elections, and no equivalent or milder substitute may be imposed. P. 542.

(b) The statutory scheme may not be saved on the ground that the certificate of residence requirement is a necessary method of proving residence, for constitutional deprivations may not be justified by some remote administrative benefit to the State. Pp. 542–544.

235 F. Supp. 66, affirmed.

Joseph C. Carter, Jr., argued the cause for appellants. With him on the briefs were *Robert Y. Button*, Attorney General of Virginia, *Richard N. Harris*, Assistant Attorney General, and *E. Milton Farley III*.

H. E. Widener, Jr., argued the cause for appellees. With him on the brief were *L. S. Parsons, Jr.*, *John N. Dalton* and *Bentley Hite*.

Harold H. Greene, by special leave of Court, argued the cause for the United States, as *amicus curiae*, urging affirmance. With him on the brief were *Solicitor General Cox*, *Assistant Attorney General Marshall*, *Louis F. Claiborne* and *David Rubin*.

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

We are called upon in this case to construe, for the first time, the Twenty-fourth Amendment to the Constitution of the United States:

> "The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."

The precise issue is whether § 24–17.2 of the Virginia Code—which provides that in order to qualify to vote in federal elections one must either pay a poll tax or file a witnessed or notarized certificate of residence [1]—contravenes this command.

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[1] Va. Code Ann. § 24–17.2 (1964 Supp.) provides:

"Proof of residence required; how furnished.—

"(a) No person shall be deemed to have the qualifications of residence required by § 18 of the Constitution of Virginia and §§ 24–17 and 24–17.1 in any calendar year subsequent to that in which he reg-

Prior to the adoption of the Twenty-fourth Amendment, the Virginia Constitution (Art. II, §§ 18–20) and statutes (Va. Code Ann. §§ 24–17, 24–67 (1950)) established uniform standards for qualification for voting in both federal and state elections. The requirements were: (1) United States citizenship; (2) a minimum age of twenty-one; (3) residence in the State for one year, in the city or county for six months, and in the voting precinct for thirty days; and (4) payment "at least six months prior to the election . . . to the proper officer all State

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istered under either § 24–67 or § 24–67.1, and shall not be entitled to vote in any election held in this State during any such subsequent calendar year, unless he has offered proof of continuing residence by filing in person, or otherwise, a certificate of residence at the time and in the manner prescribed in paragraph (b) of this section, or, at his option, by personally paying to the proper officer, at least six months prior to any such election in which he offers to vote, all State poll taxes assessed or assessable against him for the three years next preceding that in which he offers to vote. Proof of continuing residence may only be established by either of such two methods.

"(b) Any person who shall offer proof of continuing residence by filing a certificate of residence as provided in paragraph (a) of this section, shall file with the treasurer of his county or city not earlier than the first of October of the year next preceding that in which he offers to vote and not later than six months prior to the election, a certificate in form substantially as follows:

"I do certify that I am now and have been a resident of Virginia since the date of my registration to vote under the laws of Virginia, that I am now a resident of ..... (city or county), residing at ..... (street and number, or place of residence therein), and that it is my present intention not to remove from the city or county stated herein prior to the next general election.

"....."

"Witnessed: ....."

"or

"Subscribed and sworn to before me this ..... day of ....., 19.....

"....."

"Notary Public"

poll taxes [$1.50 annually] assessed or assessable against him for three years next preceding such election." [2] The statutes further provided for permanent registration.[3] Once registered, the voters could qualify for elections in subsequent years merely by paying the poll taxes.

In 1963, in anticipation of the promulgation of the Twenty-fourth Amendment, the Governor of Virginia convened a special session of the Virginia General Assembly. On November 21 of that year, the General Assembly enacted two Acts [4] designed

> "(1) to enable persons to register and vote in Federal elections without the payment of poll tax or other tax as required by the 24th Amendment to the Constitution of the United States, (2) to continue in effect in all other elections the present registration and voting requirements of the Constitution of Virginia, and (3) to provide methods by which all persons registered to vote in Federal or other elections may prove that they meet the residence requirements of Section 18 of the Constitution of Virginia." [5]

No changes were made with regard to qualification for voting in state elections. With regard to federal elections, however, the payment of a poll tax as an absolute prerequisite to registration and voting was eliminated,

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[2] Members of the Armed Services are exempt from the poll tax requirement. Va. Code Ann. § 24–23.1 (1950).

[3] Va. Code Ann. §§ 24–52—24–119 (1950). Registration, effected by filing an application showing that the statutory requirements had been met (§ 24–68), was permanent. Thereafter, in order to qualify for subsequent elections, the voter merely had to pay the assessed poll taxes (unless, of course, his name had been removed from the registration lists for, *inter alia*, failure to meet the statutory and constitutional requirements (§§ 24–94—24–96)).

[4] Va. Acts, 1963 Extra Sess., cc. 1 and 2. Chapter 2 is now codified in Title 24 of the Virginia Code. Chapter 1—applicable to 1964 elections only—has not been codified.

[5] Va. Acts, 1963 Extra Sess., c. 2, § 1 (a).

and a provision was added requiring the federal voter to file a certificate of residence in each election year or, at his option, to pay the customary poll taxes. The statute provides that the certificate of residence must be filed no earlier than October 1 of the year immediately preceding that in which the voter desires to vote and not later than six months prior to the election. The voter must state in the certificate (which must be notarized or witnessed) his present address, that he is currently a resident of Virginia, that he has been a resident since the date of his registration, and that he does not presently intend to remove from the city or county of which he is a resident prior to the next general election. Va. Code Ann. § 24–17.2 (1964 Supp.). Thus, as a result of the 1963 Acts, a citizen after registration may vote in both federal and state elections upon the payment of all assessable poll taxes. Va. Code Ann. § 24–17 (1964 Supp.). If he has not paid such taxes he cannot vote in state elections, and may vote in federal elections only upon filing a certificate of residence in each election year. Va. Code Ann. §§ 24–17.1, 24–17.2 (1964 Supp.).

The present appeal originated as two separate class actions, brought by appellees in the United States District Court for the Eastern District of Virginia, attacking the foregoing provisions of the 1963 Virginia legislation as violative of Art. I, § 2, of the Constitution of the United States, and the Fourteenth, Seventeenth, and Twenty-fourth Amendments thereto. The complaints, which prayed for declaratory and injunctive relief, named as defendants (appellants here) the three members of the Virginia State Board of Elections and, in one case, the County Treasurer of Roanoke County, Virginia, and, in the other, the Director of Finance of Fairfax County. The jurisdiction of the District Court was invoked pursuant to 28 U. S. C. §§ 1331, 1343, 2201 (1958 ed.), and

a court of three judges was convened pursuant to 28 U. S. C. §§ 2281, 2284 (1958 ed.).

The District Court denied the State's motion to stay the proceedings in order to give the Virginia courts an opportunity to resolve the issues and interpret the statutes involved. The court further denied the State's motions to dismiss for failure to join indispensable parties, for failure to state a claim on which relief could be granted, and for want of a justiciable controversy.[6] On the merits, the District Court held that the certificate of residence requirement was "a distinct qualification" or at least an "increase [in] the quantum of necessary proof of residence" imposed solely on the federal voter, and that it therefore violated Art. I, § 2, and the Seventeenth Amendment, which provide that electors choosing a Representative or Senator in the Congress of the United States "shall have the qualifications requisite for electors of the most numerous branch of the State legislature." The court rejected the argument that the residency certificate was merely a method, like the poll tax, of proving the residence qualification which is imposed on both federal and state voters. Accordingly, the District Court entered an order declaring invalid the portions of the 1963 Virginia legislation which required the filing of a certificate of residence and enjoining appellants from requiring compliance by a voter with said portions of the 1963 Acts. We noted probable jurisdiction. 379 U. S. 810.

We hold that § 24–17.2 is repugnant to the Twenty-fourth Amendment and affirm the decision of the District

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[6] The motion to dismiss for failure to state a claim on which relief could be granted and for failure to set forth a justiciable controversy was directed solely at the complaint of appellee Henderson, who was registered and had already paid his poll tax. The District Court was patently correct in rejecting the State's argument that appellee Henderson lacked standing to maintain this action. *Gray* v. *Sanders*, 372 U. S. 368, 374–376; *Baker* v. *Carr*, 369 U. S. 186, 204–208.

Court on that basis. We therefore find it unnecessary to determine whether that section violates Art. I, § 2, and the Seventeenth Amendment.

I.

At the outset, we are faced with the State's contention that the District Court should have stayed the proceedings until the courts of Virginia had been afforded a reasonable opportunity to pass on underlying issues of state law and to construe the statutes involved. We hold that the District Court did not abuse its discretion in refusing to postpone the exercise of its jurisdiction.

In applying the doctrine of abstention, a federal district court is vested with discretion to decline to exercise or to postpone the exercise of its jurisdiction in deference to state court resolution of underlying issues of state law. *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496.[7] Where resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law, abstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication. *E. g., Railroad Comm'n* v. *Pullman Co., supra.* The doctrine, however, contemplates that deference to state court adjudication only be made where the issue of state law is uncertain. *Davis* v. *Mann*, 377 U. S. 678, 690; *McNeese* v. *Board of Education*, 373 U. S. 668, 673–674; *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77, 84.[8] If the state statute

[7] See *Hostetter* v. *Idlewild Bon Voyage Liquor Corp*, 377 U. S. 324, 328–329; *Baggett* v. *Bullitt*, 377 U. S. 360, 375; *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411, 415–416.

[8] To the same effect, see *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411, 415–416; *United Gas Pipe Line Co.* v. *Ideal Cement Co.*, 369 U. S. 134, 135–136; *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 105.

in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, it is the duty of the federal court to exercise its properly invoked jurisdiction. *Baggett* v. *Bullitt,* 377 U. S. 360, 375–379. Thus, "recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law." *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411, 415–416.

The state statutes involved here are clear and unambiguous in all material respects.[9] While the State suggests that the Virginia tribunals are "unquestionably far better equipped than the lower [federal] court to unravel the skeins of local law and administrative practices in which the Appellees' claims are entangled," [10] the State

[9] The only ambiguity discussed in the briefs of the parties or developed during argument concerned the question whether § 24–17.2 required the voter to secure a prepared certificate of residence from local election officials or whether he could personally prepare one "in form substantially" as set forth in the statute. We do not regard this as a material ambiguity having any effect on the constitutional question and accept, for the purposes of this decision, the State's assertion that the voter may secure such a form from local election officials or prepare one according to the statutory description. *Infra,* p. 541.

[10] The State also argues that since the States are empowered by Art. I, § 2, Art. II, § 1, and the Seventeenth Amendment to create voter qualifications for federal elections, the question whether a state statutory enactment creates a voter qualification must initially be referred to the state tribunals. True, "[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised." *Lassiter* v. *Northampton County Board of Elections,* 360 U. S. 45, 50; *Pope* v. *Williams,* 193 U. S. 621, 633; *Mason* v. *Missouri,* 179 U. S. 328, 335. The right to vote, however, is constitutionally protected, *Ex parte Yarbrough,* 110 U. S. 651, 663–665; *Smith* v. *Allwright,* 321 U. S. 649, 664; and the conditions imposed by the States upon that right must not contravene

does not point to any provision in the legislation which leaves "reasonable room for a construction by the Virginia courts which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." *Harrison* v. *NAACP*, 360 U. S. 167, 177.

In spite of the clarity of the 1963 legislation, the State argues that the District Court should have abstained on the ground that if the certificate of residence requirement were found to be a qualification distinct from those specified in the Virginia Constitution, it would be invalid as a matter of Virginia law and "a crucial federal constitutional issue would accordingly disappear from the case." We find little force in this argument. The section of the Virginia Constitution (Art. II, § 18) on which the State relies expressly limits the franchise to citizens who have met certain residency requirements.[11] The statute in issue, § 24–17.2, requires the voter to certify that he meets those residence requirements. It is thus difficult to envisage how § 24–17.2 could be construed as setting forth a qualification not found in the Virginia Constitution.[12]

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any constitutional provision or congressional restriction enacted pursuant to constitutional power. *Carrington* v. *Rash, ante*, p. 89, 91; *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45, 50–51; *United States* v. *Classic*, 313 U. S. 299, 315. The question presented in this case—whether the Virginia statute imposes a condition upon the franchise which violates the United States Constitution—is thus quite clearly a federal question. The precise nature of the condition imposed is, of course, a question of Virginia law. However, the statutory requirement is clear and unambiguous, and the sole question remaining is whether the state requirement is valid under the Federal Constitution.

[11] Va. Const., Art. II, § 18, sets forth as a qualification for voting: residency in the State for one year, in the city or county six months, and in the voting precinct thirty days.

[12] Moreover, the State cites no Virginia decisions in support of its contention that the requirement might constitute an impermissible "qualification" according to Virginia law.

In addition to the clarity of the Virginia statutes, support for the District Court's refusal to stay the proceedings is found in the nature of the constitutional deprivation alleged and the probable consequences of abstaining. *Griffin* v. *County School Board of Prince Edward County,* 377 U. S. 218, 229; *Baggett* v. *Bullitt,* 377 U. S. 360, 375–379. The District Court was faced with two class actions attacking a statutory scheme allegedly impairing the right to vote in violation of Art. I, § 2, and the Fourteenth, Seventeenth and Twenty-fourth Amendments. As this Court has stressed on numerous occasions, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds* v. *Sims,* 377 U. S. 533, 555. The right is fundamental "because preservative of all rights." *Yick Wo* v. *Hopkins,* 118 U. S. 356, 370. In appraising the motion to stay proceedings, the District Court was thus faced with a claimed impairment of the fundamental civil rights of a broad class of citizens. The motion was heard about two months prior to the deadline for meeting the statutory requirements and just eight months before the 1964 general elections. Given the importance and immediacy of the problem, and the delay inherent in referring questions of state law to state tribunals,[13] it is evident that the District Court did not abuse its discretion in refusing to abstain. *Griffin* v. *County School Board of Prince Edward County,* 377 U. S. 218, 229; *Baggett* v. *Bullitt,* 377 U. S. 360, 375–379.[14]

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[13] See *Baggett* v. *Bullitt,* 377 U. S. 360, 378–379; *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411, 425–426 (DOUGLAS, J., concurring).

[14] The State also asserts that the District Court erred in denying its motion to dismiss for failure to join indispensable parties. The argument is that the relief requested in the complaints was an injunction against the enforcement of all provisions of the 1963 legis-

II.

Reaching the merits, it is important to emphasize that the question presented is not whether it would be within a State's power to abolish entirely the poll tax and require all voters—state and federal—to file annually a certificate of residence. Rather, the issue here is whether the State of Virginia may constitutionally confront the federal voter with a requirement that he *either* pay the customary poll taxes as required for state elections *or* file a certificate of residence. We conclude that this requirement constitutes an abridgment of the right to vote in federal elections in contravention of the Twenty-fourth Amendment.

Prior to the proposal of the Twenty-fourth Amendment in 1962, federal legislation to eliminate poll taxes, either by constitutional amendment or statute, had been introduced in every Congress since 1939. The House of Representatives passed anti-poll tax bills on five occasions and

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lation, which included a system for separate registration of state and federal voters. Va. Code Ann. §§ 24–67, 24–67.1 (1964 Supp.). Since registration in Virginia is entrusted to local registrars, the State argues, their joinder was essential in order to effect the relief requested. *Williams* v. *Fanning,* 332 U. S. 490, 493–494.

While the State is correct in asserting that the complaints were phrased broadly enough to encompass all portions of the 1963 Acts, the District Court was certainly warranted in concluding that the basic aim of the complaints was to secure relief from the certificate of residence requirement. The named defendants were clearly capable of effecting this relief and hence the District Court did not err in denying the motion to dismiss. *Ceballos* v. *Shaughnessy,* 352 U. S. 599, 603–604. Moreover, even accepting the State's broad construction of the complaints, it is apparent that, given the State Board of Elections' power to supervise and to insure "legality" in the election process (Va. Code Ann. §§ 24–25, 24–26, 24–27 (1950)), the local registrars were not indispensable parties. See *Louisiana* v. *United States, ante,* pp. 145, 151, n. 10.

the Senate twice proposed constitutional amendments.[15] Even though in 1962 only five States retained the poll tax as a voting requirement, Congress reflected widespread national concern with the characteristics of the tax. Disenchantment with the poll tax was many-faceted.[16] One of the basic objections to the poll tax was that it exacted a price for the privilege of exercising the franchise. Congressional hearings and debates indicate a general repugnance to the disenfranchisement of the poor occasioned by failure to pay the tax.[17]

> "While it is true that the amount of poll tax now required to be paid in the several States is small and imposes only a slight economical obstacle for any citizen who desires to qualify in order to vote, nevertheless, it is significant that the voting in poll tax States is relatively low as compared to the overall population which would be eligible. . . . [T]he historical analysis . . . indicates that where the poll tax has been abandoned . . . voter participation increased." H. R. Rep. No. 1821, 87th Cong., 2d Sess., p. 3.

Another objection to the poll tax raised in the congressional hearings was that the tax usually had to be paid long before the election—at a time when political campaigns were still quiescent—which tended to eliminate from the franchise a substantial number of voters who did

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[15] H. R. Rep. No. 1821, 87th Cong., 2d Sess., p. 2.

[16] See generally Ogden, The Poll Tax in the South (1958).

[17] See, *e. g.*, Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on Amendments to Abolish Tax and Property Qualifications for Electors in Federal Elections, 87th Cong., 2d Sess., 14–22, 48–58 (hereinafter cited as House Hearings); Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. J. Res. 29, 87th Cong., 2d Sess., 33 (hereinafter cited as Senate Hearings).

not plan so far ahead.[18] The poll tax was also attacked as a vehicle for fraud which could be manipulated by political machines by financing block payments of the tax.[19] In addition, and of primary concern to many, the poll tax was viewed as a requirement adopted with an eye to the disenfranchisement of Negroes and applied in a discriminatory manner.[20] It is against this background that Congress proposed, and three-fourths of the States ratified, the Twenty-fourth Amendment abolishing the poll tax as a requirement for voting in federal elections.

Upon adoption of the Amendment, of course, no State could condition the federal franchise upon payment of a poll tax. The State of Virginia accordingly removed the poll tax as an absolute prerequisite to qualification for voting in federal elections, but in its stead substituted a provision whereby the federal voter could qualify either by paying the customary poll tax or by filing a certificate of residence six months before the election.

It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. *Frost & Frost Trucking Co.* v. *Railroad Comm'n of California,* 271 U. S. 583. "Constitutional rights would be of little value if they could be . . . indirectly denied," *Smith* v. *Allwright,* 321 U. S. 649, 664, or "manipulated out of existence." *Gomillion* v. *Lightfoot,* 364 U. S. 339, 345. Significantly, the Twenty-fourth Amendment does not merely insure that the franchise shall not be "denied" by reason of failure to pay the poll tax; it expressly guarantees that the right to vote shall not be "denied or abridged" for that reason. Thus, like the Fifteenth Amendment, the Twenty-fourth "nullifies sophisticated as well as simple-minded modes" of im-

[18] See, *e. g.,* House Hearings 14–15. See generally Ogden, *supra,* note 16, at 44–52.

[19] See Ogden, *supra,* note 16, at 59–110.

[20] See House Hearings 14–22, 26–27, 48–58; Senate Hearings 33.

pairing the right guaranteed. *Lane* v. *Wilson,* 307 U. S. 268, 275. "It hits onerous procedural requirements which effectively handicap exercise of the franchise" by those claiming the constitutional immunity. *Ibid.;* cf. *Gray* v. *Johnson,* 234 F. Supp. 743 (D. C. S. D. Miss.).

Thus, in order to demonstrate the invalidity of § 24–17.2 of the Virginia Code, it need only be shown that it imposes a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax. Section 24–17.2 unquestionably erects a real obstacle to voting in federal elections for those who assert their constitutional exemption from the poll tax. As previously indicated, the requirement for those who wish to participate in federal elections without paying the poll tax is that they file in each election year, within a stated interval ending six months before the election, a notarized or witnessed certificate attesting that they have been continuous residents of the State since the date of registration (which might have been many years before under Virginia's system of permanent registration) and that they do not presently intend to leave the city or county in which they reside prior to the forthcoming election. Unlike the poll tax bill which is sent to the voter's residence, it is not entirely clear how one obtains the necessary certificate. The statutes merely provide for the distribution of the forms to city and county court clerks, and for further distribution to local registrars and election officials. Va. Code Ann. § 24–28.1 (1964 Supp.). Construing the statutes in the manner least burdensome to the voter, it would seem that the voter could either obtain the certificate of residence from local election officials or prepare personally "a certificate in form substantially" as set forth in the statute. The certificate must then be filed "in person, or otherwise" with the city or county treasurer. This is plainly a cumbersome pro-

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cedure. In effect, it amounts to annual re-registration which Virginia officials have sharply contrasted with the "simple" poll tax system.[21] For many, it would probably seem far preferable to mail in the poll tax payment upon receipt of the bill. In addition, the certificate must be filed six months before the election, thus perpetuating one of the disenfranchising characteristics of the poll tax which the Twenty-fourth Amendment was designed to eliminate. We are thus constrained to hold that the requirement imposed upon the voter who refuses to pay the poll tax constitutes an abridgment of his right to vote by reason of failure to pay the poll tax.

The requirement imposed upon those who reject the poll tax method of qualifying would not be saved even if it could be said that it is no more onerous, or even somewhat less onerous, than the poll tax. For federal elections, the poll tax is abolished absolutely as a prerequisite to voting, and no equivalent or milder substitute may be imposed. Any material requirement imposed upon the federal voter solely because of his refusal to waive the constitutional immunity subverts the effectiveness of the Twenty-fourth Amendment and must fall under its ban.

Nor may the statutory scheme be saved, as the State asserts, on the ground that the certificate is a necessary substitute method of proving residence, serving the same function as the poll tax. As this Court has held in analogous situations, constitutional deprivations may not be justified by some remote administrative benefit to the State. *Carrington* v. *Rash, ante,* pp. 89, 96; *Oyama*

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[21] See, *e. g.,* the testimony of Judge William Old before the House Judiciary Committee, defending the poll tax as enabling Virginia "to avoid the burdensome necessity for annual registration." House Hearings 81. See also *id.,* at 98–99 (Attorney General Button); 108 Cong. Rec. 4532 (Senator Byrd); 108 Cong. Rec. 4641 (Senator Robertson); R. 73, 76 (Governor Harrison).

v. *California,* 332 U. S. 633, 646–647. Moreover, in this case the State has not demonstrated that the alternative requirement is in any sense necessary to the proper administration of its election laws. The forty-six States which do not require the payment of poll taxes have apparently found no great administrative burden in insuring that the electorate is limited to bona fide residents. The availability of numerous devices to enforce valid residence requirements—such as registration, use of the criminal sanction, purging of registration lists, challenges and oaths, public scrutiny by candidates and other interested parties—demonstrates quite clearly the lack of necessity for imposing a requirement whereby persons desiring to vote in federal elections must either pay a poll tax or file a certificate of residence six months prior to the election.

The Virginia poll tax was born of a desire to disenfranchise the Negro.[22] At the Virginia Constitutional Convention of 1902, the sponsor of the suffrage plan of which the poll tax was an integral part frankly expressed the purpose of the suffrage proposal:

> "Discrimination! Why, that is precisely what we propose; that, exactly, is what this Convention was elected for—to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every negro voter who can be gotten rid of, legally, without materially impairing the numerical strength of the white electorate." [23]

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[22] See 2 Virginia Constitutional Convention (Proceedings and Debates, 1901–1902) 2937–3080.

[23] Statement of the Honorable Carter Glass, *id.,* at 3076–3077. This statement was characteristic of the entire debate on the suffrage issue; the only real controversy was whether the provisions eventually adopted were sufficient to accomplish the disenfranchisement of the Negro. See *id.,* at 2937–3080.

The poll tax was later characterized by the Virginia Supreme Court of Appeals as a device limiting "the right of suffrage to those who took sufficient interest in the affairs of the State to qualify themselves to vote." *Campbell* v. *Goode,* 172 Va. 463, 466, 2 S. E. 2d 456, 457. Whether, as the State contends, the payment of the poll tax is also a reliable indicium of continuing residence need not be decided, for even if the poll tax has served such an evidentiary function, the confrontation of the federal voter with a requirement that he either continue to pay the customary poll tax or file a certificate of residence could not be sustained. For federal elections the poll tax, regardless of the services it performs, was abolished by the Twenty-fourth Amendment. That Amendment was also designed to absolve all requirements impairing the right to vote in federal elections by reason of failure to pay the poll tax. Section 24–17.2 of the Virginia Code falls within this proscription.

The judgment of the District Court is

Affirmed.

Mr. Justice Harlan agrees with this opinion insofar as it rests on the proposition that the Twenty-fourth Amendment forbids the use of a state poll tax for any purpose whatever in determining voter qualifications in all elections for federal office. He also agrees that this is not a case for application of the abstention doctrine.

ARMSTRONG *v.* MANZO ET UX.

CERTIORARI TO THE COURT OF CIVIL APPEALS OF TEXAS, EIGHTH SUPREME JUDICIAL DISTRICT.

No. 149. Argued March 9, 1965.—Decided April 27, 1965.

Petitioner and his wife were divorced by a Texas court. Custody of their only child was granted to the respondent mother and petitioner was ordered to pay a monthly sum for the child's support. The mother thereafter married respondent Manzo, who two years later sought to become the child's adoptive father. State law requires the natural father's written consent to adoption, an exception existing if he has not substantially contributed to the child's support for two years commensurate with his financial ability. In that case the written consent of the juvenile court judge in the county of the child's residence may be accepted. The mother filed an affidavit in her county juvenile court alleging petitioner's failure for more than two years to contribute to the child's support and the judge consented to the adoption. Respondents the same day filed an adoption petition alleging that the natural father's consent was not necessary because he had not contributed to the child's support commensurate with his ability for a period of over two years and that the juvenile court judge had given his written consent. No notice of the affidavit or adoption petition was given to petitioner, though his whereabouts were well known to respondents. An adoption decree was later entered making Manzo the child's adoptive father, upon being advised of which petitioner filed a motion seeking to have the court annul its decree. A hearing was held at which petitioner introduced evidence that he had not failed to contribute to his child's support but the court denied petitioner's motion. The appellate court affirmed notwithstanding petitioner's contention of deprivation of due process of law because of entry of the decree without notice, and the state supreme court refused review. *Held:*

1. Failure to give petitioner notice of the pending adoption proceedings deprived him of his rights without due process of law. P. 550.

2. The hearing subsequently granted to petitioner did not remove the constitutional infirmity since petitioner was forced to assume burdens of proof which, had he been accorded notice of the

adoption proceedings, would have rested upon the moving parties. Pp. 550–552.

371 S. W. 2d 407, reversed and remanded.

Ewell Lee Smith, Jr., argued the cause for petitioner. With him on the brief were *Eugene L. Smith* and *Ed M. Brown*.

William Duncan argued the cause for respondents. With him on the brief was *Eugene T. Edwards*.

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner, R. Wright Armstrong, Jr., and his wife were divorced by a Texas court in 1959. Custody of their only child, Molly Page Armstrong, was awarded to Mrs. Armstrong, and the petitioner was granted "the privilege of visiting with said child at reasonable times, places, and intervals." The divorce decree ordered the petitioner to pay $50 a month for his daughter's support. In 1960 Mrs. Armstrong married the respondent, Salvatore E. Manzo. Two years later the Manzos filed a petition for adoption in the District Court of El Paso County, Texas, seeking to make Salvatore Manzo the legal father of Molly Page Armstrong.[1]

Texas law provides that an adoption such as this one shall not be permitted without the written consent of the child's natural father, except in certain specified circumstances. One such exceptional circumstance is if the father "shall have not contributed substantially to the support of such child during [a] period of two (2) years commensurate with his financial ability." In that event, the written consent of the judge of the juvenile court of

[1] Mrs. Manzo joined the petition in order to manifest her consent to the adoption, and also filed a separate written consent.

the county of the child's residence may be accepted by the adoption court in lieu of the father's consent.[2]

Preliminary to filing the adoption petition, Mrs. Manzo filed an affidavit in the juvenile court, alleging in conclusory terms that the petitioner had "failed to contribute to the support of" Molly Page Armstrong "for a period in excess of two years preceding this date." No notice was given to the petitioner of the filing of this affidavit, although the Manzos well knew his precise whereabouts in Fort Worth, Texas. On the basis of the affidavit, and without, so far as the record shows, a hearing of any kind, the juvenile court judge promptly issued his consent to the adoption. In the adoption petition, filed later the same day, the Manzos alleged that "consent of the natural father, R. W. Armstrong, Jr., to the adoption herein sought is not necessary upon grounds that the said father has not contributed to the support of said minor child commensurate with his ability to do so for a period in excess of two (2) years, and the Judge of a Juvenile Court

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[2] Vernon's Ann. Civ. Stat., Art. 46a, § 6, provides in pertinent part as follows:

"Except as otherwise provided in this Section, no adoption shall be permitted except with the written consent of the living parents of the child; provided, however, that if a living parent or parents shall voluntarily abandon and desert a child sought to be adopted, for a period of two (2) years, and shall have left such child to the care, custody, control and management of other persons, or if such parent or parents shall have not contributed substantially to the support of such child during such period of two (2) years commensurate with his financial ability, then, in either event, it shall not be necessary to obtain the written consent of the living parent or parents in such default, and in such cases adoption shall be permitted on the written consent of the Judge of the Juvenile Court of the county of such child's residence; or if there be no Juvenile Court, then on the written consent of the Judge of the County Court of the county of such child's residence."

The petitioner does not here question the constitutional validity of the substantive provisions of this statute.

of El Paso County, Texas . . . has consented in writing to said adoption." No notice of any kind was given to the petitioner of the filing or pendency of this adoption petition.

An investigator appointed by the court made a detailed written report recommending the adoption, and a few weeks later the adoption decree was entered. The decree provided in accord with Texas law that "all legal relationship and all rights and duties between such Child and the natural father shall cease and determine, and such Child is hereafter deemed and held to be for every purpose the child of its parent by adoption, as fully as though naturally born to him in lawful wedlock," [3] and further provided that "the said Molly Page Armstrong shall be known by the Christian and Surname as Molly Page Manzo, from this day forward."

During this entire period the petitioner was not given, and did not have, the slightest inkling of the pendency of these adoption proceedings. On the day the decree was entered, however, Salvatore Manzo wrote to the petitioner's father, advising him that "I have this date completed court action to adopt Molly Page as my daughter and to change her name to Molly Page Manzo." The petitioner's father immediately relayed this news to the petitioner, who promptly filed a motion in the District Court of El Paso County, asking that the adoption decree be "set aside and annulled and a new trial granted," upon the ground that he had been given no notice of the adoption proceedings.[4]

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[3] Vernon's Ann. Civ. Stat., Art. 46a, § 9.

[4] The third paragraph of the petitioner's motion was as follows:

"At the time the above entitled and numbered proceeding came on to be heard and judgment rendered, your Petitioner had never been advised or given notice, actual or constructive, as required by the laws of Texas, that this proceeding was to be heard or that it was

The court did not vacate the adoption decree, but set a date for hearing on the motion. At that hearing the petitioner introduced evidence, through witnesses and by depositions, in an effort to show that he had not failed to contribute to his daughter's support "commensurate with his financial ability." [5] At the conclusion of the hearing the court entered an order denying the petitioner's motion and providing that the "adoption decree entered herein is in all things confirmed."

The petitioner appealed to the appropriate Texas court of civil appeals, upon the ground, among others, that the trial court had erred in not setting aside the adoption decree, because the entry of the decree without notice to the petitioner had deprived him "of his child without due process of law." The appellate court affirmed the trial court's judgment,[6] and the Supreme Court of Texas refused an application for writ of error.

We granted certiorari. 379 U. S. 816. The questions before us are whether failure to notify the petitioner of the pendency of the adoption proceedings deprived him

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even pending or of the judgment herein until after the rendition of the judgment, nor was any attempt made to notify Petitioner in any way of this proceeding although his address and whereabouts were well known to the parties, in fact the parties to this proceeding deliberately and wrongfully withheld all notice from Petitioner for the expressed purpose of denying him any opportunity to appear, contest and present his defenses to this proceeding; and that Petitioner was prevented from appearing and presenting his defenses not by his own fault or negligence but rather by the deliberate and wrongful acts of the parties to this proceeding."

The prayer of the motion was as follows:

"Wherefore, Petitioner prays that the judgment and decree entered in this proceeding be in all things vacated, set aside and annulled and a new trial granted."

[5] See note 2, *supra*.

[6] 371 S. W. 2d 407.

of due process of law so as to render the adoption decree constitutionally invalid, and, if so, whether the subsequent hearing on the petitioner's motion to set aside the decree served to cure its constitutional invalidity.

In disposing of the first issue, there is no occasion to linger long. It is clear that failure to give the petitioner notice of the pending adoption proceedings violated the most rudimentary demands of due process of law. "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Tr. Co.*, 339 U. S. 306, at 313. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken* v. *Meyer*, 311 U. S. 457; *Grannis* v. *Ordean*, 234 U. S. 385; *Priest* v. *Las Vegas*, 232 U. S. 604; *Roller* v. *Holly*, 176 U. S. 398. . . ." *Id.*, at 314. Questions frequently arise as to the adequacy of a particular form of notice in a particular case. See, *e. g.*, *Schroeder* v. *City of New York*, 371 U. S. 208; *New York* v. *New York, N. H. & H. R. Co.*, 344 U. S. 293; *Walker* v. *Hutchinson City*, 352 U. S. 112; *Mullane* v. *Central Hanover Tr. Co., supra.* But as to the basic requirement of notice itself there can be no doubt, where, as here, the result of the judicial proceeding was permanently to deprive a legitimate parent of all that parenthood implies. Cf. *May* v. *Anderson*, 345 U. S. 528, 533.

The Texas Court of Civil Appeals implicitly recognized this constitutional rule, but held, in accord with its under-

standing of the Texas precedents,[7] that whatever constitutional infirmity resulted from the failure to give the petitioner notice had been cured by the hearing subsequently afforded to him upon his motion to set aside the decree. 371 S. W. 2d, at 412. We cannot agree.

Had the petitioner been given the timely notice which the Constitution requires, the Manzos, as the moving parties, would have had the burden of proving their case as against whatever defenses the petitioner might have interposed. See *Jones* v. *Willson,* 285 S. W. 2d 877; *Ex parte Payne,* 301 S. W. 2d 194. It would have been incumbent upon them to show not only that Salvatore Manzo met all the requisites of an adoptive parent under Texas law, but also to prove why the petitioner's consent to the adoption was not required. Had neither side offered any evidence, those who initiated the adoption proceedings could not have prevailed.

Instead, the petitioner was faced on his first appearance in the courtroom with the task of overcoming an adverse decree entered by one judge, based upon a finding of nonsupport made by another judge. As the record shows, there was placed upon the petitioner the burden of affirmatively showing that he had contributed to the support of his daughter to the limit of his financial ability over the period involved. The burdens thus placed upon the petitioner were real, not purely theoretical. For "it is plain that where the burden of proof lies may be decisive of the outcome." *Speiser* v. *Randall,* 357 U. S. 513, 525. Yet these burdens would not have been imposed upon him had he been given timely notice in accord with the Constitution.

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[7] See *Lee* v. *Purvin,* 285 S. W. 2d 405; *Dendy* v. *Wilson,* 142 Tex. 460, 179 S. W. 2d 269; *DeWitt* v. *Brooks,* 143 Tex. 122, 182 S. W. 2d 687; *Johnston* v. *Chapman,* 279 S. W. 2d 597.

A fundamental requirement of due process is "the opportunity to be heard." *Grannis* v. *Ordean*, 234 U. S. 385, 394. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place. His motion should have been granted.

For the reasons stated, the judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Syllabus.

GENERAL MOTORS CORP. *v.* DISTRICT OF COLUMBIA.

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

No. 352. Argued March 10, 1965.—Decided April 27, 1965.

The District of Columbia Income and Franchise Tax Act of 1947 imposes a franchise tax on corporations engaging in trade or business within the District, which is measured by that portion of the net income which "is fairly attributable to any trade or business carried on or engaged in within the District." The Act provides that if the corporation's trade or business is carried on both within and without the District, the net income derived therefrom shall be deemed to be income from sources within and without the District. Pursuant to statutory authority the District Commissioners issued regulations providing that where income is derived from the manufacture and sale of tangible personalty, the portion to be apportioned to the District shall be such percentage of the total income as the District sales are of total sales made everywhere. The petitioner, a Delaware corporation manufacturing and selling motor vehicles and parts, has manufacturing plants in Michigan, Delaware and Maryland, from which orders for car sales to dealers in the District were filled. The petitioner attacks the assessment of taxes pursuant to the regulations as unauthorized by the statute and violative of the Constitution. The Court of Appeals sustained the assessment formula. *Held:* The challenged regulations exceed the statutory authority by allocating income to the District in disregard of the express restrictions of the law. Pp. 555–562.

(a) With respect to that portion of petitioner's income which arises from sales within the District and manufacture outside the District, the statute requires that some part thereof be deemed to arise from sources outside the District. Pp. 557–559.

(b) Since most States imposing corporate income taxes apportion corporate income by giving equal weight to geographical distribution of plant, payroll, and sales, the use of a formula based wholly on sales will result in multiple taxation and unfair allocation of corporate income. Pp. 559–560.

(c) The apportionment method used should have a reasonable relation to the corporate activities within a State, and the geo-

graphic distribution of sales, standing alone, provides a doubtful criterion of allocation. Pp. 560–561.

(d) The statutory language does not allow the use of an apportionment formula utilizing only the sales factor. Pp. 561–562.

118 U. S. App. D. C. 381, 336 F. 2d 885, reversed and remanded.

Donald K. Barnes argued the cause for petitioner. With him on the briefs were *Aloysius F. Power, Thomas J. Hughes, Seymour S. Mintz, William T. Plumb, Jr.*, and *E. Barrett Prettyman, Jr.*

Henry E. Wixon argued the cause for respondent. With him on the brief were *Chester H. Gray* and *Milton D. Korman.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The District of Columbia Income and Franchise Tax Act of 1947 imposes a tax of 5% on the taxable income of every corporation, foreign or domestic, for the privilege of engaging in any trade or business within the District.[1] The Act further provides that "[t]he measure of the franchise tax shall be that portion of the net income of the corporation . . . as is fairly attributable to any trade or business carried on or engaged in within the District and such other net income as is derived from sources within the District."[2] The Act does not attempt to define a specific method whereby the portion of income "fairly attributable" to the District is to be determined, but authorizes the District Commissioners to prescribe regulations for such determination.[3] However, the Commissioners' discretion in devising such regulations is not unfettered, as the Act further commands: "If the trade or business of any corporation . . . is carried on or en-

[1] D. C. Code 1961, § 47–1571a.
[2] D. C. Code 1961, § 47–1580.
[3] D. C. Code 1961, § 47–1580a.

gaged in both within and without the District, the net income derived therefrom shall . . . be deemed to be income from sources within and without the District." [4]

Acting pursuant to the authority delegated to formulate regulations governing the allocation of income, the District Commissioners promulgated regulations which provide: "Where income for any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year." [5]

The petitioner, General Motors Corporation (G. M.), seeks review of an *en banc* decision of the Court of Appeals for the District of Columbia Circuit which approved the application of these regulations in determining the proportion of its total net income allocable to the District for the purpose of computing the franchise tax due.[6] General Motors attacks this method of computation on the grounds that it attributes to the District an unreasonably high proportion of its total income and that it is therefore both unauthorized by the relevant sections of the statute, and violative of the Interstate Commerce and Due Process Clauses of the Constitution. We agree that this method of allocation is not authorized by the D. C. Code and therefore reverse the judgment of the Court of Appeals without reaching the constitutional questions raised.

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[4] *Ibid.*

[5] Section 10.2 (c) of the District of Columbia Income and Franchise Tax Regulations, relettered by amendment of July 24, 1956.

[6] 118 U. S. App. D. C. 381, 336 F. 2d 885, certiorari granted, 379 U. S. 887. An earlier decision (91 Wash. Law Rep. 650) of a panel of the Circuit Court, reversed by the decision here reviewed, had reached a contrary conclusion in affirming the decision of the District of Columbia Tax Court (CCH D. C. Tax Rep. ¶ 200–006).

General Motors is engaged in the manufacture and sale of motor vehicles, parts, and accessories. A Delaware corporation, the petitioner maintains its principal offices in New York and Detroit. It carries on no manufacturing operations within the District of Columbia, but it makes substantial sales to customers located within the District, chiefly retail automobile dealers. During the years in question, 1957 and 1958, its volume of sales to such customers aggregated $37,185,704 and $32,542,519, respectively.[7] Orders for these sales were received and filled outside the District, and the products were shipped to customers from G. M. manufacturing plants in Maryland, Delaware, and Michigan.

It is the claim of G. M. that the use of the "sales-factor formula" in the regulations is beyond the authority of the statute, because that formula taxes more of its net income than is "fairly attributable" to its District of Columbia business, particularly in light of the statutory provision which provides that the net income of a business carried on both within and without the District shall be deemed to be from sources within and without the District. We agree that the Commissioners exceeded their statutory authority by allocating income to the District in disregard of the express restrictions of the law.

We are normally content to leave undisturbed decisions by the Court of Appeals for the District of Columbia Circuit concerning the import of legislation governing the affairs of the District. However, at times application of the District Code has an impact not confined to the Potomac's shores, but reaching far beyond. This is such a case, for approval of the District Commissioners' regulations lends sanction to an apportionment formula seriously at variance with those prevailing in the vast majority of States and creates substantial dangers of

[7] Out of total sales of $9,461,855,874 in 1957 and $7,853,393,381 in 1958.

multiple taxation. Where a decision is of such significance to interstate commerce, and where the result reached involves statutorily unsupportable exertions of administrative power, the traditional reasons underlying our customary refusal to review interpretations of District law do not apply.

It is of course clear that the District Code does not expressly prescribe the use of any particular formula for the apportionment of income to sources within and without the District. On the contrary, the Code expressly authorizes the District Commissioners to promulgate regulations for the detailed apportionment of the income of multistate enterprises. But neither does the Code leave the Commissioners wholly unguided in their exercise of this authority. The Commissioners' authority is clearly limited by the provision (§ 47–1580a) which requires that the net income of a corporation doing business inside and outside the District be deemed to arise from sources situated in like fashion. To understand the meaning of this limitation, we need but take the simple example of a corporation which has its manufacturing facilities located wholly in Maryland and sells all of its products in the District of Columbia. Application of the Commissioners' formula would result in the allocation of 100% of the corporation's income to the District. Yet there can be no doubt that the business of the corporation is carried on both within and without the District, *viz.*, manufacture in Maryland and sales in the District. The statute does not say that net income shall be deemed to be derived from sources within and without the District only where the *sales* of any corporation are made both within and without the District, which is the effect of the Commissioners' regulation. The statute is phrased more broadly and commands apportionment of income to sources within and without the District whenever "the *trade or business* of any corporation . . . is carried on or

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engaged in both within and without the District." As it is clear that some part of the trade or business of this hypothetical corporation is carried on without the District, the conclusion follows that the Commissioners must "deem" some part of the income of this corporation to be derived from sources outside the District.

It is said that the Commissioners' regulations are within the statutory grant of authority because the language "the net income derived therefrom" in § 47–1580a must be read to mean the total income of the corporation and not the "net income arising from activities in the District." The section must be so read, it is argued, because this reading least restricts the discretion of the Commissioners in devising apportionment formulae, and the traditional canon of broad construction of revenue measures demands that restrictions on the Commissioners' discretion be minimized. Applying this approach to the case at hand, it is argued that the Commissioners fulfilled their statutory obligation in apportioning the total income of G. M. to sources inside and outside the District in accordance with the geographical distribution of the company's sales.

Where, as in this case, some portion of a corporation's income is derived from manufacture and sale outside the District, there is no question that the statute requires the Commissioners to allocate that portion to sources outside the District.[8] However, it does not follow that the making of that kind of allocation alone relieves the Commissioners of their statutory responsibility to apportion that part of a corporation's income arising from manufacture outside and sale inside the District limits. As to

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[8] This is not to say that the Commissioners need engage in detailed segmentation of corporate income to source and specific allocation thereof. All that is required is that the formula adopted for general application take account of the geographical spread of the major dimensions of a business.

this segment of its income, G. M. is in precisely the same situation as the hypothetical corporation manufacturing wholly in Maryland and selling solely in the District; that is, it is carrying on a business partly within and partly without the District limits. It is not enough under the statute to require apportionment of income derived from District sales only in the case where the taxed corporation has no sales outside the District. The inescapable and determinative fact in both the hypothetical case and the case before us is that the company carries on business both inside and outside the District with respect to the income which it derives from the sales made within the District. Consequently, § 47–1580a requires that some portion of this income be deemed to arise from sources outside the District.

The conclusion which we reach by analysis of the plain language of the statute also finds support in the consequences which a contrary view would have for the overall pattern of taxation of income derived from interstate commerce. The great majority of States imposing corporate income taxes apportion the total income of a corporation by application of a three-factor formula which gives equal weight to the geographical distribution of plant, payroll, and sales.[9] The use of an apportionment formula based wholly on the sales factor, in the context of general use of the three-factor approach, will ordinarily result in multiple taxation of corporate net income; for

[9] Of the 38 States requiring payment of such taxes, 26 employ varieties of a three-factor formula which takes into account the geographical distribution of a corporation's payroll, property and sales, generally giving equal weight to each factor. Another three use substantially the same formula, replacing the payroll factor with the broader category of manufacturing costs. Yet another three make use of a formula which incorporates the sales and property factors. Only four taxing jurisdictions use formulae based solely on the geographic distribution of corporate sales. See H. R. Rep. No. 1480, 88th Cong., 2d Sess., at 119.

the States in which the property and payroll of the corporation are located will allocate to themselves 67% of the corporation's income, whereas the jurisdictions in which the sales are made will allocate 100% of the income to themselves. Conversely, in some cases enterprises will have their payroll and plant located in the sales-factor jurisdictions and make their sales in the three-factor jurisdictions so that only 33% of their incomes will be subject to state taxation. In any case, the sheer inconsistency of the District formula with that generally prevailing may tend to result in the unhealthy fragmentation of enterprise and an uneconomic pattern of plant location, and so presents an added reason why this Court must give proper meaning to the relevant provisions of the District Code.

Moreover, the result reached in this case is consistent with the concern which the Court has shown that state taxes imposed on income from interstate commerce be fairly apportioned. In upholding taxes imposed on corporate income by Connecticut and New York and apportioned in accordance with the geographical distribution of a corporation's property, this Court carefully inquired into the reasonableness of the apportionment formulae used.

> "The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sale in other States. In this it was typical of a large part of the manufacturing business conducted in the State. The legislature in attempting to put upon this business its fair share of the burden of taxation was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. . . . There is . . . nothing in this record to show that the method of apportionment adopted by the State was inherently arbitrary, or that its

application to this corporation produced an unreasonable result." *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 120–121.

See also *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n,* 266 U. S. 271. While the Court has refrained from attempting to define any single appropriate method of apportionment, it has sought to ensure that the methods used display a modicum of reasonable relation to corporate activities within the State. The Court has approved formulae based on the geographical distribution of corporate property and those based on the standard three-factor formula. See, *e. g., Underwood Typewriter Co.* v. *Chamberlain, supra; Butler Bros.* v. *McColgan,* 315 U. S. 501. The standard three-factor formula can be justified as a rough, practical approximation of the distribution of either a corporation's sources of income or the social costs which it generates. By contrast, the geographic distribution of a corporation's sales is, by itself, of dubious significance in indicating the locus of either factor. We of course do not mean to take any position on the constitutionality of a state income tax based on the sales factor alone. For the present purpose, it is sufficient to note that the factors alluded to by this Court in justifying apportionment measures constitutionally challenged in the past lend little support to the use of an exclusively sales-oriented approach. In construing the District Code to prohibit the use of a sales-factor formula, we sacrifice none of the values which our scrutiny of state apportionment measures has sought to protect.

In sum, we find that the language of the authorizing statute does not permit the application of an apportionment formula which makes use of the sales factor alone. The conclusion which we draw from examination of the statutory language finds support in the conflict with other taxing jurisdictions which would result from a contrary view. It finds further support in the continuing concern

for fair apportionment which this Court has displayed over the years in scrutinizing state taxing statutes. As the District Code confides in the Commissioners the authority to prescribe detailed regulations, it is not for us to make specific prescription, and we limit ourselves to holding that the present regulation is unauthorized by the statute. Accordingly, the judgment of the Court of Appeals for the District of Columbia Circuit is reversed and the case remanded for proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, agreeing with the Court of Appeals that the tax here is authorized by the controlling statute, would affirm the judgment.

COMMISSIONER OF INTERNAL REVENUE *v.* BROWN ET AL.

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

No. 63. Argued March 3, 1965.—Decided April 27, 1965.

Respondent Brown, members of his family and three others, who owned substantially all the stock of a lumber milling company, of which Brown was president, sold their stock to a tax-exempt charitable organization (Institute) for $1,300,000. Institute paid $5,000 down from the company's assets. Concomitantly with the transfer, Institute liquidated the company and leased its assets for five years to a new corporation (Fortuna), formed and wholly owned by respondents' attorneys, which agreed to pay Institute 80% of the operating profits before taxes and depreciation, Institute to apply 90% of such payments (amounting to 72% of the net profits of the business) to a $1,300,000 noninterest-bearing note Institute gave the respondents which was secured by mortgages and assignments of the assets leased to Fortuna. The entire balance of the note was payable if payments thereon failed to total $250,000 over any consecutive two years. The foregoing transaction, consummated in February 1953, was effected pursuant to agreement between respondents, Institute, and other interested parties. Fortuna operated the business with practically the same personnel (including Brown as general manager up to his resignation over a year and a half later) until 1957, when Fortuna's operations ended with a severe decline in the lumber market. Respondents did not repossess under their mortgages but agreed that the properties be sold, with Institute receiving 10% of the $300,000 proceeds and the respondents the balance. In their federal income tax returns respondents showed the payments remitted to them out of the profits of the business as capital gains. Petitioner asserted that such payments were taxable as ordinary income under the Internal Revenue Code. The Tax Court upheld respondents' position, concluding that the transfer to the Institute of respondents' stock was a bona fide sale. The Court of Appeals affirmed. *Held:*

1. The transaction constituted a bona fide sale under local law, the Institute having acquired title to the company stock and, by

liquidation, to all the assets in return for its promise to pay over money from the operating profits. P. 569.

2. The transaction also constituted a sale within the meaning of § 1222 (3) of the Internal Revenue Code defining a capital gain as gain from the sale of a capital asset. Pp. 570–573.

(a) The fact that payment was made from business earnings did not divest the transaction of its status as a sale, which is a transfer of property for a fixed monetary price or its equivalent. Pp. 570–572.

(b) The sales price in the arm's-length transaction between respondents and the Institute, as the Tax Court found, was within a reasonable range in light of the company's earnings history and the adjusted net worth of its assets. P. 572.

(c) There had been an appreciation in value of the company's property accruing over a period of years which respondents could have realized at capital gains rates on a cash sale of their stock. Pp. 572–573.

3. It does not follow from the fact that there was no risk-shifting from seller to buyer that the transaction constituted not a sale but a device to collect future earnings at capital gains rates for which the price set was excessive. Pp. 573–577.

(a) The Tax Court did not find the price excessive. P. 573.

(b) The petitioner offered no evidence to show that an excessive price resulted from the lack of risk-shifting. Pp. 573–574.

(c) Accelerated payment of the purchase price resulted from the deductibility of the rents payable by Fortuna which were not taxable to the Institute, thus constituting an advantage to the seller desiring the balance of the purchase price paid off rapidly. P. 574.

(d) Risk-shifting has not previously been deemed essential to the concept of sale for tax purposes. Pp. 574–575.

(e) The transaction here is not analogous to cases involving a transfer of mineral deposits in exchange for a royalty from the minerals produced, the mineral-extracting business being viewed as an income-producing operation and not as a conversion of capital investment. *Thomas* v. *Perkins*, 301 U. S. 655, distinguished. Pp. 575–577.

4. The Treasury Department itself has noted the availability of capital gains treatment on the sale of capital assets where the seller

retained an interest in the income produced by the assets. Pp. 578–579.

325 F. 2d 313, affirmed.

Wayne G. Barnett argued the cause for petitioner. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Ernest J. Brown.*

William H. Kinsey argued the cause for respondents. With him on the brief were *James R. Moore, James A. Larpenteur, Jr.,* and *Robert T. Mautz.*

Briefs of *amici curiae,* urging affirmance, were filed by *Arthur A. Armstrong* for West Los Angeles Institute for Cancer Research, and by *Dana Latham, John H. Hall, Joseph D. Peeler* and *John E. Scheifly.*

MR. JUSTICE WHITE delivered the opinion of the Court.

In 1950, when Congress addressed itself to the problem of the direct or indirect acquisition and operation of going businesses by charities or other tax-exempt entities, it was recognized that in many of the typical sale and lease-back transactions, the exempt organization was trading on and perhaps selling part of its exemption. H. R. Rep. No. 2319, 81st Cong., 2d Sess., pp. 38–39; S. Rep. No. 2375, 81st Cong., 2d Sess., pp. 31–32. For this and other reasons the Internal Revenue Code was accordingly amended in several respects, of principal importance for our purposes by taxing as "unrelated business income" the profits earned by a charity in the operation of a business, as well as the income from long-term leases of the business.[1] The short-term lease, however, of five years or

[1] The Revenue Act of 1950, c. 994, 64 Stat. 906, amended § 101 of the Internal Revenue Code of 1939 and added §§ 421 through 424, 3813 and 3814. These sections are now §§ 501 through 504 and 511 through 515 of the Internal Revenue Code of 1954.

less, was not affected and this fact has moulded many of the transactions in this field since that time, including the one involved in this case.[2]

The Commissioner, however, in 1954, announced that when an exempt organization purchased a business and leased it for five years to another corporation, not investing its own funds but paying off the purchase price with rental income, the purchasing organization was in danger of losing its exemption; that in any event the rental income would be taxable income; that the charity might be unreasonably accumulating income; and finally, and most important for this case, that the payments received by the seller would not be entitled to capital gains treatment. Rev. Rul. 54–420, 1954–2 Cum. Bull. 128.

This case is one of the many in the course of which the Commissioner has questioned the sale of a business concern to an exempt organization.[3] The basic facts are un-

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[2] The sale and leaseback transaction has been much examined. Lanning, Tax Erosion and the "Bootstrap Sale" of a Business–I, 108 U. Pa. L. Rev. 623 (1960); Moore and Dohan, Sales, Churches, and Monkeyshines, 11 Tax L. Rev. 87 (1956); MacCracken, Selling a Business to a Charitable Foundation, 1954 U. So. Cal. Tax Inst. 205; Comment, The Three-Party Sale and Lease-Back, 61 Mich. L. Rev. 1140 (1963); Alexander, The Use of Foundations in Business, 15 N. Y. U. Tax Inst. 591 (1957); New Developments in Tax-exempt Institutions, 19 J. Taxation 302 (1963). See also Stern, The Great Treasury Raid, p. 245 (1964).

[3] *Union Bank* v. *United States,* 152 Ct. Cl. 426, 285 F. 2d 126; *Commissioner* v. *Johnson,* 267 F. 2d 382, aff'g *Estate of Howes* v. *Commissioner,* 30 T. C. 909; *Kolkey* v. *Commissioner,* 254 F. 2d 51; *Knapp Bros. Shoe Mfg. Corp.* v. *United States,* 135 Ct. Cl. 797, 142 F. Supp. 899; *Oscar C. Stahl,* P–H 1963 TC Mem. Dec. ¶ 63,201; *Isis Windows, Inc.,* P–H 1963 TC Mem. Dec. ¶ 63,176; *Ralph M. Singer,* P–H 1963 TC Mem. Dec. ¶ 63,158; *Brekke* v. *Commissioner,* 40 T. C. 789; *Royal Farms Dairy Co.* v. *Commissioner,* 40 T. C. 172; *Anderson Dairy, Inc.* v. *Commissioner,* 39 T. C. 1027; *Estate of Hawthorne,* P–H 1960 TC Mem. Dec. ¶ 60,146; *Estate of Hawley,* P–H 1961 TC Mem. Dec. ¶ 61,038; *Ohio Furnace Co.* v. *Commis-*

disputed. Clay Brown, members of his family and three other persons owned substantially all of the stock in Clay Brown & Company, with sawmills and lumber interests near Fortuna, California. Clay Brown, the president of the company and spokesman for the group, was approached by a representative of California Institute for Cancer Research in 1952, and after considerable negotiation the stockholders agreed to sell their stock to the Institute for $1,300,000, payable $5,000 down from the assets of the company and the balance within 10 years from the earnings of the company's assets. It was provided that simultaneously with the transfer of the stock, the Institute would liquidate the company and lease its assets for five years to a new corporation, Fortuna Sawmills, Inc., formed and wholly owned by the attorneys for the sellers.[4] Fortuna would pay to the Institute 80% of its operating profit without allowance for depreciation or taxes, and 90% of such payments would be paid over by the Institute to the selling stockholders to apply on the $1,300,000 note. This note was noninterest bearing, the Institute had no obligation to pay it except from the rental income and it was secured by mortgages and assignments of the assets transferred or leased to Fortuna. If the payments on the note failed to total $250,000 over any two consecutive years, the sellers could declare the entire balance of the note due and payable. The sellers were neither stockholders nor directors of Fortuna but it was provided that Clay Brown was to have a management con-

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sioner, 25 T. C. 179; *Truschel* v. *Commissioner,* 29 T. C. 433. Some of these cases are now pending on appeal in one or more of the courts of appeals.

[4] The net current assets subject to liabilities were sold by the Institute to Fortuna for a promissory note which was assigned to sellers. The lease covered the remaining assets of Clay Brown & Company. Fortuna was capitalized at $25,000, its capital being paid in by its stockholders from their own funds.

tract with Fortuna at an annual salary and the right to name any successor manager if he himself resigned.[5]

The transaction was closed on February 4, 1953. Fortuna immediately took over operations of the business under its lease, on the same premises and with practically the same personnel which had been employed by Clay Brown & Company. Effective October 31, 1954, Clay Brown resigned as general manager of Fortuna and waived his right to name his successor. In 1957, because of a rapidly declining lumber market, Fortuna suffered severe reverses and its operations were terminated. Respondent sellers did not repossess the properties under their mortgages but agreed they should be sold by the Institute with the latter retaining 10% of the proceeds. Accordingly, the property was sold by the Institute for $300,000. The payments on the note from rentals and from the sale of the properties totaled $936,131.85. Respondents returned the payments received from rentals as the gain from the sale of capital assets. The Commissioner, however, asserted the payments were taxable as ordinary income and were not capital gain within the meaning of I. R. C. 1939, § 117 (a)(4) and I. R. C. 1954, § 1222 (3). These sections provide that "[t]he term 'long-term capital gain' means gain from the sale or exchange of a capital asset held for more than 6 months . . . ."

In the Tax Court, the Commissioner asserted that the transaction was a sham and that in any event respondents retained such an economic interest in and control over the property sold that the transaction could not be treated as a sale resulting in a long-term capital gain. A divided Tax Court, 37 T. C. 461, found that there had

[5] Clay Brown's personal liability for some of the indebtedness of Clay Brown & Company, assumed by Fortuna, was continued. He also personally guaranteed some additional indebtedness incurred by Fortuna.

been considerable good-faith bargaining at arm's length between the Brown family and the Institute, that the price agreed upon was within a reasonable range in the light of the earnings history of the corporation and the adjusted net worth of its assets, that the primary motivation for the Institute was the prospect of ending up with the assets of the business free and clear after the purchase price had been fully paid, which would then permit the Institute to convert the property and the money for use in cancer research, and that there had been a real change of economic benefit in the transaction.[6] Its conclusion was that the transfer of respondents' stock in Clay Brown & Company to the Institute was a bona fide sale arrived at in an arm's-length transaction and that the amounts received by respondents were proceeds from the sale of stock and entitled to long-term capital gains treatment under the Internal Revenue Code. The Court of Appeals affirmed, 325 F. 2d 313, and we granted certiorari, 377 U. S. 962.

Having abandoned in the Court of Appeals the argument that this transaction was a sham, the Commissioner now admits that there was real substance in what occurred between the Institute and the Brown family. The transaction was a sale under local law. The Institute acquired title to the stock of Clay Brown & Company and, by liquidation, to all of the assets of that company, in return for its promise to pay over money from the operating profits of the company. If the stipulated price was paid, the Brown family would forever lose all rights to the income and properties of the company. Prior to the transfer, these respondents had access to all of the income of the company; after the transfer, 28% of the income remained with Fortuna and the Institute. Respondents

[6] The Tax Court found nothing to indicate that the arrangement between the stockholders and the Institute contemplated the Brown family's being free at any time to take back and operate the business.

had no interest in the Institute nor were they stockholders or directors of the operating company. Any rights to control the management were limited to the management contract between Clay Brown and Fortuna, which was relinquished in 1954.

Whatever substance the transaction might have had, however, the Commissioner claims that it did not have the substance of a sale within the meaning of § 1222 (3). His argument is that since the Institute invested nothing, assumed no independent liability for the purchase price and promised only to pay over a percentage of the earnings of the company, the entire risk of the transaction remained on the sellers. Apparently, to qualify as a sale, a transfer of property for money or the promise of money must be to a financially responsible buyer who undertakes to pay the purchase price other than from the earnings or the assets themselves or there must be a substantial down payment which shifts at least part of the risk to the buyer and furnishes some cushion against loss to the seller.

To say that there is no sale because there is no risk-shifting and that there is no risk-shifting because the price to be paid is payable only from the income produced by the business sold, is very little different from saying that because business earnings are usually taxable as ordinary income, they are subject to the same tax when paid over as the purchase price of property. This argument has rationality but it places an unwarranted construction on the term "sale," is contrary to the policy of the capital gains provisions of the Internal Revenue Code, and has no support in the cases. We reject it.

"Capital gain" and "capital asset" are creatures of the tax law and the Court has been inclined to give these terms a narrow, rather than a broad, construction. *Corn Products Co.* v. *Commissioner,* 350 U. S. 46, 52. A "sale," however, is a common event in the non-tax world; and

since it is used in the Code without limiting definition and without legislative history indicating a contrary result, its common and ordinary meaning should at least be persuasive of its meaning as used in the Internal Revenue Code. "Generally speaking, the language in the Revenue Act, just as in any statute, is to be given its ordinary meaning, and the words 'sale' and 'exchange' are not to be read any differently." *Helvering* v. *Flaccus Leather Co.,* 313 U. S. 247, 249; *Hanover Bank* v. *Commissioner,* 369 U. S. 672, 687; *Commissioner* v. *Korell,* 339 U. S. 619, 627–628; *Crane* v. *Commissioner,* 331 U. S. 1, 6; *Lang* v. *Commissioner,* 289 U. S. 109, 111; *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, 560.

"A sale, in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent," *Iowa* v. *McFarland,* 110 U. S. 471, 478; it is a contract "to pass rights of property for money,—which the buyer pays or promises to pay to the seller . . . ," *Williamson* v. *Berry,* 8 How. 495, 544. Compare the definition of "sale" in § 1 (2) of the Uniform Sales Act and in § 2–106 (1) of the Uniform Commercial Code. The transaction which occurred in this case was obviously a transfer of property for a fixed price payable in money.

Unquestionably the courts, in interpreting a statute, have some "scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute." *Helvering* v. *Hammel,* 311 U. S. 504, 510–511; cf. *Commissioner* v. *Gillette Motor Co.,* 364 U. S. 130, 134, and *Commissioner* v. *P. G. Lake, Inc.,* 356 U. S. 260, 265. But it is otherwise "where no such consequences would follow and where . . . it appears to be consonant with the purposes of the Act . . . ." *Helvering* v. *Hammel, supra,* at 511; *Ozawa* v. *United States,* 260 U. S. 178, 194. We find nothing in this case indicating that the Tax Court or the

Court of Appeals construed the term "sale" too broadly or in a manner contrary to the purpose or policy of capital gains provisions of the Code.

Congress intended to afford capital gains treatment only in situations "typically involving the realization of appreciation in value accrued over a substantial period of time, and thus to ameliorate the hardship of taxation of the entire gain in one year." *Commissioner* v. *Gillette Motor Co.*, 364 U. S. 130, 134. It was to "relieve the taxpayer from . . . excessive tax burdens on gains resulting from a conversion of capital investments" that capital gains were taxed differently by Congress. *Burnet* v. *Harmel*, 287 U. S. 103, 106; *Commissioner* v. *P. G. Lake, Inc.*, 356 U. S. 260, 265.

As of January 31, 1953, the adjusted net worth of Clay Brown & Company as revealed by its books was $619,457.63. This figure included accumulated earnings of $448,471.63, paid in surplus, capital stock and notes payable to the Brown family. The appraised value as of that date, however, relied upon by the Institute and the sellers, was $1,064,877, without figuring interest on deferred balances. Under a deferred payment plan with a 6% interest figure, the sale value was placed at $1,301,989. The Tax Court found the sale price agreed upon was arrived at in an arm's-length transaction, was the result of real negotiating and was "within a reasonable range in light of the earnings history of the corporation and the adjusted net worth of the corporate assets." 37 T. C. 461, 486.

Obviously, on these facts, there had been an appreciation in value accruing over a period of years, *Commissioner* v. *Gillette Motor Co., supra,* and an "increase in the value of the income-producing property." *Commissioner* v. *P. G. Lake, Inc., supra,* at 266. This increase taxpayers were entitled to realize at capital gains rates on a cash sale of their stock; and likewise if they sold on a deferred pay-

ment plan taking an installment note and a mortgage as security. Further, if the down payment was less than 30% (the 1954 Code requires no down payment at all) and the transaction otherwise satisfied I. R. C. 1939, § 44, the gain itself could be reported on the installment basis.

In the actual transaction, the stock was transferred for a price payable on the installment basis but payable from the earnings of the company. Eventually $936,131.85 was realized by respondents. This transaction, we think, is a sale, and so treating it is wholly consistent with the purposes of the Code to allow capital gains treatment for realization upon the enhanced value of a capital asset.

The Commissioner, however, embellishes his risk-shifting argument. Purporting to probe the economic realities of the transaction, he reasons that if the seller continues to bear all the risk and the buyer none, the seller must be collecting a price for his risk-bearing in the form of an interest in future earnings over and above what would be a fair market value of the property. Since the seller bears the risk, the so-called purchase price *must* be excessive and *must* be simply a device to collect future earnings at capital gains rates.

We would hesitate to discount unduly the power of pure reason and the argument is not without force. But it does present difficulties. In the first place, it denies what the tax court expressly found—that the price paid was within reasonable limits based on the earnings and net worth of the company; and there is evidence in the record to support this finding. We do not have, therefore, a case where the price has been found excessive.

Secondly, if an excessive price is such an inevitable result of the lack of risk-shifting, it would seem that it would not be an impossible task for the Commissioner to demonstrate the fact. However, in this case he offered no evidence whatsoever to this effect; and in a good many other cases involving similar transactions, in some of which

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the reasonableness of the price paid by a charity was actually contested, the Tax Court has found the sale price to be within reasonable limits, as it did in this case.[7]

Thirdly, the Commissioner ignores as well the fact that if the rents payable by Fortuna were deductible by it and not taxable to the Institute, the Institute could pay off the purchase price at a considerably faster rate than the ordinary corporate buyer subject to income taxes, a matter of considerable importance to a seller who wants the balance of his purchase price paid as rapidly as he can get it. The fact is that by April 30, 1955, a little over two years after closing this transaction, $412,595.77 had been paid on the note and within another year the sellers had collected another $238,498.80, for a total of $651,094.57.

Furthermore, risk-shifting of the kind insisted on by the Commissioner has not heretofore been considered an essential ingredient of a sale for tax purposes. In *LeTulle* v. *Scofield,* 308 U. S. 415, one corporation transferred properties to another for cash and bonds secured by the properties transferred. The Court held that there was "a sale or exchange upon which gain or loss must be reckoned in accordance with the provisions of the revenue act dealing with the recognition of gain or loss upon a sale or exchange," *id.,* at 421, since the seller retained only

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[7] In all but four of the cases listed in note 3, *supra,* there was a finding that the price was within permissible limits. The exceptions are: *Kolkey* v. *Commissioner,* where the price was considered grossly excessive and the transaction a sham; *Union Bank* v. *United States,* in which the Court of Claims referred to the evidence of excessive price but nevertheless held a sale had taken place; *Brekke* v. *Commissioner,* where the seller was not before the court, the price was said to be twice the fair market value and the issue was the deductibility of the rent paid by the operating company to the exempt organization; and *Estate of Hawley,* in which there was no express treatment of the sale price, but the transaction was found to be a bona fide sale.

a creditor's interest rather than a proprietary one. "[T]hat the bonds were secured solely by the assets transferred and that, upon default, the bondholder would retake only the property sold, [did not change] his status from that of a creditor to one having a proprietary stake." *Ibid.* Compare *Marr* v. *United States,* 268 U. S. 536. To require a sale for tax purposes to be to a financially responsible buyer who undertakes to pay the purchase price from sources other than the earnings of the assets sold or to make a substantial down payment seems to us at odds with commercial practice and common understanding of what constitutes a sale. The term "sale" is used a great many times in the Internal Revenue Code and a wide variety of tax results hinge on the occurrence of a "sale." To accept the Commissioner's definition of sale would have wide ramifications which we are not prepared to visit upon taxpayers, absent congressional guidance in this direction.

The Commissioner relies heavily upon the cases involving a transfer of mineral interests, the transferor receiving a bonus and retaining a royalty or other interest in the mineral production. *Burnet* v. *Harmel,* 287 U. S. 103; *Palmer* v. *Bender,* 287 U. S. 551; *Thomas* v. *Perkins,* 301 U. S. 655; *Kirby Petroleum Co.* v. *Commissioner,* 326 U. S. 599; *Burton-Sutton Oil Co.* v. *Commissioner,* 328 U. S. 25; *Commissioner* v. *Southwest Exploration Co.,* 350 U. S. 308. *Thomas* v. *Perkins* is deemed particularly pertinent. There a leasehold interest was transferred for a sum certain payable in oil as produced, and it was held that the amounts paid to the transferor were not includable in the income of the transferee but were income of the transferor. We do not, however, deem either *Thomas* v. *Perkins* or the other cases controlling.

First, "Congress . . . has recognized the peculiar character of the business of extracting natural resources," *Burton-Sutton Oil Co.* v. *Commissioner,* 328 U. S. 25, 33;

see *Stratton's Independence, Ltd.* v. *Howbert,* 231 U. S. 399, 413–414, which is viewed as an income-producing operation and not as a conversion of capital investment, *Anderson* v. *Helvering,* 310 U. S. 404, at 407, but one which has its own built-in method of allowing through depletion "a tax-free return of the capital consumed in the production of gross income through severance," *Anderson* v. *Helvering, supra,* at 408, which is independent of cost and depends solely on production, *Burton-Sutton,* at 34. Percentage depletion allows an arbitrary deduction to compensate for exhaustion of the asset, regardless of cost incurred or any investment which the taxpayer may have made. The Commissioner, however, would assess to respondents as ordinary income the entire amount of all rental payments made by the Institute, regardless of the accumulated values in the corporation which the payments reflected and without regard for the present policy of the tax law to allow the taxpayer to realize on appreciated values at the capital gains rates.

Second, *Thomas* v. *Perkins* does not have unlimited sweep. The Court in *Anderson* v. *Helvering, supra,* pointed out that it was still possible for the owner of a working interest to divest himself finally and completely of his mineral interest by effecting a sale. In that case the owner of royalty interest, fee interest and deferred oil payments contracted to convey them for $160,000 payable $50,000 down and the balance from one-half the proceeds which might be derived from the oil and gas produced and from the sale of the fee title to any of the lands conveyed. The Court refused to extend *Thomas* v. *Perkins* beyond the oil payment transaction involved in that case. Since the transferor in *Anderson* had provided for payment of the purchase price from the sale of fee interest as well as from the production of oil and gas, "the reservation of this additional type of security for the deferred payments serve[d] to distinguish this case from

Thomas v. *Perkins*. It is similar to the reservation in a lease of oil payment rights together with a personal guarantee by the lessee that such payments shall at all events equal the specified sum." *Anderson* v. *Helvering, supra,* at 412–413. Hence, there was held to be an outright sale of the properties, all of the oil income therefrom being taxable to the transferee notwithstanding the fact of payment of part of it to the seller. The respondents in this case, of course, not only had rights against income, but if the income failed to amount to $250,000 in any two consecutive years, the entire amount could be declared due, which was secured by a lien on the real and personal properties of the company.[8]

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[8] Respondents place considerable reliance on the rule applicable where patents are sold or assigned, the seller or assignor reserving an income interest. In Rev. Rul. 58–353, 1958–2 Cum. Bull. 408, the Service announced its acquiescence in various Tax Court cases holding that the consideration received by the owner of a patent for the assignment of a patent or the granting of an exclusive license to such patent may be treated as the proceeds of a sale of property for income tax purposes, even though the consideration received by the transferor is measured by production, use, or sale of the patented article. The Government now says that the Revenue Ruling amounts only to a decision to cease litigating the question, at least temporarily, and that the cases on which the rule is based are wrong in principle and inconsistent with the cases dealing with the taxation of mineral interests. We note, however, that in Rev. Rul. 60–226, 1960–1 Cum. Bull. 26, the Service extended the same treatment to the copyright field. Furthermore, the Secretary of the Treasury in 1963 recognized the present law to be that "the sale of a patent by the inventor may be treated as the sale of a capital asset," Hearings before the House Committee on Ways and Means, 88th Cong., 1st Sess., Feb. 6, 7, 8 and 18, 1963, Pt. I (rev.), on the President's 1963 Tax Message, p. 150, and the Congress failed to enact the changes in the law which the Department recommended.

These developments in the patent field obviously do not help the position of the Commissioner. Nor does I. R. C. 1954, § 1235, which expressly permits specified patent sales to be treated as sales of capital assets entitled to capital gains treatment. We need not, however,

There is another reason for us not to disturb the ruling of the Tax Court and the Court of Appeals. In 1963, the Treasury Department, in the course of hearings before the Congress, noted the availability of capital gains treatment on the sale of capital assets even though the seller retained an interest in the income produced by the assets. The Department proposed a change in the law which would have taxed as ordinary income the payments on the sale of a capital asset which were deferred over more than five years and were contingent on future income. Payments, though contingent on income, required to be made within five years would not have lost capital gains status nor would payments not contingent on income even though accompanied by payments which were. Hearings before the House Committee on Ways and Means, 88th Cong., 1st Sess., Feb. 6, 7, 8 and 18, 1963, Pt. I (rev.), on the President's 1963 Tax Message, pp. 154–156.

Congress did not adopt the suggested change [9] but it is significant for our purposes that the proposed amendment did not deny the fact or occurrence of a sale but would have taxed as ordinary income those income-contingent

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decide here whether the extraction and patent cases are irreconcilable or whether, instead, each situation has its own peculiar characteristics justifying discrete treatment under the sale and exchange language of § 1222. Whether the patent cases are correct or not, absent § 1235, the fact remains that this case involves the transfer of corporate stock which has substantially appreciated in value and a purchase price payable from income which has been held to reflect the fair market value of the assets which the stock represents.

[9] It did, however, accept and enact another suggestion made by the Treasury Department. Section 483, which was added to the Code, provided for treating a part of the purchase price as interest in installment sales transactions where no interest was specified. The provision was to apply as well when the payments provided for were indefinite as to their size, as for example "where the payments are in part at least dependent upon future income derived from the property." S. Rep. No. 830, 88th Cong., 2d Sess., p. 103. This section would apparently now apply to a transaction such as occurred in this case.

payments deferred for more than five years. If a purchaser could pay the purchase price out of earnings within five years, the seller would have capital gain rather than ordinary income. The approach was consistent with allowing appreciated values to be treated as capital gain but with appropriate safeguards against reserving additional rights to future income. In comparison, the Commissioner's position here is a clear case of "overkill" if aimed at preventing the involvement of tax-exempt entities in the purchase and operation of business enterprises. There are more precise approaches to this problem as well as to the question of the possibly excessive price paid by the charity or foundation. And if the Commissioner's approach is intended as a limitation upon the tax treatment of sales generally, it represents a considerable invasion of current capital gains policy, a matter which we think is the business of Congress, not ours.

The problems involved in the purchase of a going business by a tax-exempt organization have been considered and dealt with by the Congress. Likewise, it has given its attention to various kinds of transactions involving the payment of the agreed purchase price for property from the future earnings of the property itself. In both situations it has responded, if at all, with precise provisions of narrow application. We consequently deem it wise to "leave to the Congress the fashioning of a rule which, in any event, must have wide ramifications." *American Automobile Assn.* v. *United States,* 367 U. S. 687, 697.

Affirmed.

MR. JUSTICE HARLAN, concurring.

Were it not for the tax laws, the respondents' transaction with the Institute would make no sense, except as one arising from a charitable impulse. However the tax laws exist as an economic reality in the businessman's world, much like the existence of a competitor. Businessmen

plan their affairs around both, and a tax dollar is just as real as one derived from any other source. The Code gives the Institute a tax exemption which makes it capable of taking a greater after-tax return from a business than could a nontax-exempt individual or corporation. Respondents traded a residual interest in their business for a faster payout apparently made possible by the Institute's exemption. The respondents gave something up; they received something substantially different in return. If words are to have meaning, there was a "sale or exchange."

Obviously the Institute traded on its tax exemption. The Government would deny that there was an exchange, essentially on the theory that the Institute did not put anything at risk; since its exemption is unlimited, like the magic purse that always contains another penny, the Institute gave up nothing by trading on it.

One may observe preliminarily that the Government's remedy for the so-called "bootstrap" sale—defining sale or exchange so as to require the shifting of some business risks—would accomplish little by way of closing off such sales in the future. It would be neither difficult nor burdensome for future users of the bootstrap technique to arrange for some shift of risks. If such sales are considered a serious abuse, ineffective judicial correctives will only postpone the day when Congress is moved to deal with the problem comprehensively. Furthermore, one may ask why, if the Government does not like the tax consequences of such sales, the proper course is not to attack the exemption rather than to deny the existence of a "real" sale or exchange.

The force underlying the Government's position is that the respondents did clearly retain some risk-bearing interest in the business. Instead of leaping from this premise to the conclusion that there was no sale or exchange, the Government might more profitably have

broken the transaction into components and attempted to distinguish between the interest which respondents retained and the interest which they exchanged. The worth of a business depends upon its ability to produce income over time. What respondents gave up was not the entire business, but only their interest in the business' ability to produce income in excess of that which was necessary to pay them off under the terms of the transaction. The value of such a residual interest is a function of the risk element of the business and the amount of income it is capable of producing per year, and will necessarily be substantially less than the value of the total business. Had the Government argued that it was that interest which respondents exchanged, and only to that extent should they have received capital gains treatment, we would perhaps have had a different case.

I mean neither to accept nor reject this approach, or any other which falls short of the all-or-nothing theory specifically argued by the petitioner, specifically opposed by the respondents, and accepted by the Court as the premise for its decision. On a highly complex issue with as wide ramifications as the one before us, it is vitally important to have had the illumination provided by briefing and argument directly on point before any particular path is irrevocably taken. Where the definition of "sale or exchange" is concerned, the Court can afford to proceed slowly and by stages. The illumination which has been provided in the present case convinces me that the position taken by the Government is unsound and does not warrant reversal of the judgment below. Therefore I concur in the judgment to affirm.

MR. JUSTICE GOLDBERG, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACK join, dissenting.

The essential facts of this case which are undisputed illuminate the basic nature of the transaction at issue.

Respondents conveyed their stock in Clay Brown & Co., a corporation owned almost entirely by Clay Brown and the members of his immediate family, to the California Institute for Cancer Research, a tax-exempt foundation. The Institute liquidated the corporation and transferred its assets under a five-year lease to a new corporation, Fortuna, which was managed by respondent Clay Brown, and the shares of which were in the name of Clay Brown's attorneys, who also served as Fortuna's directors. The business thus continued under a new name with no essential change in control of its operations. Fortuna agreed to pay 80% of its pretax profits to the Institute as rent under the lease, and the Institute agreed to pay 90% of this amount to respondents in payment for their shares until the respondents received $1,300,000, at which time their interest would terminate and the Institute would own the complete beneficial interest as well as all legal interest in the business. If remittances to respondents were less than $250,000 in any two consecutive years or any other provision in the agreements was violated, they could recover the property. The Institute had no personal liability. In essence respondents conveyed their interest in the business to the Institute in return for 72% of the profits of the business and the right to recover the business assets if payments fell behind schedule.

At first glance it might appear odd that the sellers would enter into this transaction, for prior to the sale they had a right to 100% of the corporation's income, but after the sale they had a right to only 72% of that income and would lose the business after 10 years to boot. This transaction, however, afforded the sellers several advantages. The principal advantage sought by the sellers was capital gain, rather than ordinary income, treatment for that share of the business profits which they received. Further, because of the Tax Code's charitable exemption [1]

[1] See I. R. C. 1954, § 501 (c)(3).

and the lease arrangement with Fortuna,[2] the Institute believed that neither it nor Fortuna would have to pay income tax on the earnings of the business. Thus the sellers would receive free of corporate taxation, and subject only to personal taxation at capital gains rates, 72% of the business earnings until they were paid $1,300,000. Without the sale they would receive only 48% of the business earnings, the rest going to the Government in corporate taxes, and this 48% would be subject to personal taxation at ordinary rates. In effect the Institute sold the respondents the use of its tax exemption, enabling the respondents to collect $1,300,000 from the business more quickly than they otherwise could and to pay taxes on this amount at capital gains rates. In return, the Institute received a nominal amount of the profits while the $1,300,000 was being paid, and it was to receive the whole business after this debt had been paid off. In any realistic sense the Government's grant of a tax exemption was used by the Institute as part of an arrangement that allowed it to buy a business that in fact cost it nothing. I cannot believe that Congress intended such a result.

The Court today legitimates this bootstrap transaction and permits respondents the tax advantage which the parties sought. The fact that respondent Brown, as a

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[2] This lease arrangement was designed to permit the Institute to take advantage of its charitable exemption to avoid taxes on payment of Fortuna's profits to it, with Fortuna receiving a deduction for the rental payments as an ordinary and necessary business expense, thus avoiding taxes to both. Though unrelated business income is usually taxable when received by charities, an exception is made for income received from the lease of real and personal property of less than five years. See I. R. C. § 514; Lanning, Tax Erosion and the "Bootstrap Sale" of a Business–I, 108 Pa. L. Rev. 623, 684–689. Though denial of the charity's tax exemption on rent received from Fortuna would also remove the economic incentive underlying this bootstrap transaction, there is no indication in the Court's opinion that such income is not tax exempt. See the Court's opinion, *ante,* at 565–566.

result of the Court's holding, escapes payment of about $60,000 in taxes may not seem intrinsically important—although every failure to pay the proper amount of taxes under a progressive income tax system impairs the integrity of that system. But this case in fact has very broad implications. We are told by the parties and by interested *amici* that this is a test case. The outcome of this case will determine whether this bootstrap scheme for the conversion of ordinary income into capital gain, which has already been employed on a number of occasions, will become even more widespread.[3] It is quite clear that the Court's decision approving this tax device will give additional momentum to its speedy proliferation. In my view Congress did not sanction the use of this scheme under the present revenue laws to obtain the tax advantages which the Court authorizes. Moreover, I believe that the Court's holding not only deviates from the intent of Congress but also departs from this Court's prior decisions.

The purpose of the capital gains provisions of the Internal Revenue Code of 1954, § 1201 *et seq.*, is to prevent gains which accrue over a long period of time from being taxed in the year of their realization through a sale at high rates resulting from their inclusion in the higher tax brackets. *Burnet* v. *Harmel,* 287 U. S. 103, 106. These provisions are not designed, however, to allow capital gains treatment for the recurrent receipt of commercial or business income. In light of these purposes this Court has held that a "sale" for capital gains purposes is not produced by the mere transfer of legal title. *Burnet* v. *Harmel, supra; Palmer* v. *Bender,* 287 U. S. 551. Rather, at the very least, there must be a meaningful economic transfer in addition to a change in legal title. See *Corliss* v. *Bowers,* 281 U. S. 376. Thus the question posed here is not whether this transaction constitutes a sale within the

[3] See the articles cited in the majority opinion, *ante,* at 566, n. 2.

terms of the Uniform Commercial Code or the Uniform Sales Act—we may assume it does—but, rather, the question is whether, at the time legal title was transferred, there was also an economic transfer sufficient to convert ordinary income into capital gain by treating this transaction as a "sale" within the terms of I. R. C. § 1222 (3).

In dealing with what constitutes a sale for capital gains purposes, this Court has been careful to look through formal legal arrangements to the underlying economic realities. Income produced in the mineral extraction business, which "resemble[s] a manufacturing business carried on by the use of the soil," *Burnet* v. *Harmel, supra,* at 107, is taxed to the person who retains an economic interest in the oil. Thus, while an outright sale of mineral interests qualifies for capital gains treatment, a purported sale of mineral interests in exchange for a royalty from the minerals produced is treated only as a transfer with a retained economic interest, and the royalty payments are fully taxable as ordinary income. *Burnet* v. *Harmel, supra.* See *Palmer* v. *Bender, supra.*

In *Thomas* v. *Perkins,* 301 U. S. 655, an owner of oil interests transferred them in return for an "oil production payment," an amount which is payable only out of the proceeds of later commercial sales of the oil transferred. The Court held that this transfer, which constituted a sale under state law, did not constitute a sale for tax purposes because there was not a sufficient shift of economic risk. The transferor would be paid only if oil was later produced and sold; if it was not produced, he would not be paid. The risks run by the transferor of making or losing money from the oil were shifted so slightly by the transfer that no § 1222 (3) sale existed, notwithstanding the fact that the transaction conveyed title as a matter of state law, and once the payout was complete, full ownership of the minerals was to vest in the purchaser.

I believe that the sellers here retained an economic interest in the business fully as great as that retained by the seller of oil interests in *Thomas* v. *Perkins*. The sellers were to be paid only out of the proceeds of the business. If the business made money they would be paid; if it did not, they would not be paid. In the latter event, of course, they could recover the business, but a secured interest in a business which was losing money would be of dubious value. There was no other security. The Institute was not bound to pay any sum whatsoever. The Institute, in fact, promised only to channel to the sellers a portion of the income it received from Fortuna.

Moreover, in numerous cases this Court has refused to transfer the incidents of taxation along with a transfer of legal title when the transferor retains considerable control over the income-producing asset transferred. See, *e. g.*, *Commissioner* v. *Sunnen*, 333 U. S. 591; *Helvering* v. *Clifford*, 309 U. S. 331; *Corliss* v. *Bowers*, *supra*. Control of the business did not, in fact, shift in the transaction here considered. Clay Brown, by the terms of the purchase agreement and the lease, was to manage Fortuna. Clay Brown was given power to hire and arrange for the terms of employment of all other employees of the corporation. The lease provided that "if for any reason Clay Brown is unable or unwilling to so act, the person or persons holding a majority interest in the principal note described in the Purchase Agreement shall have the right to approve his successor to act as general manager of Lessee company." Thus the shareholders of Clay Brown & Co. assured themselves of effective control over the management of Fortuna. Furthermore, Brown's attorneys were the named shareholders of Fortuna and its Board of Directors. The Institute had no control over the business.

I would conclude that on these facts there was not a sufficient shift of economic risk or control of the business

to warrant treating this transaction as a "sale" for tax purposes. Brown retained full control over the operations of the business; the risk of loss and the opportunity to profit from gain during the normal operation of the business shifted but slightly. If the operation lost money, Brown stood to lose; if it gained money Brown stood to gain, for he would be paid off faster. Moreover, the entire purchase price was to be paid out of the ordinary income of the corporation, which was to be received by Brown on a recurrent basis as he had received it during the period he owned the corporation. I do not believe that Congress intended this recurrent receipt of ordinary business income to be taxed at capital gains rates merely because the business was to be transferred to a tax-exempt entity at some future date. For this reason I would apply here the established rule that, despite formal legal arrangements, a sale does not take place until there has been a significant economic change such as a shift in risk or in control of the business.[4]

To hold as the Court does that this transaction constitutes a "sale" within the terms of I. R. C. § 1222 (3), thereby giving rise to capital gain for the income received, legitimates considerable tax evasion. Even if the Court restricts its holding, allowing only those transactions to be § 1222 (3) sales in which the price is not excessive, its decision allows considerable latitude for the unwarranted conversion of ordinary income into capital gain. Valuation of a closed corporation is notoriously difficult. The Tax Court in the present case did not determine that the price for which the corporation was sold represented its true value; it simply stated that the price "was the result

[4] The fact that respondents were to lose complete control of the business after the payments were complete was taken into account by the Commissioner, for he treated the business in respondents' hands as a wasting asset, see I. R. C. 1954, § 167, and allowed them to offset their basis in the stock against the payments received.

of real negotiating" and "within a reasonable range in light of the earnings history of the corporation and the adjusted net worth of the corporate assets." 37 T. C., at 486. The Tax Court, however, also said that "[i]t may be . . . that petitioner [Clay Brown] would have been unable to sell the stock at as favorable a price to anyone other than a tax-exempt organization." 37 T. C., at 485. Indeed, this latter supposition is highly likely, for the Institute was selling its tax exemption, and this is not the sort of asset which is limited in quantity. Though the Institute might have negotiated in order to receive beneficial ownership of the corporation as soon as possible, the Institute, at no cost to itself, could increase the price to produce an offer too attractive for the seller to decline. Thus it is natural to anticipate sales such as this taking place at prices on the upper boundary of what courts will hold to be a reasonable price—at prices which will often be considerably greater than what the owners of a closed corporation could have received in a sale to buyers who were not selling their tax exemptions. Unless Congress repairs the damage done by the Court's holding, I should think that charities will soon own a considerable number of closed corporations, the owners of which will see no good reason to continue paying taxes at ordinary income rates. It should not be necessary, however, for Congress to address itself to this loophole, for I believe that under the present laws it is clear that Congress did not intend to accord capital gains treatment to the proceeds of the type of sale present here.

Although the Court implies that it will hold to be "sales" only those transactions in which the price is reasonable, I do not believe that the logic of the Court's opinion will justify so restricting its holding. If this transaction is a sale under the Internal Revenue Code, entitling its proceeds to capital gains treatment because it was arrived at after hard negotiating, title in a con-

veyancing sense passed, and the beneficial ownership was expected to pass at a later date, then the question recurs, which the Court does not answer, why a similar transaction would cease to be a sale if hard negotiating produced a purchase price much greater than actual value. The Court relies upon *Kolkey* v. *Commissioner,* 254 F. 2d 51 (C. A. 7th Cir.), as authority holding that a bootstrap transaction will be struck down where the price is excessive. In *Kolkey,* however, the price to be paid was so much greater than the worth of the corporation in terms of its anticipated income that it was highly unlikely that the price would in fact ever be paid; consequently it was improbable that the sellers' interest in the business would ever be extinguished. Therefore, in *Kolkey* the court, viewing the case as one involving "thin capitalization," treated the notes held by the sellers as equity in the new corporation and payments on them as dividends. Those who fashion "bootstrap" purchases have become considerably more sophisticated since *Kolkey;* vastly excessive prices are unlikely to be found and transactions are fashioned so that the "thin capitalization" argument is conceptually inapplicable. Thus I do not see what rationale the Court might use to strike down price transactions which, though excessive, do not reach *Kolkey's* dimensions, when it upholds the one here under consideration. Such transactions would have the same degree of risk-shifting, there would be no less a transfer of ownership, and consideration supplied by the buyer need be no less than here.

Further, a bootstrap tax avoidance scheme can easily be structured under which the holder of any income-earning asset "sells" his asset to a tax-exempt buyer for a promise to pay him the income produced for a period of years. The buyer in such a transaction would do nothing whatsoever; the seller would be delighted to lose his asset at the end of, say, 30 years in return for capital gains treat-

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ment of all income earned during that period. It is difficult to see, on the Court's rationale, why such a scheme is not a sale. And, if I am wrong in my reading of the Court's opinion, and if the Court would strike down such a scheme on the ground that there is no economic shifting of risk or control, it is difficult to see why the Court upholds the sale presently before it in which control does not change and any shifting of risk is nominal.

I believe that the Court's overly conceptual approach has led to a holding which will produce serious erosion of our progressive taxing system, resulting in greater tax burdens upon all taxpayers. The tax avoidance routes opened by the Court's opinion will surely be used to advantage by the owners of closed corporations and other income-producing assets in order to evade ordinary income taxes and pay at capital gains rates, with a resultant large-scale ownership of private businesses by tax-exempt organizations.[5] While the Court justifies its result in the name of conceptual purity,[6] it simultaneously violates long-standing congressional tax policies that capital gains treatment is to be given to significant economic transfers of investment-type assets but not to ordinary commercial or business income and that transactions are to be judged on their entire substance rather than their naked form. Though turning tax consequences on form alone might produce greater certainty of the tax results of any transaction, this stability exacts as its price the certainty that tax evasion will be produced. In *Commissioner* v. *P. G.*

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[5] Attorneys for *amici* have pointed out that tax-exempt charities which they represent have bought numerous closed corporations.

[6] It should be noted, however, that the Court's holding produces some rather unusual conceptual results. For example, after the payout is complete the Institute presumably would have a basis of $1,300,000 in a business that in reality cost it nothing. If anyone deserves such a basis, it is the Government, whose grant of tax exemption is being used by the Institute to acquire the business.

Lake, Inc., 356 U. S. 260, 265, this Court recognized that the purpose of the capital gains provisions of the Internal Revenue Code is " 'to relieve the taxpayer from . . . excessive tax burdens on gains resulting from a conversion of capital investments, and to remove the deterrent effect of those burdens on such conversions.' . . . And this exception has always been narrowly construed so as to protect the revenue against artful devices." I would hold in keeping with this purpose and in order to prevent serious erosion of the ordinary income tax provisions of the Code, that the bootstrap transaction revealed by the facts here considered is not a "sale" within the meaning of the capital gains provisions of the Code, but that it obviously is an "artful device," which this Court ought not to legitimate. The Court justifies the untoward result of this case as permitted tax avoidance; I believe it to be a plain and simple case of unwarranted tax evasion.

FEDERAL TRADE COMMISSION *v.* CONSOLIDATED FOODS CORP.

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

No. 422. Argued March 10–11, 1965.—Decided April 28, 1965.

Respondent, a large, diversified company, which owns food processing plants and a network of wholesale and retail food stores, in 1951 acquired Gentry, Inc., a manufacturer of dehydrated onion and garlic. Gentry, before the merger, had about 32% of the sales of those products, and, with its chief competitor, accounted for about 90% of the total industry sales. By 1958, in an expanding market, Gentry had 35% of the sales and the combined share with its principal competitor remained about 90%. After the merger respondent attempted to induce reciprocal buying of Gentry's products by respondent's suppliers. The Federal Trade Commission held that the acquisition violated § 7 of the Clayton Act, as the opportunity for reciprocal buying in this oligopolistic industry created a probability of a substantial lessening of competition and ordered divestiture. The Court of Appeals reversed, finding no substantial impact on the market in the light of ten years of post-acquisition experience. *Held:*

1. Post-acquisition evidence of the effect of the merger upon competition is entitled to consideration in determining whether a merger violates § 7, but it must not be given conclusive weight or allowed to override all probabilities. P. 598.

2. The finding by the Commission of the probability of reciprocal buying leading to a lessening of competition in the instant case was supported by substantial evidence. P. 600.

3. Reciprocal buying is an anticompetitive device condemned by § 7 of the Clayton Act. Pp. 594–595.

329 F. 2d 623, reversed.

Solicitor General Cox argued the cause for petitioner. With him on the brief were *Assistant Attorney General Orrick, Nathan Lewin, Lionel Kestenbaum, James McI. Henderson* and *George R. Kucik.*

Daniel Walker argued the cause for respondent. With him on the brief were *Anderson A. Owen, Bruce Bromley, George B. Turner* and *Allen F. Maulsby.*

Herbert Bruce Griswold filed a brief for Trabon Engineering Corp. et al., as *amici curiae,* urging reversal.

Thomas V. Koykka and *Edward D. Crocker* filed a brief for Eaton Manufacturing Co., as *amicus curiae,* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question presented involves an important construction and application of § 7 of the Clayton Act,[1] 38 Stat. 731, as amended, 15 U. S. C. § 18. Consolidated Foods Corp.—which owns food processing plants and a network of wholesale and retail food stores—acquired Gentry, Inc., in 1951. Gentry manufactures principally dehydrated onion and garlic. The Federal Trade Commission held that the acquisition violated § 7 because it gave respondent the advantage of a mixed threat and lure of reciprocal buying in its competition for business and "the power to foreclose competition from a substantial share of the markets for dehydrated onion and garlic." It concluded, in other words, that the effect of the acquisition "may be substantially to lessen competition" within the meaning of § 7, and it ordered divestiture and gave

[1] Section 7 reads in pertinent part as follows:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U. S. C. § 18.

other relief. — F. T. C. —, —. The Court of Appeals, relying mainly on 10 years of post-acquisition experience, held that the Commission had failed to show a probability that the acquisition would substantially lessen competition. 329 F. 2d 623. The case is here on certiorari. 379 U. S. 912.

We hold at the outset that the "reciprocity" made possible by such an acquisition is one of the congeries of anticompetitive practices at which the antitrust laws are aimed. The practice results in "an irrelevant and alien factor," — F. T. C., p. —, intruding into the choice among competing products, creating at the least "a priority on the business at equal prices." *International Salt Co.* v. *United States,* 332 U. S. 392, 396–397; *Northern Pac. R. Co.* v. *United States,* 356 U. S. 1, 3, 6, 12. Reciprocal trading may ensue not from bludgeoning or coercion but from more subtle arrangements. A threatened withdrawal of orders if products of an affiliate cease being bought, as well as a conditioning of future purchases on the receipt of orders for products of that affiliate, is an anticompetitive practice.[2] Section 7 of the Clayton Act is

[2] Edwards, Conglomerate Bigness as a Source of Power, in Nat. Bur. Eco. Research, Business Concentration and Price Policy (1955), 331, p. 342:

"Where large and powerful concerns encounter each other as seller and buyer, there is sometimes a reciprocal exchange of favors, by which each of the great enterprises strengthens the other.

"The most common form of such a relationship is probably reciprocal buying. A reciprocal buying arrangement may arise either through formal contract or through an informal understanding that may be scarcely distinguishable from a mere policy of cultivating the good will of a large customer. The essence of the arrangement is the willingness of each company to buy from the other, conditioned upon the expectation that the other company will make reciprocal purchases. The goods bought are typically dissimilar in kind, and in the usual case could be obtained from other sources on terms which, aside from the reciprocal purchases, would be no less advantageous. Where such a relationship is well established, it prevents the competitors of

concerned "with probabilities, not certainties." *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 323; *United States* v. *Philadelphia Nat. Bank,* 374 U. S. 321, 362. Reciprocity in trading as a result of an acquisition violates § 7, if the probability of a lessening of competition is shown. We turn then to that, the principal, aspect of the present case.

Consolidated is a substantial purchaser of the products of food processors who in turn purchase dehydrated onion and garlic for use in preparing and packaging their food. Gentry, which as noted is principally engaged in the manufacture of dehydrated onion and garlic, had in 1950, immediately prior to its acquisition by Consolidated, about 32% of the total sales of the dehydrated garlic and onion industry and, together with its principal competitor, Basic Vegetable Products, Inc., accounted for almost 90% of the total industry sales. The remaining 10% was divided between two other firms. By 1958 the total industry output of both products had doubled, Gentry's share rising to 35% and the combined share of Gentry and Basic remaining at about 90%.[3]

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each company from selling to the other company, and affords to each company whatever increase of size and strength can be derived from an assured place as supplier to the other."

And see Stocking and Mueller, Business Reciprocity and the Size of Firms, 30 J. Bus. U. Chi. 73, 75–77 (1957); Ammer, Realistic Reciprocity, 40 Harv. Bus. Rev. No. 1, 116 (1962); Hausman, Reciprocal Dealing and the Antitrust Laws, 77 Harv. L. Rev. 873 (1964).

For a discussion of the conglomerate acquisition (the type involved in the present case) see Report, Federal Trade Commission on The Merger Movement (A Summary Report, 1948), p. 59 *et seq.*

[3] As stated by the Court of Appeals:

"Immediately prior to the Consolidated-Gentry merger, Basic accounted for 60% and Gentry 28% of dehydrated onion sales. By 1958, these figures were 57% and 35%, respectively. In dehydrated garlic sales, Basic had 36% of the market in 1950 and 50% in 1958, while Gentry's shares were 51% and 39% for the same years." 329 F. 2d, p. 625.

After the acquisition Consolidated (though later disclaiming adherence to any policy of reciprocity) did undertake to assist Gentry in selling. An official of Consolidated wrote as follows to its distributing divisions:

> "Oftentimes, it is a great advantage to know when you are calling on a prospect, whether or not that prospect is a supplier of someone within your own organization. Everyone believes in reciprocity providing all things are equal.
>
> "Attached is a list of prospects for our Gentry products. We would like to have you indicate on the list whether or not you are purchasing any of your supplies from them. If so, indicate whether your purchases are relatively large, small or insignificant. . . .
>
> . . . . . .
>
> "Will you please refer the list to the proper party in your organization. . . . If you have any special suggestions, as to how you could be helpful in properly presenting Gentry to any of those listed, it will be appreciated."

Food processors who sold to Consolidated stated they would give their onion and garlic business to Gentry for reciprocity reasons if it could meet the price and quality of its competitors' products. Typical is a letter from Armour and Co.:

> "I can assure you that it is the desire of our people to reciprocate and cooperate with you in any way we can in line with good business practices, and I am sure that if our quality obstacles can be overcome, your quotations will receive favorable consideration. We value our relationship with you very highly and are disappointed that we have been unable lately to reciprocate for your fine cooperation on Armour Pantry Shelf Meats."

Some suppliers responded and gave reciprocal orders. Some who first gave generous orders later reduced them or abandoned the practice. It is impossible to recreate the precise anatomy of the market arrangements following the acquisition, though respondent offers a factual brief seeking to prove that "reciprocity" either failed or was not a major factor in the post-acquisition history.

The Commission found, however, that "merely as a result of its connection with Consolidated, and without any action on the latter's part, Gentry would have an unfair advantage over competitors enabling it to make sales that otherwise might not have been made."

And the Commission concluded:

> "With two firms accounting for better than 85% of both product lines for eleven successive years, maximum concentration short of monopoly has already been achieved. If it is desirable to prevent a trend toward oligopoly it is *a fortiori* desirable to remove, so far as possible, obstacles to the creation of genuinely competitive conditions in an oligopolistic industry. Respondent's reciprocal buying power, obtained through acquisition of Gentry, is just such an anticompetitive obstacle.
>
> "This conclusion is buttressed by the peculiar nature of the dehydrated onion and garlic industry. In the first place, the record shows that Gentry's leading competitor, Basic Vegetable Products, Inc., has been the innovator and leader in the field. Gentry has recently made technical strides narrowing, although probably not closing, the gap between them. There is also evidence that the third firm, Puccinelli Packing Co., is not only much smaller—commanding only about 10% of each product market—but is considered by many buyers to offer an inferior product and inferior service." —— F. T. C., p. ——.

The Court of Appeals, on the other hand, gave post-acquisition evidence almost conclusive weight. It pointed out that, while Gentry's share of the dehydrated onion market increased by some 7%, its share of the dehydrated garlic market decreased 12%. 329 F. 2d, p. 626. It also relied on apparently unsuccessful attempts at reciprocal buying. *Ibid.* The Court of Appeals concluded that "Probability can best be gauged by what the past has taught." *Id.*, p. 627.

The Court of Appeals was not in error in considering the post-acquisition evidence in this case. See *United States* v. *du Pont & Co.*, 353 U. S. 586, 597 *et seq.*, 602 *et seq.* But we think it gave too much weight to it. Cf. *United States* v. *Continental Can Co.*, 378 U. S. 441, 463. No group acquiring a company with reciprocal buying opportunities is entitled to a "free trial" period. To give it such would be to distort the scheme of § 7. The "mere *possibility*" of the prohibited restraint is not enough. (*United States* v. *du Pont & Co., supra,* p. 598.) Probability of the proscribed evil is required, as we have noted. If the post-acquisition evidence were given conclusive weight or allowed to override all probabilities, then acquisitions would go forward willy-nilly, the parties biding their time until reciprocity was allowed fully to bloom. It is, of course, true that post-acquisition conduct may amount to a violation of § 7 even though there is no evidence to establish probability *in limine.* See *United States* v. *du Pont & Co., supra,* pp. 597–598. But the force of § 7 is still in probabilities, not in what later transpired. That must necessarily be the case, for once the two companies are united no one knows what the fate of the acquired company and its competitors would have been but for the merger.

Moreover, the post-acquisition evidence here tends to confirm, rather than cast doubt upon, the probable anti-competitive effect which the Commission found the merger would have. The Commission found that Basic's

product was superior to Gentry's—as Gentry's president freely and repeatedly admitted. Yet Gentry, in a rapidly expanding market, was able to increase its share of onion sales by 7% and to hold its losses in garlic to a 12% decrease. Thus the Commission was surely on safe ground in reaching the following conclusion:

> "If reciprocal buying creates for Gentry a protected market, which others cannot penetrate despite superiority of price, quality, or service, competition is lessened whether or not Gentry can expand its market share. It is for this reason that we reject respondent's argument that the decline in its share of the garlic market proves the ineffectiveness of reciprocity. We do not know that its share would not have fallen still farther, had it not been for the influence of reciprocal buying. This loss of sales fails to refute the likelihood that Consolidated's reciprocity power, which it has shown a willingness to exploit to the full, will not immunize a substantial segment of the garlic market from normal quality, price, and service competition." —— F. T. C., p. ——.[4]

But the Court of Appeals ignored the Commission's findings as to the inferiority of Gentry's product; indeed at one point it even supplanted those findings with its own conclusion that Gentry's onions were superior:

> "Consolidated's Gentry division in the years following the acquisition, during which time it improved its onion processing equipment to eliminate a problem arising from the presence of wood splinters and *achieved a product of higher quality than that of its competitors,* increased its share of the rapidly expanding market by only some 7% with respect to dehydrated onion . . . ." 329 F. 2d, p. 626. (Emphasis supplied.)

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[4] The last three sentences were a footnote to the first sentence.

But the Commission's contrary conclusion was unquestionably based on substantial evidence, as the following excerpt from the testimony of Gentry's president particularly indicates:

> "Q. You mentioned the fact, Dr. Prater, that Gentry had a reputation of being second to Basic in quality. Was one of the factors involved in the quality competition the wood splinter problem?
>
> "A. Yes, the wood splinter problem has been a problem in the dehydration industry for many years. Basic exploited this extensively, and solved it by improvements in production techniques in the use, or by the use of better methods, and by using, instead of wood trays, trays of aluminum plastic glass fibers. We met this competition partially by the improvement of our production techniques and installation of continuous conveyor dehydrators."

We do not go so far as to say that any acquisition, no matter how small, violates § 7 if there is a probability of reciprocal buying. Some situations may amount only to *de minimis*. But where, as here, the acquisition is of a company that commands a substantial share of a market, a finding of probability of reciprocal buying by the Commission, whose expertise the Congress trusts, should be honored, if there is substantial evidence to support it.

The evidence is in our view plainly substantial. Reciprocity was tried over and again and it sometimes worked. The industry structure was peculiar, Basic being the leader with Gentry closing the gap. Moreover there is evidence, as the Commission found, "that many buyers have determined that their source of supply may best be protected by a policy of buying from two suppliers." When reciprocal buying—or the inducement of it—is added, the Commission observed:

> "Buyers are likely to lean toward Basic on the ground of quality, but, in seeking a second, protective supply

channel, to purchase from Gentry in the belief that this will further their sales to Consolidated. Not only does Gentry thus obtain sales that might otherwise go to Basic or Puccinelli, but the two-firm oligopoly structure of the industry is strengthened and solidified and new entry by others is discouraged." — F. T. C., p. —.

We conclude that there is substantial evidence to sustain that conclusion and that the order of the Commission should not have been denied enforcement. The judgment of the Court of Appeals is accordingly

Reversed.

MR. JUSTICE HARLAN, concurring in the judgment.

Had the Commission's complaint been grounded on § 5 of the Federal Trade Commission Act, it seems manifest to me that no case would have been made out on this record. But given the ambulatory use of § 7 of the Clayton Act sanctioned by the Court in *United States* v. *du Pont & Co.*, 353 U. S. 586, I concur in the judgment.

I do so, however, upon the premises stated in the concurring opinion of my Brother STEWART, *post*, p. 602, but with one reservation. To the extent that anything in his opinion might be taken as drawing on evidence upon which the Commission indicated no reliance, I could not subscribe to that approach. This Court must review administrative findings as they are made by the agency concerned, and if the evidence will not support the findings and theory upon which the agency acted, an affirmance of the agency's order cannot properly rest upon a reassessment of the record by us. See *Securities & Exchange Comm'n* v. *Chenery Corp.*, 332 U. S. 194, 196; *Labor Board* v. *Metropolitan Life Ins. Co.*, *ante*, pp. 438, 443–444. However, since both sides agree that "conglomerate" mergers and reciprocal buying are within the purview of § 7, I think the Commission's order is supportable, though

barely so, within the confines of the evidence upon which it apparently relied.

Brown Shoe Co. v. *United States*, 370 U. S. 294, forecloses any contention that the "market affected" was not substantial enough to bring § 7 into play. In this Court Consolidated has pitched its case on the proposition that it used to the full whatever power it acquired as a result of the merger to bring about reciprocal buying. The Commission found only seven instances of successful efforts by Consolidated to pressure suppliers to buy from Gentry. If in fact these few instances had represented the full measure of Consolidated's ability to induce purchasing from Gentry, they would for me be insufficient to carry the day for the Commission's order, and I would vote to affirm. While I cannot subscribe to the undiscriminating use made in the Court's opinion of the buying statistics, I think there was enough in these seven instances—for example, the Phillips Packing Company, J. J. Gielow & Sons, Illinois Meat Company, and Morgan Packing Company episodes—for the Commission justifiably to find that Consolidated had not used all the reciprocal buying leverage it could muster; the Commission, therefore, could reasonably conclude that the probable effect of the Gentry acquisition would be substantially to lessen competition in the relevant market.

On this basis I concur in the result reached by the Court.

MR. JUSTICE STEWART, concurring in the judgment.

The Federal Trade Commission, in invalidating a merger between Consolidated Foods and Gentry, Inc., has espoused a novel theory to bring the facts of this case within the scope of § 7 of the Clayton Act. Its resolution of the issue has been much debated and much disputed.[1]

[1] See Hausman, Reciprocal Dealing and the Antitrust Laws, 77 Harv. L. Rev. 873; Krash, The Legality of Reciprocity under Section 7 of the Clayton Act, 9 Antitrust Bull. 93 (1964); Ammer, Realistic Reciprocity, 40 Harv. Bus. Rev. No. 1, 116 (1962).

The Court of Appeals has disagreed with the Commission's appraisal of the facts in this case and with its conclusions concerning the § 7 implications of reciprocity. Other cases are being held awaiting clarification from this Court.[2] We must decide the applicability of the Act to the facts of this case, but we should also provide guidance to the Commission and to the courts which will have to grapple in the future with the potentialities of reciprocal buying in § 7 cases. While I agree with the result that the Court has reached, I am persuaded to file this separate statement of my views regarding the issues involved.

Clearly the opportunity for reciprocity is not alone enough to invalidate a merger under § 7. The Clayton Act was not passed to outlaw diversification. Yet large scale diversity of industrial interests almost always presents the possibility of some reciprocal relationships. Often the purpose of diversification is to acquire companies whose present management can benefit from the technical skills and sales acumen of the acquiring corporation. Without more, § 7 of the Clayton Act does not prohibit mergers whose sole effect is to introduce into an arena of "soft" competition the experience and skills of a more aggressive organization.

It obviously requires more than this kind of bare potential for reciprocal buying to bring a merger within the ban of § 7. Before a merger may be properly outlawed under § 7 on the basis solely of reciprocal buying potentials, the law requires a more closely textured economic analysis. The Court summarizes the "substantial" evidence before the Commission as follows:

> "Reciprocity was tried over and again and it sometimes worked. The industry structure was peculiar, Basic being the leader with Gentry closing the gap.

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[2] See, *e. g.*, *United States* v. *General Dynamics Corp.* (D. C. S. D. N. Y.); *United States* v. *General Motors Corp.* (D. C. N. D. Ill.); *Trabon Engineering Corp.* v. *Eaton Mfg. Co.* (D. C. N. D. Ohio).

> Moreover there is evidence, as the Commission found, 'that many buyers have determined that their source of supply may best be protected by a policy of buying from two suppliers.' When reciprocal buying—or the inducement of it—is added, the Commission observed: '. . . the two-firm oligopoly structure of the industry is strengthened and solidified and new entry by others is discouraged.' "

I cannot agree that these elements, singly or together, are sufficient to make unlawful the merger negotiated by Consolidated and Gentry. Certainly the mere effort at reciprocity cannot be the basis for finding the probability of a significant alteration in the market structure. Section 7 does not punish intent. No matter how bent on reciprocity Consolidated might have been, if its activities would not have the requisite probable impact on competition, it cannot be held to have violated this law. And, I think, it is not enough to say that the merger is illegal merely because the reciprocity attempts "sometimes worked." If the opportunity for reciprocity itself is not a violation of the Act when the merger occurs, then some standard must be established for determining how effective reciprocity must be before the merger is subject to invalidation. Nor do I think that illegality of this merger can be rested upon the fact that "[t]he industry structure was peculiar, Basic being the leader with Gentry closing the gap." There is evidence that in the years following 1951, when the merger took place, increased emphasis was placed on solving technical problems which had prevented some processors from relying on dehydrated, rather than raw, onions. The 1950's were a time of flux for the industry. Basic was sometimes the innovator of technological change leading to increased sales; sometimes Gentry had the upper hand. It is possible that this shift to more intensive competition was connected with the merger. Faced with a new competitive situation, Basic may have

determined to solve quality control problems which had long been dormant. Indeed, the evidence seems to show that, after the acquisition, the industry reflected the salutary qualities normally associated with free competition. Overall, both Basic and Gentry were furnishing a better product at the end of this period than at the beginning. It is true that the industry had oligopolistic features, but there is no evidence to indicate that barriers to entry were particularly severe.[3] And Gentry, while it was "closing the gap" with regard to dehydrated onions, was falling even farther behind Basic in the sales of dehydrated garlic. Finally, I can attach no significance to the fact that processors, seeking a second source of supply, normally relied on Gentry rather than Puccinelli. That fact can rest on so many alternative hypotheses that it is persuasive as to none.[4]

The touchstone of § 7 is the probability that competition will be lessened. But before a court takes the drastic step of ordering divestiture, the evidence must be clear that such a probability exists. The Act does not require that there be a certainty of anticompetitive effect. But that does not mean that the courts or the Commission can rely on slipshod information confusingly presented and ambiguous in its implications. The law does not require proof that competition certainly will be lessened by the merger. But the record should be clear and convincing that the requisite probability is present.

To determine that probability, the courts and the Commission should rely on the best information available,

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[3] Indeed, by the time of the Commission's decision an additional firm, Gilroy Foods, Inc., had entered this market.

[4] For example, customers of Gentry often chose Basic for their alternative supplier, probably because of doubt that Puccinelli could satisfy their needs if the occasion arose. There is no reason to assume that customers of Basic chose Gentry as a backstop for motives any more nefarious.

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whether it is an examination of the market structure before the merger has taken place, or facts concerning the changes in the market after the merger has been consummated. For that reason, I differ with the Court in its assessment of the weight to be accorded post-acquisition evidence. That evidence is the best evidence available to determine whether the merger will distort market forces in the dehydrated onion and garlic industry. The Court of Appeals, in my view, was not wrong because it "gave too much weight" to the post-acquisition evidence. It erred because of the gloss it placed on the statistics and testimony adduced before the hearing examiner and the Commission.

The Court discounts the value of post-acquisition evidence on the ground that the companies are not entitled to a "free trial" period after the merger. That characterization, however, misstates the case. No one gives the company a "free trial" by assessing, in light of what actually happened, what could only be hypotheses at the time the merger occurred. Without post-acquisition evidence, the trier is faced with a blank slate and untested speculation. The merger in this case was achieved in 1951, yet the Commission did not issue a cease-and-desist order until six years later. We may be sure that the Commission relied on post-acquisition factors in issuing its order; there is no reason why we should rely on those factors less in assessing the propriety of the Commission's action. Indeed, if anyone had a "free trial" period to check the anticompetitive potential of the merger, it was not the respondent but the Commission.

The record in this case is sorely incomplete, and a reviewing court is given little guidance in determining why this merger should be voided, if reciprocity-creating mergers are not *per se* invalid. Yet our responsibility to the Commission—to respect its findings where there is evidence to support them—requires close scrutiny of the

record before its conclusions are upset. I think the record contains just enough to support invalidation of the merger, but because of evidence not referred to in the Court's opinion.

The food processing industry is composed basically of two classes of manufacturers. One class, which includes such processors as Armour and Swift, has built significant brand names commanding consumer acceptance of their products. For such companies, exposure at the retail market is assured. Consolidated Foods, as the wholesaler, is sufficiently dependent on such processors that its economic power over this class is minimal. It cannot readily strong-arm Armour into purchasing dehydrated onions from Gentry at the pain of losing Consolidated's favor. A second class incorporates the smaller processors in the industry. Many of these sell their product to Consolidated in bulk, for packaging under house labels of Consolidated divisions. Many of the products which these processors package under their own labels are not so widely known; they rely on the wholesaler to persuade supermarkets to try them on their counters. These processors are susceptible to the subtle pressures of reciprocity.

My reading of the record persuades me that most of the processors in this second class shifted their buying from Basic to Gentry, though the extent of that shift varied from company to company. It is true that testimony from the purchasing agents of many of these companies attributed the shift to other causes. However, the pattern of movement in this class, when contrasted to the lack of a pattern among the major processors, seems to me sufficient to support the Commission's conclusion that these shifts were in response to the influence of reciprocity, whether express or "tacitly accommodative." The pattern is relevant because the independent processors are substantial purchasers in the dehydrated onion and

garlic market. Furthermore, this pattern confirms what was assumed by the Commission: that Consolidated has the power to influence the purchases by a substantial segment of its suppliers. Some of the independent processors have failed, and others have merged with large processors leading to greater concentration in the food processing industry. The Commission could, therefore, have fairly concluded that the inhibitory effects of reciprocity in this situation marked this merger with illegality.

For these reasons I concur in the judgment of the Court.

GRIFFIN *v.* CALIFORNIA.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 202. Argued March 9, 1965.—
Decided April 28, 1965.

Comment to the jury by a prosecutor in a state criminal trial upon a defendant's failure to testify as to matters which he can reasonably be expected to deny or explain because of facts within his knowledge or by the court that the defendant's silence under those circumstances evidences guilt violates the Self-Incrimination Clause of the Fifth Amendment of the Federal Constitution as made applicable to the States by the Fourteenth, *Malloy* v. *Hogan,* 378 U. S. 1. Pp. 610–615.

60 Cal. 2d 182, 383 P. 2d 432, reversed.

Morris Lavine argued the cause and filed briefs for petitioner.

Albert W. Harris, Jr., Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *Thomas C. Lynch,* Attorney General, *Arlo E. Smith,* Chief Assistant Attorney General, and *Derald E. Granberg,* Deputy Attorney General.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner was convicted of murder in the first degree after a jury trial in a California court. He did not testify at the trial on the issue of guilt, though he did testify at the separate trial [1] on the issue of penalty. The trial court instructed the jury on the issue of guilt, stating

[1] See Penal Code § 190.1, providing for separate trials on the two issues.

that a defendant has a constitutional right not to testify. But it told the jury: [2]

> "As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable."

It added, however, that no such inference could be drawn as to evidence respecting which he had no knowledge. It stated that failure of a defendant to deny or explain the evidence of which he had knowledge does not create a presumption of guilt nor by itself warrant an inference of guilt nor relieve the prosecution of any of its burden of proof.

Petitioner had been seen with the deceased the evening of her death, the evidence placing him with her in the alley where her body was found. The prosecutor made much of the failure of petitioner to testify:

> "The defendant certainly knows whether Essie Mae had this beat up appearance at the time he left her apartment and went down the alley with her.
>
> "What kind of a man is it that would want to have sex with a woman that beat up if she was beat up at the time he left?

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[2] Article I, § 13, of the California Constitution provides in part: ". . . in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury."

"He would know that. He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. He would know how long he was with her in that box. He would know how her wig got off. He would know whether he beat her or mistreated her. He would know whether he walked away from that place cool as a cucumber when he saw Mr. Villasenor because he was conscious of his own guilt and wanted to get away from that damaged or injured woman.

"These things he has not seen fit to take the stand and deny or explain.

"And in the whole world, if anybody would know, this defendant would know.

"Essie Mae is dead, she can't tell you her side of the story. The defendant won't."

The death penalty was imposed and the California Supreme Court affirmed. 60 Cal. 2d 182, 383 P. 2d 432. The case is here on a writ of certiorari which we granted, 377 U. S. 989, to consider whether comment on the failure to testify violated the Self-Incrimination Clause of the Fifth Amendment which we made applicable to the States by the Fourteenth in *Malloy* v. *Hogan,* 378 U. S. 1, decided after the Supreme Court of California had affirmed the present conviction.[3]

[3] The California Supreme Court later held in *People* v. *Modesto,* 62 Cal. 2d 436, 398 P. 2d 753, that its "comment" rule squared with *Malloy* v. *Hogan,* 378 U. S. 1. The overwhelming consensus of the States, however, is opposed to allowing comment on the defendant's failure to testify. The legislatures or courts of 44 States have recognized that such comment is, in light of the privilege against self-incrimination, "an unwarrantable line of argument." *State* v. *Howard,* 35 S. C. 197, 203, 14 S. E. 481, 483. See 8 Wigmore, Evidence § 2272, n. 2 (McNaughton rev. ed. 1961 and 1964 Supp.). Of the six States which permit comment, two, California and Ohio, give this permission by means of an explicit constitutional qualification of the

If this were a federal trial, reversible error would have been committed. *Wilson* v. *United States,* 149 U. S. 60, so holds. It is said, however, that the *Wilson* decision rested not on the Fifth Amendment, but on an Act of Congress, now 18 U. S. C. § 3481.[4] That indeed is the fact, as the opinion of the Court in the *Wilson* case states. And see *Adamson* v. *California,* 332 U. S. 46, 50, n. 6;

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privilege against self-incrimination. Cal. Const., Art. I, § 13; Ohio Const., Art. I, § 10. New Jersey permits comment, *State* v. *Corby,* 28 N. J. 106, 145 A. 2d 289; cf. *State* v. *Garvin,* 44 N. J. 268, 208 A. 2d 402; but its constitution contains no provision embodying the privilege against self-incrimination (see *Laba* v. *Newark Bd. of Educ.,* 23 N. J. 364, 389, 129 A. 2d 273, 287; *State* v. *White,* 27 N. J. 158, 168–169, 142 A. 2d 65, 70). The absence of an express constitutional privilege against self-incrimination also puts Iowa among the six. See *State* v. *Ferguson,* 226 Iowa 361, 372–373, 283 N. W. 917, 923. Connecticut permits comment by the judge but not by the prosecutor. *State* v. *Heno,* 119 Conn. 29, 174 A. 181. New Mexico permits comment by the prosecutor but holds that the accused is then entitled to an instruction that "the jury shall indulge no presumption against the accused because of his failure to testify." N. M. Stat. Ann. § 41–12–19; *State* v. *Sandoval,* 59 N. M. 85, 279 P. 2d 850.

[4] Section 3481 reads as follows:

"In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him." June 25, 1948, c. 645, 62 Stat. 833.

The legislative history shows that 18 U. S. C. § 3481 was designed, *inter alia,* to bar counsel for the prosecution from commenting on the defendant's refusal to testify. Mr. Frye of Maine, spokesman for the bill, said, "That is the law of Massachusetts, and we propose to adopt it as a law of the United States." 7 Cong. Rec. 385. The reference was to Mass. Stat. 1866, c. 260, now Mass. Gen. Laws Ann., c. 233, § 20, cl. Third (1959), which is almost identical with 18 U. S. C. § 3481. See also *Commonwealth* v. *Harlow,* 110 Mass. 411; *Commonwealth* v. *Scott,* 123 Mass. 239; *Opinion of the Justices,* 300 Mass. 620, 15 N. E. 2d 662.

Bruno v. *United States*, 308 U. S. 287, 294. But that is the beginning, not the end, of our inquiry. The question remains whether, statute or not, the comment rule, approved by California, violates the Fifth Amendment.

We think it does. It is in substance a rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify. No formal offer of proof is made as in other situations; but the prosecutor's comment and the court's acquiescence are the equivalent of an offer of evidence and its acceptance. The Court in the *Wilson* case stated:

> ". . . the act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand. The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him." 149 U. S., p. 66.

If the words "Fifth Amendment" are substituted for "act" and for "statute," the spirit of the Self-Incrimina-

tion Clause is reflected. For comment on the refusal to testify is a remnant of the "inquisitorial system of criminal justice," *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 55, which the Fifth Amendment outlaws.[5] It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. *People* v. *Modesto*, 62 Cal. 2d 436, 452–453, 398 P. 2d 753, 762–763. What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another. That the infer-

[5] Our decision today that the Fifth Amendment prohibits comment on the defendant's silence is no innovation, for on a previous occasion a majority of this Court indicated their acceptance of this proposition. In *Adamson* v. *California*, 332 U. S. 46, the question was, as here, whether the Fifth Amendment proscribed California's comment practice. The four dissenters (BLACK, DOUGLAS, Murphy and Rutledge, JJ.) would have answered this question in the affirmative. A fifth member of the Court, Justice Frankfurter, stated in a separate opinion: "For historical reasons a limited immunity from the common duty to testify was written into the Federal Bill of Rights, and I am prepared to agree that, as part of that immunity, comment on the failure of an accused to take the witness stand is forbidden in federal prosecutions." *Id.*, p. 61. But, though he agreed with the dissenters on this point, he also agreed with Justices Vinson, Reed, Jackson, and Burton that the Fourteenth Amendment did not make the Self-Incrimination Clause of the Fifth Amendment applicable to the States; thus he joined the opinion of the Court which so held (the Court's opinion assumed that the Fifth Amendment barred comment, but it expressly disclaimed any intention to decide the point. *Id.*, p. 50).

ence of guilt is not always so natural or irresistible is brought out in the *Modesto* opinion itself:

> "Defendant contends that the reason a defendant refuses to testify is that his prior convictions will be introduced in evidence to impeach him ([Cal.] Code Civ. Proc. § 2051) and not that he is unable to deny the accusations. It is true that the defendant might fear that his prior convictions will prejudice the jury, and therefore another possible inference can be drawn from his refusal to take the stand." *Id.*, p. 453, 398 P. 2d, p. 763.

We said in *Malloy* v. *Hogan, supra,* p. 11, that "the same standards must determine whether an accused's silence in either a federal or state proceeding is justified." We take that in its literal sense and hold that the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.[6]

Reversed.

THE CHIEF JUSTICE took no part in the decision of this case.

MR. JUSTICE HARLAN, concurring.

I agree with the Court that within the federal judicial system the Fifth Amendment bars adverse comment by federal prosecutors and judges on a defendant's failure to take the stand in a criminal trial, a right accorded him by that amendment. And given last Term's decision in *Malloy* v. *Hogan,* 378 U. S. 1, that the Fifth Amendment ap-

[6] We reserve decision on whether an accused can require, as in *Bruno* v. *United States,* 308 U. S. 287, that the jury be instructed that his silence must be disregarded.

plies to the States in all its refinements, I see no legitimate escape from today's decision and therefore concur in it. I do so, however, with great reluctance, since for me the decision exemplifies the creeping paralysis with which this Court's recent adoption of the "incorporation" doctrine is infecting the operation of the federal system. See my opinion concurring in the result in *Pointer* v. *Texas, ante,* p. 400, at 408.

While I would agree that the accusatorial rather than inquisitorial process is a fundamental part of the "liberty" guaranteed by the Fourteenth Amendment, my Brother STEWART in dissent, *post,* p. 617, fully demonstrates that the no-comment rule "might be lost, and justice still be done," *Palko* v. *Connecticut,* 302 U. S. 319, 325. As a "non-fundamental" part of the Fifth Amendment (cf. my opinion concurring in the result in *Pointer,* at 409), I would not, but for *Malloy,* apply the no-comment rule to the States.

Malloy put forward a single argument for applying the Fifth Amendment, *as such,* to the States:

> "It would be *incongruous* to have different standards determine the validity of a claim of privilege . . . , depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal or state proceeding is justified." *Malloy* v. *Hogan, supra,* at 11. (Emphasis added.)

My answer then (378 U. S., at 27) and now is that "incongruity," within the limits of fundamental fairness, is at the heart of our federal system. The powers and responsibilities of the State and Federal Governments are not congruent, and under the Constitution they are not intended to be.

It has also recently been suggested that measuring state procedures against standards of fundamental fairness as reflected in such landmark decisions as *Twining* v. *New*

Jersey, 211 U. S. 78, and *Palko* v. *Connecticut, supra,* "would require this Court to intervene in the state judicial process with considerable lack of predictability and with a consequent likelihood of considerable friction," *Pointer* v. *Texas, supra,* at 413–414 (concurring opinion of GOLDBERG, J.). This approach to the requirements of federalism, not unlike that evinced by the Court in *Henry* v. *Mississippi,* 379 U. S. 443, apparently leads, in cases like this, to the conclusion that the way to eliminate friction with state judicial systems is not to attempt a working harmony, but to override them altogether.

Although compelled to concur in this decision, I am free to express the hope that the Court will eventually return to constitutional paths which, until recently, it has followed throughout its history.

MR. JUSTICE STEWART, with whom MR. JUSTICE WHITE joins, dissenting.

The petitioner chose not to take the witness stand at his trial upon a charge of first-degree murder in a California court. Article I, § 13, of the California Constitution establishes a defendant's privilege against self-incrimination and further provides:

> "[I]n any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury."

In conformity with this provision, the prosecutor in his argument to the jury emphasized that a person accused of crime in a public forum would ordinarily deny or explain the evidence against him if he truthfully could do so.[1] Also in conformity with this California constitu-

[1] See the excerpt from the prosecutor's argument quoted in the Court's opinion, *ante,* pp. 610–611.

tional provision, the judge instructed the jury in the following terms:

> "It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify, or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. In this connection, however, it should be noted that if a defendant does not have the knowledge that he would need to deny or to explain any certain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence. The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt."

The jury found the petitioner guilty as charged, and his conviction was affirmed by the Supreme Court of California.[2]

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[2] 60 Cal. 2d 182, 383 P. 2d 432. As this case was decided before *Malloy* v. *Hogan*, 378 U. S. 1, the California Supreme Court did not give plenary consideration to the question now before us; however, that court has since upheld the federal constitutionality of the California comment rule in a thoroughly reasoned opinion by Chief Justice Traynor. *People* v. *Modesto*, 62 Cal. 2d 436, 398 P. 2d 753.

No claim is made that the prosecutor's argument or the trial judge's instructions to the jury in this case deprived the petitioner of due process of law as such. This Court long ago decided that the Due Process Clause of the Fourteenth Amendment does not of its own force forbid this kind of comment on a defendant's failure to testify. *Twining* v. *New Jersey*, 211 U. S. 78; *Adamson* v. *California*, 332 U. S. 46. The Court holds, however, that the California constitutional provision violates the Fifth Amendment's injunction that no person "shall be compelled in any criminal case to be a witness against himself," an injunction which the Court less than a year ago for the first time found was applicable to trials in the courts of the several States.

With both candor and accuracy, the Court concedes that the question before us is one of first impression here.[3] It is a question which has not arisen before, because until last year the self-incrimination provision of the Fifth Amendment had been held to apply only to federal proceedings, and in the federal judicial system the matter has been

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[3] In the *Adamson* case, the present question was not reached because the majority ruled that the Fifth Amendment is not applicable to the States. Mr. Justice Reed's opinion made clear that the California rule was only assumed to contravene the Fifth Amendment, "without any intention . . . of ruling upon the issue." The dissenting opinion of MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS read the majority opinion as "strongly imply[ing] that the Fifth Amendment does not, of itself, bar comment upon failure to testify," but they considered the case on the majority's assumption, thereby giving no approval to that assumption, even in dictum. That no such approval was given by this dissenting opinion is further made evident by the fact that Mr. Justice Murphy and Mr. Justice Rutledge, also in dissent, felt it necessary to make what they characterized as an "addition," an expression of their view that the guarantee against self-incrimination had been violated in the case. Mr. Justice Frankfurter, in concurring, also indicated that he was prepared to agree that the Fifth Amendment barred comment, thus bringing to three the members of the Court who, in dicta, took the view embraced by the Court today.

covered by a specific Act of Congress which has been in effect ever since defendants have been permitted to testify at all in federal criminal trials.[4] See *Bruno* v. *United States*, 308 U. S. 287; *Wilson* v. *United States*, 149 U. S. 60; *Adamson* v. *California*, *supra*.

We must determine whether the petitioner has been "compelled . . . to be a witness against himself." Compulsion is the focus of the inquiry. Certainly, if any compulsion be detected in the California procedure, it is of a dramatically different and less palpable nature than that involved in the procedures which historically gave rise to the Fifth Amendment guarantee. When a suspect was brought before the Court of High Commission or the Star Chamber, he was commanded to answer whatever was asked of him, and subjected to a far-reaching and deeply probing inquiry in an effort to ferret out some unknown and frequently unsuspected crime. He declined to answer on pain of incarceration, banishment, or mutilation. And if he spoke falsely, he was subject to further punishment. Faced with this formidable array of alternatives, his decision to speak was unquestionably coerced.[5]

Those were the lurid realities which lay behind enactment of the Fifth Amendment, a far cry from the subject matter of the case before us. I think that the Court in this case stretches the concept of compulsion beyond all reasonable bounds, and that whatever compulsion may exist derives from the defendant's choice not to testify, not from any comment by court or counsel. In support of its conclusion that the California procedure does compel the accused to testify, the Court has only this to say: "It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." Exactly what the pen-

[4] 20 Stat. 30, as amended, now 18 U. S. C. § 3481.

[5] See generally 8 Wigmore, Evidence § 2250 (McNaughton rev. ed. 1961).

alty imposed consists of is not clear. It is not, as I understand the problem, that the jury becomes aware that the defendant has chosen not to testify in his own defense, for the jury will, of course, realize this quite evident fact, even though the choice goes unmentioned. Since comment by counsel and the court does not compel testimony by creating such an awareness, the Court must be saying that the California constitutional provision places some other compulsion upon the defendant to incriminate himself, some compulsion which the Court does not describe and which I cannot readily perceive.

It is not at all apparent to me, on any realistic view of the trial process, that a defendant will be at more of a disadvantage under the California practice than he would be in a court which permitted no comment at all on his failure to take the witness stand. How can it be said that the inferences drawn by a jury will be more detrimental to a defendant under the limiting and carefully controlling language of the instruction here involved than would result if the jury were left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt? The instructions in this case expressly cautioned the jury that the defendant's failure to testify "does not create a presumption of guilt or by itself warrant an inference of guilt"; it was further admonished that such failure does not "relieve the prosecution of its burden of proving every essential element of the crime," and finally the trial judge warned that the prosecution's burden remained that of proof "beyond a reasonable doubt." Whether the same limitations would be observed by a jury without the benefit of protective instructions shielding the defendant is certainly open to real doubt.

Moreover, no one can say where the balance of advantage might lie as a result of the attorneys' discussion of the matter. No doubt the prosecution's argument will seek to encourage the drawing of inferences unfavorable to the

defendant. However, the defendant's counsel equally has an opportunity to explain the various other reasons why a defendant may not wish to take the stand, and thus rebut the natural if uneducated assumption that it is because the defendant cannot truthfully deny the accusations made.

I think the California comment rule is not a coercive device which impairs the right against self-incrimination, but rather a means of articulating and bringing into the light of rational discussion a fact inescapably impressed on the jury's consciousness. The California procedure is not only designed to protect the defendant against unwarranted inferences which might be drawn by an uninformed jury; it is also an attempt by the State to recognize and articulate what it believes to be the natural probative force of certain facts. Surely no one would deny that the State has an important interest in throwing the light of rational discussion on that which transpires in the course of a trial, both to protect the defendant from the very real dangers of silence and to shape a legal process designed to ascertain the truth.

The California rule allowing comment by counsel and instruction by the judge on the defendant's failure to take the stand is hardly an idiosyncratic aberration. The Model Code of Evidence, and the Uniform Rules of Evidence both sanction the use of such procedures.[6] The practice has been endorsed by resolution of the American Bar Association and the American Law Institute,[7] and has the support of the weight of scholarly opinion.[8]

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[6] Model Code of Evidence, Rule 201 (1942); Uniform Rules of Evidence, Rule 23 (4) (1953).

[7] 56 A. B. A. Rep. 137–159 (1931); 59 A. B. A. Rep. 130–141 (1934); 9 Proceedings A. L. I. 202, 203 (1931).

[8] See Bruce, The Right to Comment on the Failure of the Defendant to Testify, 31 Mich. L. Rev. 226; Dunmore, Comment on Failure of Accused to Testify, 26 Yale L. J. 464; Hadley, Criminal Justice in America, 11 A. B. A. J. 674, 677; Hiscock, Criminal Law and Pro-

The formulation of procedural rules to govern the administration of criminal justice in the various States is properly a matter of local concern. We are charged with no general supervisory power over such matters; our only legitimate function is to prevent violations of the Constitution's commands. California has honored the constitutional command that no person shall "be compelled in any criminal case to be a witness against himself." The petitioner was not compelled to testify, and he did not do so. But whenever in a jury trial a defendant exercises this constitutional right, the members of the jury are bound to draw inferences from his silence. No constitution can prevent the operation of the human mind. Without limiting instructions, the danger exists that the inferences drawn by the jury may be unfairly broad. Some States have permitted this danger to go unchecked, by forbidding any comment at all upon the defendant's failure to take the witness stand.[9] Other States have dealt with this danger in a variety of ways, as the Court's opinion indicates. *Ante*, note 3, at pp. 611–612. Some might differ, as a matter of policy, with the way California has chosen to deal with the problem, or even disapprove of the judge's specific instructions in this case.[10] But, so long as the constitutional command is obeyed, such matters of state policy are not for this Court to decide.

I would affirm the judgment.

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cedure in New York, 26 Col. L. Rev. 253, 258–262; Note, Comment on Defendant's Failure to Take the Stand, 57 Yale L. J. 145.

[9] See, *e. g.*, *State* v. *Pearce*, 56 Minn. 226, 57 N. W. 652; *Tines* v. *Commonwealth*, 25 Ky. L. Rep. 1233, 77 S. W. 363; *Hanks* v. *Commonwealth*, 248 Ky. 203, 58 S. W. 2d 394.

[10] It should be noted that the defendant's counsel did not request any additions to the instructions which would have brought out other possible reasons which might have influenced the defendant's decision not to become a witness. The California Constitution does not in terms prescribe what form of instruction should be given and the petitioner has not argued that another form would have been denied.

PARAGON JEWEL COAL CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 134. Argued March 8, 1965.—Decided April 28, 1965.*

Petitioner Paragon Jewel Coal Company (Paragon), lessee of coal lands, made substantial investments preparatory to the mining of the coal but made agreements with contract miners who were actually to mine the coal at their own expense and deliver it to Paragon at a price per ton to be fixed by Paragon. The coal was mined by drift-mining, a costly and time-consuming process. All equipment used by the miners except buildings and connecting roadways could be removed, and several miners, who were not bound to continue, sold their equipment to others. The miners paid nothing for the privilege of mining, they acquired no title to the coal before or after mining, and they took depreciation on their equipment. Both Paragon and the mining contractors claimed a depletion deduction pursuant to 26 U. S. C. §§ 611 and 613 in computing income taxes, but the Commissioner disallowed both claims. The Tax Court held that Paragon was entitled to the entire depletion allowance. Although on appeal the Commissioner then contended that the Tax Court result was right, the Court of Appeals reversed. *Held:* Depletion deductions are allowed only to the owner of an economic interest in the mineral deposits. Pp. 631–638.

(a) Under § 611 (b), read in the light of § 631 (c), the lessee in a typical lessor-lessee arrangement is entitled to the entire depletion allowance on the gross income from the property. Pp. 632–633.

(b) *Parsons* v. *Smith*, 359 U. S. 215, 225, sets forth factors to be considered in determining whether contract miners have an economic interest in the coal in place, which are applicable here. Pp. 633–634.

(c) A Treasury Regulation buttresses this conclusion. It provides that an agreement between the owner of an economic interest and another entitling the latter to compensation for extraction does

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*Together with No. 237, *Commissioner of Internal Revenue* v. *Merritt et al.*, also on certiorari to the same court.

not of itself convey a depletable economic interest and having survived successive enactments of the Revenue Code the Regulation is entitled to great weight. Pp. 635–636.

(d) In addition the subsequent enactment of § 631 (c), when contrasted with § 631 (b), indicates the intention of Congress that contract coal miners without more are not entitled to a tax allowance. Pp. 636–637.

(e) *Commissioner* v. *Southwest Exploration Co.*, 350 U. S. 308, based upon a statute requiring upland drill sites for drilling offshore oil and a lease with upland owners providing for a percentage of net profits, is clearly distinguishable. Pp. 637–638.

330 F. 2d 161, reversed.

Frederick Bernays Wiener argued the cause for petitioner in No. 134. With him on the brief were *LeRoy Katz* and *Carl C. Gillespie.*

Philip B. Heymann argued the cause for respondent in No. 134 and petitioner in No. 237. With him on the brief were *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Melva M. Graney.*

John Y. Merrell argued the cause for respondents in No. 237. With him on the brief was *Paul P. Senio.*

Seymour S. Mintz and *Robert K. Eifler* filed a brief for Jewell Ridge Coal Corp., as *amicus curiae,* urging reversal in No. 134.

John Y. Merrell and *Paul P. Senio* filed a brief for Raymond E. Cooper et al., as *amici curiae,* urging affirmance in No. 237.

MR. JUSTICE CLARK delivered the opinion of the Court.

The issue in these consolidated tax cases is whether the lessee [1] of coal lands is entitled to percentage depletion on all the gross income derived from the sale of the coal

[1] Paragon Jewel Coal Co. was actually an assignee or sublessee of the coal lands in this particular case. However, this is a factual matter without significance here, and for purposes of convenience it will be referred to as the lessee throughout the opinion.

mined from its leases, or whether contract miners who do the actual mining acquired a depletable interest within the meaning of §§ 611 and 613 (b)(4) of the Internal Revenue Code of 1954 to the extent they were paid by the lessee for mining and delivering coal to it.

The mining contractors, respondents in No. 237, claimed an allocable portion of the allowance for the years 1954 through 1956, while the lessee, petitioner in No. 134, claimed the right to the entire depletion deduction for 1955 through 1957. In each case the deduction was denied the taxpayer. However, the Commissioner now takes the position that the lessee is entitled to the entire allowance; [2] the Tax Court so held, 39 T. C. 257, but the Court of Appeals agreed with the contractors. 330 F. 2d 161. We granted certiorari in No. 134, 379 U. S. 812, and in No. 237, 379 U. S. 886, and consolidated them for argument. We have concluded that the Tax Court was correct and reverse the judgment of the Court of Appeals.

The parties agree that the principles of our opinion in *Parsons* v. *Smith,* 359 U. S. 215 (1959), are controlling here. There we held that the deduction is allowed in recognition of the fact that mineral deposits are wasting assets and that the deduction is intended as compensation to the owner for the part used in production; that there may be more than one depletable interest in the same coal deposit, but that the right to an allocable portion of the allowance depends on the ownership of an economic interest in the coal in place since the statute makes the deduction available only to the owner of a capital interest in such deposit; and, finally, that the legal form of such capital interest is unimportant so long as it constitutes a right with regard to the coal in place.

[2] The Commissioner took a neutral position in the Tax Court, but contended before the Court of Appeals, as he does here, that the lessee is entitled to the depletion deduction on all the gross income derived from the sale of coal mined from its leases.

The problem arises in applying those principles "according to the peculiar conditions in each case." [3] The mining contractors contend that they made a capital investment in the coal in place because of the nature and extent of their expenditures in preparation for and in the performance of oral agreements which they claim granted them the right to mine certain designated areas to exhaustion. They contend that they could only look to the extraction and sale of coal for a return of their investment, and thus that the test of *Parsons* v. *Smith, supra,* is satisfied.

Paragon, on the other hand, says that Congress never intended for contractors mining coal to have a depletable interest as evidenced by statutory enactments adopted subsequent to the tax years involved in *Parsons* v. *Smith, supra;* that in the case of a lease the lessor of coal lands is no longer granted a deduction for depletion but is relegated to capital gains treatment only.[4] And, finally, that the expenditures made by the contractors were only for equipment which they depreciated and could not constitute an investment in the coal in place as required under *Parsons* v. *Smith, supra.*

The Commissioner of Internal Revenue takes the position that only a taxpayer with a legally enforceable right to share in the value of a mineral deposit has a depletable capital or economic interest in that deposit and the contract miners in this case had no such interest in the unmined coal.

The Facts.

Paragon took an assignment of written leases on the coal in and under certain lands which obligated it to pay annual minimum cash royalties, tonnage royalties, land taxes, and to mine all or 85% of the minable coal in the

[3] I. R. C. 1954, § 611, 26 U. S. C. § 611 (1958 ed.).

[4] I. R. C. 1954, § 631 (c), 26 U. S. C. § 631 (c) (1958 ed.).

tracts. It made substantial investments in preparation for processing and marketing the coal, including construction of a tipple, a power line, a railroad siding with four spurs and the purchase of processing equipment. It also built a road from the tipple which circled the mountain close to the outcrop line of coal. This road was used to truck the coal from the contractors' mines to Paragon's tipple.

Paragon made oral agreements with various individuals and firms to mine the coal in allocated areas under its leases. They were to mine the coal at their own expense and deliver it to Paragon's tipple at a fixed fee per ton for mining, less 2½% for rejects. It was understood that this fee might vary from time to time—and it did so—depending somewhat on the general trend of the market price for the coal over extended periods and to some extent on labor costs. However, any changes in the fixed fee were always prospective, the contractors being notified several days in advance of any change so that they always knew the amount they would get for the mining of the coal upon delivery. After delivery to Paragon's tipple the contractor had no further control over the coal, and no responsibility for its sale or in fixing its price. The fixed fee was earned and payable upon delivery and the contractors did not even know the price at which Paragon sold.

The contractors agreed to buy power at a fixed rate per ton from Paragon's line or put in their own diesel engine generator and compressors. A certain amount per ton was also paid by the contractors for engineering services inside the mine. An engineer provided by Paragon was used to map out or show each of the contractors the particular direction his mine was to take, the locations of adjacent mines, etc. The single engineer was utilized for all of the mines to ensure that they would not run into each other and also so that no minable coal would be

rendered unrecoverable by haphazard mining methods. Periodically, the engineer would extend his projections of the mine in order to keep it within the contractor's original location.

Because of the nature of the coal deposits, it was necessary to use the drift-mining method [5] which requires the opening of two parallel tunnels, one for ventilation and the other for working space and removal of coal. In this type operation the roof is supported by leaving pillars of coal in place and erecting wooden supports about every 18 inches.[6] However, as the miners withdraw from a mine where the coal seam has been exhausted, they take out the wooden supports and also remove the coal pillars, thus recovering the last bit of minable coal. Because of the method used it often takes six to eight weeks to develop a mine to the point where it can be operated profitably.

The nature of the coal deposits here involved was such that the miners often encountered "a sandstone roll" which is an outcrop of rock which "squeezes" out the coal. When one of these situations is encountered the miners must move large amounts of rock to reach the coal seam. During this period, of course, they are receiving no money because they are not delivering merchantable coal to Paragon's tipple.[7] At other times, water might accumulate which would have to be pumped out before work

[5] Drift mining is an underground mining operation in which a horizontal coal seam is reached by clearing away a part of the mountainside with a bulldozer. Two openings are made into the coal seam. One is an entry and the other is an air course used to ventilate the mine. Coal is removed as the drift mine is driven into the mountain following the seam of coal.

[6] This shoring up prevents cave-ins and like all safety requirements, both state and federal, was done at the miners' expense.

[7] Paragon on at least one occasion shared in the cost incident to going through a sandstone roll of unusual proportions, but that was apparently not the practice.

could resume. Again, the contract miners received nothing for this clearing operation.

After the coal was removed it was placed in the contractor's bins at the entrance to the mine and was later trucked over a connecting roadway built by the contractor to the adjacent road of Paragon and then taken to the latter's tipple. Paragon took all of the merchantable coal mined. If its facilities were full at the moment the contractor would fill his own bins and then shut down his mine. The record shows no deliveries by the contractors to anyone other than Paragon.

Although there was nothing said at the time of the oral contracts regarding who was to receive the depletion, the Tax Court found that Paragon expected to receive that deduction and had fixed its per-ton fee for mining with this in mind. The contracts were also silent regarding termination and were apparently for an indefinite period. However, numerous contractors quit mining, and some sold their equipment, buildings, tracks, etc., to others. Under the agreements, those ceasing to operate could not remove the buildings, but could remove all other equipment. It was anticipated that the contractors would continue mining in their allocated areas as long as it was profitable and so long as proper mining methods were used and the coal met Paragon's standards. However, the contractors were under no obligation to mine any specific amount of coal and were not specifically given the right to mine any particular area to exhaustion.

The contractors paid nothing for the privilege of mining the coal; they acquired no title to the coal either in place or after it was mined; they paid none of the royalty or land taxes required by Paragon's leases; they claim no sublease, no co-adventure, no partnership. Their sole claim to any interest in the coal in place is based on their investment in equipment, connecting roadways, buildings and the costs of opening the mine, and, in some in-

stances, on their installation of track inside the mine to remove the coal. They admit, however, that all of this was removable, save the buildings and the connecting roadways, neither of which represented any appreciable expenditure. All of their expenditures were deducted either as direct costs, development costs, depreciation of equipment or capital assets.

On the basis of these facts the Tax Court concluded as a matter of law that the contractors did not have a depletable interest under their contracts. The Court of Appeals accepted all of the Tax Court's findings but held that the latter erred in its conclusions. It reversed on the basis that the contractors were "performing Paragon's obligation under its leases and this constituted ample consideration" together with their "continuing right to produce the coal and to be paid therefor at a price which was closely related to the market price" to give them "an economic interest in the mineral [bringing] them within the rationale of Parsons v. Smith . . . ." At 163. We believe that the Court of Appeals was in error in so doing.

Statutory Provisions for Coal Depletion.

This Court has often said that the purpose of the allowance for depletion is to compensate the owner of wasting mineral assets for the part exhausted in production, so that when the minerals are gone, the owner's capital and his capital assets remain unimpaired. *United States* v. *Cannelton Sewer Pipe Co.*, 364 U. S. 76, 81 (1960). Percentage depletion first came into the tax structure in 1926 and has been consistently regarded as a matter of legislative grace.[8] We, therefore, must look to the Code provisions and regulations in effect during the years involved to determine whether these contract coal miners acquired a depletable interest in the coal in place.

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[8] *Parsons* v. *Smith*, 359 U. S. 215, and cases cited in n. 5, at 219.

Section 611 (a) provides for "a reasonable allowance for depletion . . . according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under regulations prescribed by the Secretary . . . ." The pertinent regulation states:

> "(1) Annual depletion deductions are allowed only to the owner of an economic interest in mineral deposits or standing timber. An economic interest is possessed in every case in which the taxpayer has acquired by investment any interest in mineral in place or standing timber and secures, by any form of legal relationship, income derived from the extraction of the mineral or severance of the timber, to which he must look for a return of his capital. But a person who has no capital investment in the mineral deposit or standing timber does not possess an economic interest merely because through a contractual relation he possess[es] a mere economic or pecuniary advantage derived from production. For example, an agreement between the owner of an economic interest and another entitling the latter to purchase or process the product upon production or entitling the latter to compensation for extraction or cutting does not convey a depletable economic interest. . . ." Treas. Reg. § 1.611–1 (b)(1).

Section 611 (b) establishes an equitable apportionment of such allowance between the lessor and the lessee in the case of a lease. However, § 611 (b) must now be read in light of § 631 (c)[9] which provides that an owner who disposes of coal under any form of contract in which he retains an economic interest shall not receive percentage depletion, but instead must take capital gains treatment for the royalties received under that contract. The result of this in the typical lessor-lessee situation is that the

[9] For the text of § 631 (c) see n. 10, *infra*.

lessee is entitled to the entire depletion allowance on the gross income from the property. Respondent contract miners make no contention that they are lessees or the sublessees of Paragon.

However, they claim that they are entitled to a portion of the percentage depletion because they have somehow acquired an economic interest in the coal in place. This test was first enunciated in *Palmer* v. *Bender,* 287 U. S. 551, 557 (1933), and has since become the touchstone of decisions determining the eligibility of a party to share in the depletion allowance. The contract miners contend that their investments of time and money in developing these mines bring them within the meaning of our cases. We believe that *Parsons* v. *Smith, supra,* completely settles this question against them.

In *Parsons,* the Court enumerated seven factors to be considered in determining whether the coal-mining contracts there involved gave the contract miners any capital investment or economic interest in the coal in place. They were:

> "(1) that [the contract miners'] investments were in their equipment, all of which was movable—not in the coal in place; (2) that their investments in equipment were recoverable through depreciation—not depletion; (3) that the contracts were completely terminable without cause on short notice; (4) that the landowners did not agree to surrender and did not actually surrender to [the contract miners] any capital interest in the coal in place; (5) that the coal at all times, even after it was mined, belonged entirely to the landowners, and that [the contract miners] could not sell or keep any of it but were required to deliver all that they mined to the landowners; (6) that [the contract miners] were not to have any part of the proceeds of the sale of the coal, but, on the contrary, they were to be paid a fixed sum for

> each ton mined and delivered . . . ; and (7) that [the contract miners], thus, agreed to look only to the landowners for all sums to become due them under their contracts." At 225.

The Tax Court found all of these factors present in this case and ruled therefore that *Parsons* controlled.

The Court of Appeals agreed with the contractors' position and held, contrary to the Tax Court, that the contracts under which they mined the coal were not terminable at the will of Paragon but gave the contractors "a continuing right to produce the coal and to be paid therefor at a price which was closely related to the market price." It based its decision on the fact that the operators made "large expenditures of time and money in preparing their respective sites for mining" and that "[i]t would be inequitable indeed to hold that Paragon might . . . then take the benefit of the operators' efforts at will and without cause." At 163. We regret that we are unable to agree.

In *Parsons* the contract was expressly terminable on short notice; here no specific right to terminate was mentioned in the agreement between the parties. However, as the Court of Appeals noted, "the contracts did not fix upon the operators an *obligation* to mine to exhaustion." In fact, many of them quit at any time they chose. We are unable to say that it is any more inequitable to allow Paragon to terminate the contracts at will than it is to allow the contractors to terminate work and thereby impose upon Paragon the obligation to get other people to work the mine or forfeit its right under the leases.

In any event, the right to mine even to exhaustion, without more, does not constitute an economic interest under *Parsons*, but is "a mere economic advantage derived from production, through a contractual relation to the owner, by one who has no capital investment in the

mineral deposit." *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362, 367 (1938).

The court below also indicated that it disagreed with the conclusion of the Tax Court that Paragon could set the price at any level it chose under the agreements. It stated that the contractors were "to be paid therefor at a price which was closely related to the market price." The conclusion of the Tax Court was that while the fee varied somewhat with labor costs, "there [was] *no evidence* that the amount paid by Paragon was directly related either to the price it was getting for the coal or to the sales price of a particular contractor's coal, and the amount was apparently changeable at the will of Paragon." (Emphasis supplied.) 39 T. C., at 282. After an examination of the entire record, we can only conclude that Paragon at all times retained the right to change its fixed fee at will, and after delivery to the tipple, the contractors could only rely on Paragon's personal covenant to pay the posted price. This is insufficient. As we said in *Palmer* v. *Bender*, 287 U. S. 551, 557 (1933), the deduction is allowed only to one who "has acquired, by investment, any interest in the oil in place, and secures, by any form of legal relationship, income derived from the extraction of the oil, *to which he must look for a return of his capital.*" (Emphasis supplied.) Here, Paragon was bound to pay the posted fee regardless of the condition of the market at the time of the particular delivery and thus the contract miners did not look to the sale of the coal for a return of their investment, but looked solely to Paragon to abide by its covenant.

This construction of the Act as to coal depletion is buttressed by the language of the Treasury Regulations which, by example, specifically provide that "an agreement between the owner of an economic interest and another entitling the latter to . . . compensation for ex-

traction . . . does not convey a depletable economic interest." This language was taken almost verbatim from *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362, 367 (1938), and incorporated in the first regulations under the Internal Revenue Code of 1939, and since that time there have been no major changes in the economic-interest-versus-economic-advantage paragraph. Compare Treas. Reg. 103, § 19.23(m)–1; Treas. Reg. 111, § 29.23(m)–1; and Treas. Reg. 118, § 39.23 (m)–1 (a)–(b), with Treas. Reg. § 1.611–1 (b)(1). This Regulation has survived through successive amendments of the Internal Revenue Code and therefore is entitled to great weight.

Further, we believe that additional support is given to our construction by subsequent statutory enactments. As noted above, an owner who by contract disposes of the coal in place while retaining an economic interest is relegated to capital gains treatment of the royalties received. However, exemptive language in § 631 (c)[10]

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[10] Section 631 (c) for the pertinent period read:

"In the case of the disposal of coal (including lignite), held for more than 6 months before such disposal, by the owner thereof under any form of contract by virtue of which such owner retains an economic interest in such coal, the difference between the amount realized from the disposal of such coal and the adjusted depletion basis thereof plus the deductions disallowed for the taxable year under section 272 shall be considered as though it were a gain or loss, as the case may be, on the sale of such coal. Such owner shall not be entitled to the allowance for percentage depletion provided in section 613 *with respect to such coal.* This subsection shall not apply to income realized by any owner as a co-adventurer, partner, or principal in the mining of such coal, and the word 'owner' means any person who owns an economic interest in coal in place, *including a sublessor.* The date of disposal of such coal shall be deemed to be the date such coal is mined. In determining the gross income, the adjusted gross income, or the taxable income of the lessee, the deductions allowable with respect to rents and royalties shall be determined without regard to the provisions of this subsection. This subsection shall have no application, for purposes of applying subchapter

excludes an owner who is also a co-adventurer, partner or principal in the mining of coal, thus permitting such an owner to secure percentage depletion. "Owner" is defined for purposes of this subsection as "any person who *owns an economic interest in coal in place, including a sublessor.*" (Emphasis supplied.) While Paragon is certainly an owner of an economic interest in the coal, it is also a principal in the mining of coal and thus comes within the exemption and is expressly allowed depletion. The contract miners do not claim, nor will the record support a contention, that they are a "co-adventurer, partner, or principal." In contrast to the language of § 631 (c), it is noted that in treating with timber in § 631 (b) an "owner" is allowed capital gains instead of depletion. In this instance "owner" is defined to be "any person who owns *an interest in such timber,* including a sublessor and *a holder of a contract to cut timber.*" (Emphasis supplied.) This last phrase as to contractors is not included in § 631 (c) thus indicating that as to coal, "owner" does not include contract coal miners. Clearly the Congress knew what language to use when it wished to give a contractor a tax allowance. It gave holders of contracts to cut timber capital gains treatment in § 631 (b) but did not so provide for contract coal miners in § 631 (c).

Nor does the opinion in *Commissioner* v. *Southwest Exploration Co.*, 350 U. S. 308 (1956), undercut our conclusion. There the State of California required that the

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G, relating to corporations used to avoid income tax on shareholders (including the determinations of the amount of the deductions under section 535 (b)(6) or section 545 (b)(5))." (Emphasis supplied.) It is interesting to note that when § 631 (c) was amended in 1964 to include domestic iron ore Congress did not change the language of this section to also include those mining such ore or coal under a contract since it had made provision for such contractors in § 631 (b) dealing with timber.

State's offshore oil might be extracted only from wells drilled on filled lands or slant drilled from upland drill sites to the submerged oil deposits. Pursuant to that statute Southwest entered into an agreement with upland owners whereby in the event it was awarded a lease by the State it was given the right to use the surface of the upland as a base for its derrick and drilling operation in reaching the leased oil premises. In consideration of this use Southwest assigned to the upland owners, 24½% of the net profits derived from the oil recovered. This agreement was the *sine qua non* of Southwest's securing a lease to drill the submerged land from the State. We held that Southwest's right to drill being expressly conditioned by law upon the agreements with the upland owners made the latter essential parties to the lease from the State and was a sufficient investment by them in the obtaining of the lease to give them an economic interest in the oil in place, which investment was recoverable solely through the extraction of the oil to which they had to look for the return of their investment. Here we have no such statute; the contractors had no part whatever in the lease but were wholly disassociated from it; no fixed percentage of the net income from Paragon's lease was assigned to the contractors; and the latter did not look to the coal but to Paragon for their payment.[11]

For these reasons the judgment is reversed.

It is so ordered.

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[11] We said in *Commissioner* v. *Southwest Exploration Co., supra,* at 317:

"We decide only that where, in the circumstances of this case, a party essential to the drilling for and extraction of oil has made an indispensable contribution of the use of real property adjacent to the oil deposits in return for a share in the net profits from the production of oil, that party has an economic interest which entitles him to depletion on the income thus received."

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

I respectfully dissent. I cannot accept the Court's formalistic view of the depletion provisions of the Internal Revenue Code of 1954, §§ 611, 613, and 614, which, as applied to this case, would give the entire depletion allowance to Paragon, the lessee of the coal-bearing land. I cannot agree with the Court's decision that a lessee of mineral lands, whose total investment may consist merely of a promise to pay a small royalty for minerals produced, is entitled to the full allowance for depletion and that no share of this allowance is to be apportioned to a mining company with substantial investment in digging and maintaining a particular coal mine. I believe that the issue in this case is basically a simple one: For purposes of the depletion allowance under the Internal Revenue Code, should the mine operators here be viewed as independent contractors selling their services to Paragon, the lessee, or should they be viewed as entrepreneurs participating in a type of joint venture to which Paragon contributes its lease of the land and certain necessary equipment and for which the mine operators provide the other investment necessary to open and run the mines? A look through the formal legal arrangements to the underlying economic realities makes clear that the position of the miners is far closer to that of the entrepreneur participating in a joint venture than to that of a seller of services. For this reason I would hold that the miners have "an economic interest in the . . . [mineral], in place, which is depleted by production," *Palmer* v. *Bender,* 287 U. S. 551, 557, and they are therefore entitled to a fairly proportioned share of the depletion allowance.

The factual situation presented by this case is far different from that considered by the Court in *Parsons* v.

Smith, 359 U. S. 215. *Parsons* held that persons contracting with the owners of coal-bearing land to strip-mine the land were not entitled to an allowance for depletion. *Parsons* involved comparatively little investment in any particular mines. The coal was obtained through a strip-mining process which consists of removing the earth which lies over the coal, and then removing the coal uncovered. The entire investment of petitioners in *Parsons* took the form of equipment, such as mechanical shovels, trucks and bulldozers, which "was movable and usable elsewhere in strip mining and . . . for other purposes." *Parsons* v. *Smith*, *supra*, at 219. In fact, one of petitioners in *Parsons* was primarily a road-building firm. It insisted upon a contract terminable by either party on 10 days' notice since, " '. . . if an opportunity opened up, [it] wanted to go back to road building,' " *id.*, at 216, for which its shovels and bulldozers were primarily designed. The contracts of both petitioners in *Parsons* were made terminable on very short notice. Thus the strippers in *Parsons* were clearly independent contractors hired to do the stripping, not entrepreneurs with a fixed investment in a particular mine.

On the other hand, the mines here involved were not strip mines but deep underground mines. The mine operators in the instant case had to use a drift, rather than a strip, method of mining. Unlike a strip-mine contractor, who can begin full production immediately upon removal of the overburden with one employee and a mechanical shovel, the drift-mine operators here had to employ a number of miners and spend many months opening the underground mines. The operations of the miners here included cutting shafts, building a railroad spur, opening ventilation tunnels, shoring the roof of the mine, removing rock and unmarketable coal, and developing entries, cross sections, rooms and air courses, etc. Normally six to eight weeks was required before any mar-

ketable coal was reached and several months before the mine reached the production [1] stage. Moreover, even after the production stage was reached, the miners had to face and prepare pillars of coal for support, and frequently they spent many weeks excavating worthless "rolls" of nonmarketable rock or removing excess water from the mines. All this activity required considerable capital investment.

Kyva and Standard, the two partnerships of mine operators involved here, state without challenge that as of the end of 1956, they had invested in machinery, $33,263.81 and $26,901.30, respectively. Their expenses during their first year of operation were, respectively, $76,036.64 and $73,214.02. This expense was primarily capital expense representing investment in the mine, making it ready for exploitation of the coal in place. Unlike *Parsons* where the bulldozers, trucks and shovels were movable and primarily designed for road building and other work, the major part of the mine operators' capital investment here consisted of labor costs and was usable only in this particular underground mine operation. The mine operators could look for a return of their investment only to sales of the coal which they were to mine. Moreover, the Court of Appeals held that Paragon's contracts with the operators were not terminable at will or upon short notice, and that "the operators had a continuing right to produce the coal and to be paid therefor at a price which was closely related to the market price." 330 F. 2d 161, 163. Under these circumstances I believe it undeniable that the operators invested considerable time, labor, and equipment in the coal in place. In order to extract the mineral, they pooled their resources, funds, and energies with Paragon, which supplied its base interest and made other investment necessary

[1] For the applicable definition of production stage, see Treas. Reg. § 1.616–2 (b).

for processing and marketing the coal. I would hold, with the Court of Appeals, that the operators as well as Paragon fit within the rule enunciated in *Palmer* v. *Bender, supra,* and followed in other cases,[2] and that they had an economic interest in the mineral in place which entitled them to an allowance for depletion.

The Court tries to assimilate this case to *Parsons* by stating that Paragon could have terminated the interest of the operators in the coal at any time and that the operators had no right to mine their coal veins to exhaustion. The actual facts, however, reveal that Paragon has never taken steps, nor given the slightest intimation that it might take steps, to terminate anyone's contract. As a matter of practical fact the operators could count on mining the coal vein so long as coal remained and selling that coal to Paragon at a rate which varied slightly with the market price of coal. Additionally, the Court of Appeals found that the operators had "a *right* to mine to exhaustion," and a "continuing right to produce the coal and to be paid therefor at a price which was closely related to the market price." 330 F. 2d, at 163. Whether or not the actions of the parties would produce these legal results is, of course, a question of state law. And, it is a clear rule of long standing that this Court, in the absence of exceptional circumstances, accepts the determinations of the Court of Appeals, the members of which are closer to the local scene than we, on questions of local law. *General Box Co.* v. *United States,* 351 U. S. 159, 165; *Allegheny County* v. *Frank Mashuda Co.,* 360 U. S. 185, 191; *Ragan* v. *Merchants Transfer Co.,* 337 U. S. 530, 534. Moreover, in view of the operators' considerable investment in the mines and their substantial reliance on being

[2] See, *e. g., Burton-Sutton Oil Co.* v. *Commissioner,* 328 U. S. 25, 32; *Kirby Petroleum Co.* v. *Commissioner,* 326 U. S. 599, 603; *Helvering* v. *O'Donnell,* 303 U. S. 370, 371; *Thomas* v. *Perkins,* 301 U. S. 655, 661.

able to work those mines, I should be most surprised were state courts, contrary to the view of the Court of Appeals, to allow Paragon to terminate the contracts at will or to lower drastically the price it paid for the coal deliberately in order to drive particular operators out of business. Thus this case differs from *Parsons* not only because here the operators had a substantial fixed and unmovable investment in each particular mine, but also because here the operators had a right to mine the coal until it was exhausted in order to attempt to recover their investment and make a profit. In *Parsons,* as I have noted, it was the strip operator itself which insisted upon terminability so that it would be free to move its equipment to more profitable and unrelated opportunities.

The Court, in reaching its result, relies upon Treasury Regulations § 1.611–1 (b)(1) and *Helvering* v. *Bankline Oil Co.,* 303 U. S. 362. With all deference I do not believe that either the regulation or *Bankline Oil* bears significantly upon the issue here presented. The regulation in its entirety makes clear that "[a]n economic interest is possessed in every case in which the taxpayer has acquired by investment any interest in mineral in place . . . and secures, by any form of legal relationship, income derived from the extraction of the mineral . . . . But a person who has no capital investment in the mineral deposit . . . does not possess an economic interest merely because through a contractual relation he possess[es] a mere economic or pecuniary advantage derived from production." [3] The regulation thus indicates that the ques-

[3] Treas. Reg. § 1.611–1 (b)(1) reads as follows:

"Annual depletion deductions are allowed only to the owner of an economic interest in mineral deposits or standing timber. An economic interest is possessed in every case in which the taxpayer has acquired by investment any interest in mineral in place or standing timber and secures, by any form of legal relationship, income derived from the extraction of the mineral or severance of the timber, to which he

tion to be asked is whether the mine operators have a significant investment in the coal in place. I think it clear from the facts I have recited that their investment has given them an economic interest in the coal. *Bankline Oil* held that a processor of natural gas who received the gas at the mouth of the well and " '. . . had no enforceable rights whatsoever under its contracts prior to the time the wet gas was actually placed in its pipe line,' " "had no capital investment in the mineral deposit," for he "had no interest in the gas in place." 303 U. S., at 368. The facts that "the taxpayer's capital investment was in equipment facilitating delivery of the gas produced rather than in equipment for production of gas, . . . that its function was not production of gas but the processing of gas," G. C. M. 22730, 1941–1 Cum. Bull. 214, 220, and that the taxpayer had no enforcible right to receive any gas from the well,[4] all adequately distinguish *Bankline Oil* from the case here before us.

Further, I find this case virtually indistinguishable from *Commissioner* v. *Southwest Exploration Co.*, 350 U. S. 308. In *Southwest Exploration,* owners of uplands next to offshore oil drilling sites allowed drillers to use their land as a base for offshore drilling operations in re-

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must look for a return of his capital. But a person who has no capital investment in the mineral deposit or standing timber does not possess an economic interest merely because through a contractual relation he possess[es] a mere economic or pecuniary advantage derived from production. For example, an agreement between the owner of an economic interest and another entitling the latter to purchase or process the product upon production or entitling the latter to compensation for extraction or cutting does not convey a depletable economic interest. Further, depletion deductions with respect to an economic interest of a corporation are allowed to the corporation and not to its shareholders."

[4] The Court of Appeals found that the mine operators here had an enforcible right to mine the coal to exhaustion. See discussion, *supra,* at 642.

turn for 24½% of the net profits derived from the oil recovered. Though no oil lay under the owners' land, under California law offshore oil could be extracted only from filled lands or by slant drilling from upland drill sites. The Court held, because the owners of the upland sites had contributed the use of their land, necessary for the extraction of the oil, in return for a share in the net profits from the production of oil, that they had "an economic interest which entitle[d] . . . [them] to depletion on the income thus received." 350 U. S., at 317. The coal mine operators in this case made as significant an investment in the mine as did the upland owners in *Southwest Exploration.* Their contribution was as necessary for the extraction of the coal as was the land for the extraction of the oil. They were as dependent upon the coal for the recoupment of their investment as were the landowners upon the oil. Though the mine operators had little control over who bought the coal, there is no indication that the landowners had any control over who bought the oil. And the mine operators made a substantial investment in the mine—not an investment in machinery which could be moved from place to place or mine to mine, but a fixed investment of time and labor in opening and developing the mine. The coal mine operators could look only to a sale of the coal for the return of their investment.

The Court also attempts to draw support from §§ 631 (b) and (c) of the Internal Revenue Code of 1954 as showing a congressional intent not to allow mine operators to share in the depletion allowance. These sections, however, have nothing to do with the issue of apportioning the depletion allowance here under consideration. They state only that the holders of certain passive kinds of income interest, such as royalty interests in coal like that of the *lessor* in this case—interests quite unlike those owned either by Paragon or the mine operators here—will *not* receive any allowance for depletion but *instead*

will receive capital gains treatment for their income. See S. Rep. No. 781, 82d Cong., 1st Sess., 43. Section 631 (b), a rather lengthy subsection, provides capital gains treatment for the income of certain passive owners of timber interests and states in part that "[f]or purposes of this subsection, the term 'owner' means any person who owns an interest in such timber, including a sublessor and a holder of a contract to cut timber." This definition, by its very terms, applies only to § 631 (b), a section with no bearing on the question at issue here. Section 631 (c), also a lengthy subsection, provides for capital gains treatment for income arising from coal royalties. To make certain that only passive holders of royalties received capital gains treatment and that holders of working interests did not receive capital gains treatment but instead received a depletion allowance, Congress specifically excluded holders of working interests from the coverage of § 631 (c). Congress stated that certain owners of royalty interests would receive capital gains treatment, but stated that "[t]his subsection shall not apply to income realized by any owner as a co-adventurer, partner, or principal in the mining of such coal, and the word 'owner' means any person who owns an economic interest in coal in place, including a sublessor." This definition is meant to exclude from the coverage of § 631 (c) not only mine operators, but also lessees such as Paragon, whose income does not arise from passive royalties. In my view, this sentence adequately does the job Congress intended for it to do, for the income of both mine operators and lessees falls within the scope of "income realized by any owner as a co-adventurer, partner, or principal in the mining of such coal." See S. Rep. No. 781, *supra*, at 43.[5]

[5] The Court points out that the mine operators do not claim to be a "co-adventurer, partner, or principal" in the mining of the coal. *Ante*, at 637. The mine operators, however, do claim to be engaged in a type of joint venture with Paragon in mining the coal. It is

Even were I to assume that the definitions of "owner" in §§ 631 (b) and (c) have a more direct bearing upon §§ 611, 613, and 614, the sections dealing with the depletion allowance, §§ 631 (b) and (c) would not show that Congress did not intend to grant contract miners for coal any depletion allowance. "[A] holder of a contract to cut timber" may well have been included specifically in § 631 (b)'s definition because Congress wished to make crystal clear that *all* holders of contracts to cut timber were to receive capital gains treatment for their income. See H. R. Rep. No. 1337, 83d Cong., 2d Sess., 59. Congress may not have included a similar provision in § 631 (c) because it did not believe that the *strip* miner, whose function is similar to that of the holder of a contract to cut timber, should be brought within the coverage of § 631 (c); or Congress may have felt that since lessees such as Paragon were not included within the coverage of § 631 (c), holders of contracts to mine coal should similarly not have their income treated as a capital gain; or the issue of according capital gains treatment to the income of contract mine operators might not have been before the Committee when § 631 was being drafted. If §§ 631 (b) and (c) have any relevance to this case, it must be in the fact that § 631 (c) defines an owner as a person "who owns an *economic* interest in coal in place" (emphasis added), thus indicating a specific congressional intent that formal *legal* ownership of the mineral should not be controlling.

Finally, it is argued that the operators were able to recover their investments through depreciation and to allow them depletion as well would be to permit a double recovery of their costs. This argument overlooks the fact that Paragon too is able to recover every cent of its invest-

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understandable that they do not use the exact language of § 631 (c), for that section has no bearing upon the question here at issue: whether they own an economic interest in the coal in place.

ment through depreciation and amortization allowances in addition to depletion. The only investment made by Paragon which might be considered different in kind from that of the mine operators is Paragon's promise to pay a royalty to its lessors of between 30 and 40 cents per ton of coal.[6] This royalty was fully deductible from Paragon's income. Despite the fact that to allow a lessee to share in the depletion allowance is to allow a double deduction, Congress affirmatively stated its intent to allow lessees of land to share in this allowance. See Internal Revenue Code of 1954, § 611 (b) (1). Perhaps allowing both a depletion allowance and depreciation is inequitable, but this is a congressional decision which is not for us to question.

I conclude that the depletion allowance should be properly apportioned between the lessee and the coal mine operators. The operators were not employees or independent contractors hired to perform services. Unlike a man hired to mow a lawn, or shovel snow, or strip-mine coal, they made a substantial investment in opening and developing each individual mine and could look only to proceeds of the sale of coal extracted for a return of that investment. Under these circumstances I believe that the operators meet the test of *Palmer* v. *Bender, supra,* which undisputedly applies here, for they have "an economic interest in the . . . [coal], in place, which is depleted by production." 287 U. S., at 557. While, clearly, the "phrase 'economic interest' is not to be taken as embracing a mere economic advantage derived from production," *Helvering* v. *Bankline Oil Co.,* 303 U. S. 362, 367, the operators here, unlike the strip miners in *Parsons,* do not merely derive an economic advantage through production; they also have a substantial capital investment in

[6] Paragon paid the mine operators between $4 and $5 per ton for the coal.

the mineral in place. To refuse to recognize this merely because the operators do not hold legal title to the coal is, in my view, a blind following of form, which I cannot accept.[7] To hold that the operators here are, in fact, like sellers of services is equally unrealistic. I would accept the sound view of the Court of Appeals—the members of which come from local mining areas—that the operators are substantial investors in the coal, and, in accordance with what I believe to be the intent of Congress, I would require that they be permitted a share of the allowance for depletion.

[7] Compare this Court's rejection of the argument that only a legal interest can constitute a "substantial interest" in a corporation in *United States* v. *Boston & M. R. Co.*, 380 U. S. 157.

BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES *v.* ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES.

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

No. 138. Argued March 4, 1965.—Decided April 28, 1965.*

The Brotherhood of Railway and Steamship Clerks (Brotherhood) filed with the National Mediation Board (Board) an application under § 2, Ninth of the Railway Labor Act which as later amended requested investigation of a representation dispute among the "clerical, office, stores, fleet and passenger service" employees of United Air Lines (United). The Board had determined that grouping to be appropriate for collective bargaining in a case (R–1706) decided in 1947 after an extensive hearing in which United and other airlines by invitation gave their views. The Board found that a representation dispute existed and scheduled a secret election, proposing to use its standard ballot providing for the printing of the names of the two labor organizations in the dispute, with a third space for a "write in" designation but no space for a specific "no union" vote. Seeking to enjoin the Board from conducting an election unless it held a hearing on the craft or class issue and unless the ballot allowed an employee to vote against representation, United, after extensive correspondence with the Board, filed suit. The District Court dismissed the case, the Court of Appeals affirmed, and the case is here on certiorari as No. 139. The Association for the Benefit of Non-Contract Employees of United (the Association), which had been formed only to be heard by the Board in a craft or class proceeding and to have the ballot amended, brought a similar suit after United's case was dismissed, and the Brotherhood intervened. The District Court enjoined the Board from conducting an election which did not permit an employee to

*Together with No. 139, *United Air Lines, Inc.* v. *National Mediation Board et al.* and No. 369, *National Mediation Board et al.* v. *Association for the Benefit of Non-Contract Employees*, also on certiorari to the same court.

vote against collective bargaining representation. The Board and the Brotherhood filed separate appeals. The Court of Appeals affirmed both cases, which are here on certiorari as Nos. 138 and 369. The Board later amended the ballot form to state that no employee is required to vote and that if less than a majority of employees casts valid ballots no representative will be certified. *Held:*

1. The Railway Labor Act precludes judicial review of the Board's certification of a collective bargaining representative. *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, followed. Pp. 658–660.

2. The Board's action here is reviewable only to the extent of the question of the Board's performance of its statutory duty to "investigate" the representation dispute. P. 661.

3. The Board performed its statutory duty to conduct an investigation and designate the craft or class in which the election should be held. P. 661.

(a) The Board's duty to investigate is to make such informal, non-adversary investigation as the nature of the case may require. P. 662.

(b) The Board has not failed to make sufficient investigation and has not blindly followed its R–1706 ruling. Pp. 662–665.

(c) The Board did not adhere solely to the craft or class chosen by the unions, having consistently held hearings (though not required to do so) to determine the propriety of units requested by unions which were untested by actual collective bargaining, but dispensing with such hearings where, as here, experience has shown the grouping to be satisfactory. P. 665.

(d) The Act does not require that a carrier be made a party to whatever procedure the Board uses to determine the propriety of a craft or class, that status being given only to those who seek to represent employees; and whether and to what extent the carrier's views may be presented is solely within the Board's discretion. Pp. 666–667.

(e) The Board does not select the bargaining representative; it only investigates, defines the scope of the electorate, holds the election, and certifies the winner. P. 667.

4. The Board's decision as to the form of ballot or whether selection shall be by ballot is not subject to judicial review, and, in view of the Board's long-established election procedures, the District

Court erred in enjoining the Board from holding an election with a ballot not providing opportunity on its face for an employee to vote against collective representation. Pp. 668–669.

5. The Board's rule of election procedure that "no vote" is a vote for no representation is within the Board's statutory authority under § 2, Fourth and was favorable to the Association's employees. Pp. 670–671.

117 U. S. App. D. C. 387, 330 F. 2d 853, judgments in Nos. 138 and 369 reversed, judgment in No. 139 affirmed.

James L. Highsaw, Jr., argued the cause for petitioner in No. 138. With him on the brief were *Milton Kramer* and *William J. Donlon.*

Stuart Bernstein argued the cause for petitioner in No. 139. With him on the brief were *H. Templeton Brown* and *Robert L. Stern.*

Solicitor General Cox argued the cause for petitioners in No. 369 and respondents in No. 139. With him on the briefs were *Assistant Attorney General Douglas, Daniel M. Friedman, Morton Hollander* and *John C. Eldridge.*

Alex L. Arguello argued the cause for respondent in Nos. 138 and 369. With him on the brief was *Jerome C. Muys.*

Clarence M. Mulholland and *Edward J. Hickey, Jr.*, filed a brief for the Railway Labor Executives' Association, as *amicus curiae*, urging reversal in Nos. 138 and 369 and affirmance in No. 139.

MR. JUSTICE CLARK delivered the opinion of the Court.

These consolidated cases involve claims of United Air Lines (United) and the Association for the Benefit of Non-Contract Employees of United (the Association), attacking the form of ballot that the Board intends to use in a representation election among United's employees under § 2, Ninth of the Railway Labor Act, 44 Stat. 577,

as amended, 45 U. S. C. § 152, Ninth (1958 ed.).[1] United also contends that the National Mediation Board (Board) should hold a hearing under the same section, with its participation, to determine the appropriate craft or class in which the election should be held. Before the Board the conflicting unions—Brotherhood of Railway and Steamship Clerks (Brotherhood) and International Association of Machinists (Machinists)—agreed that the appropriate craft or class in which the election should be held was "clerical, office, stores, fleet and passenger service employees"; over the objection of United the Board ordered an election in this unit to determine which union, if either, would be its bargaining representative. United then filed suit against the Board raising the questions it presses here. This case was dismissed and is here, after affirmance by

[1] Section 2, Ninth provides:

"If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. . . ." 45 U. S. C. § 152, Ninth.

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the Court of Appeals, as No. 139. After this dismissal the Association filed suit against the Board, the Brotherhood being permitted to intervene, and raised substantially the same claims. The District Court enjoined the Board from conducting an election with a ballot that did not permit an employee to cast a vote against collective bargaining representation; the other issues were remanded to the Board for further consideration. 218 F. Supp. 114. The Court of Appeals affirmed these cases by a divided court and they are here as Nos. 138 and 369. 117 U. S. App. D. C. 387, 330 F. 2d 853. Judge Wright, dissenting, thought the District Court was without jurisdiction to enjoin the Board from conducting a representation election, citing *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297 (1943). We granted certiorari in all three of the cases. 379 U. S. 814.

We hold that the Board satisfied its statutory duty to investigate the dispute; that United is not entitled to be a party to proceedings by which the Board determines the scope of the appropriate craft or class; and that the Board's choice of ballot for its future elections does not exceed its statutory authority and is therefore not open to judicial review.

1. The Facts.

In January 1947, after lengthy hearings in which United and other airlines participated at the request of the Board, it was determined that the "clerical, office, stores, fleet and passenger service" grouping of employees constituted an appropriate craft or class, within the meaning of the Act, for collective bargaining purposes. Case No. R–1706, N. M. B. Determinations of Craft or Class 423 (1948). All of the parties here, save the Association, participated in this public hearing. Since that time they have participated in other cases involving the same questions decided in R–1706, but, with some exceptions, the

Board has continued through the years to hold elections in that craft or class.

In August 1962 the Brotherhood filed with the Board an application under § 2, Ninth to investigate a representation dispute among employees of United. In its original application the Brotherhood proposed to exclude those stores and fleet service personnel then represented by the Machinists. After the Board had advised United and the Machinists of the Brotherhood's application each informed the Board that in its opinion the application should be dismissed because it did not conform to what the Board had found to constitute a craft or class in Case No. R–1706, *supra*. Alternatively, United requested that if dismissal was not in order the Board should hold hearings to determine the proper craft or class in which the election should be held. Upon receiving notice of this opposition the Brotherhood amended its application to include the full craft or class approved in R–1706. The Machinists then agreed that this was the appropriate unit in which to conduct the election.

The Board concluded that a dispute existed requiring an election and scheduled one for January 1963. It proposed to use its standard form of ballot which provided for the printing of the names of the labor organizations—in this case, the Brotherhood and the Machinists—with a box below each name for the employee to check the representative preferred. A third space was provided in which the employee could write in the name of any other organization or individual he wished to represent him. There was not a place on the ballot in which the employee could vote specifically for "no union."

The Board, on December 19, 1962, directed that a list of the employees involved be supplied by United not later than January 14, 1963. On January 11 United advised that the request was premature and requested a hearing as to the scope of the unit involved in the Brotherhood's

amended application. It outlined in some detail the past practices of the Board in dealing with such requests and attacked the continued suitability of the R–1706 determination, asking that the case be re-opened and that the group be divided into three separate crafts or classes. On January 17 the Board denied this request. It pointed out that United on September 7, 1962, had objected to the craft proposed in the Brotherhood's original application on the sole ground that it did not conform to R–1706; that the Brotherhood had then amended its request to conform with R–1706; that United had been notified of this change on October 8, 1962; that on October 24 the Board had requested United to furnish the number of employees in the craft or class as amended and that it had furnished this information on November 2, stating that there were 12,451 as of a given date; and that it had failed to furnish the names of the employees. The Board then commented that "the carrier is not a party to this representation dispute"; that "no request for a review of . . . Case No. R–1706, et al. has been received from either organization party to NMB Case No. 3590" (the pending application of the Brotherhood); and that United's request was "not timely made, since the Board, on December 19, 1962, found that a representation dispute existed among the employees in this craft or class, and has authorized an election." United requested reconsideration of this decision, but without success.

Meanwhile, on January 18, 1963, when United advised the Board that it was "willing to allow a ballot box election on Company property provided the ballot follows the form used by the National Labor Relations Board," *i. e.*, the ballot "would have a space for the employee to vote *against* representation as well as space for the employee to vote *for* representation" by the Brotherhood or the Machinists. (Emphasis in the original.) The Board replied that its form of ballot had been used since 1934

and that it saw no reason to depart from it. Thereafter United advised that it would furnish the list of employees by February 11, but on that date the list was refused and action was begun the next day against the Board in the District Court for the District of Columbia. This case was later dismissed, as we have noted.

It appears that while the election was being delayed the Association was being organized among United's employees. By March 1963 it claimed 6,400 members, about 50% of the total number of United's employees. It sought, like United, to be heard in a craft or class proceeding and to have the ballot amended. It stated, however, that it did not seek recognition as a bargaining representative, and it did not want its name on the ballot. It intended to dissolve after the election. The Board denied the applications.

After United's case was dismissed, the Association filed a similar suit in the same court, seeking substantially the same relief. The Brotherhood was permitted to intervene, and it filed a separate appeal from that of the Board after the court had disposed of the case as we have already stated.

After we granted certiorari, the Board adopted an amended form of ballot on which there appears the following directly above the names of the unions seeking election as representative:

"INSTRUCTIONS FOR VOTING

"No employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified."

In effect, this amended ballot stated on its face what has been the practice of the Board in these elections since its inception. The Board has announced its intention to use this form of ballot in future representation elections, including any that may be held in this particular matter.

2. The Purposes of the Act and the Board's Function.

The major objective of the Railway Labor Act, 44 Stat. 577, as amended, 45 U. S. C. §§ 151–188 (1958 ed.), was "the avoidance of industrial strife, by conference between the authorized representatives of employer and employee." *Virginian R. Co.* v. *System Federation No. 40,* 300 U. S. 515, 547 (1937). Section 2, Ninth set up the machinery for the selection of the representatives of employees. It authorized the National Mediation Board, upon request, to investigate disputes over representation; to "designate" those who were affected; to use a secret ballot or any other appropriate means of ascertaining the choice of employees; to establish rules governing elections and to certify the representatives so chosen to represent the employees in negotiations. Upon the issuance of this certificate the employer, under the Act, is required to "treat" with the representative certified to it by the Board. As we said in *Virginian R. Co.:* "The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First." *Id.,* at 548.

In *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297 (1943), the petitioner sued for the cancellation of a Board representation certificate. The Court held that the Act precluded review of the Board's certification of a collective bargaining representative under § 2, Ninth. The case involved a question of statutory con-

struction, *i. e.,* whether the Act permitted the division of crafts or classes of a single carrier into smaller units for collective bargaining purposes. The Court refused to consider the merits of the claim, holding that it was for the Board, not the courts, finally to resolve such questions. "The Act in § 2, Fourth," the Court said, "writes into law the 'right' of the 'majority of any craft or class of employees' to 'determine who shall be the representative of the craft or class for the purposes of this Act.' That 'right' is protected by § 2, Ninth which gives the Mediation Board the power to resolve controversies concerning it and as an incident thereto to determine what is the appropriate craft or class in which the election should be held." *Id.,* at 300–301. The Court goes on to note that Congress decided on the method which might be employed to protect this "right"; and that where Congress "has not expressly authorized judicial review," *id.,* at 301, "this Court has often refused to furnish one even where questions of law might be involved," *id.,* at 303. The Court's conclusion was that "the intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law." *Id.,* at 305. Thus, the Court held there could be no judicial review.

It is sometimes said that in *Leedom* v. *Kyne,* 358 U. S. 184 (1958), the Court created an "exception" to the doctrine of *Switchmen's Union.* In *Kyne,* it was held that the law afforded a remedy in the courts when unlawful action by the National Labor Relations Board inflicted injury on one of the parties to a bargaining dispute. But this was no exception to *Switchmen's Union.* Rather the Court was careful to note that "[t]his suit is not one to 'review,' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board

made in excess of its delegated powers and contrary to a *specific prohibition in the Act.*" *Leedom* v. *Kyne*, 358 U. S. 184, 188. (Emphasis supplied.) The limited nature of this holding was re-emphasized only last Term where we referred to the "narrow limits" and "painstakingly delineated procedural boundaries of *Kyne*." *Boire* v. *Greyhound Corp.*, 376 U. S. 473, 481 (1964). It is with these principles in mind that we turn to the questions in the instant cases.

3. The Craft or Class Determination.

The order of the District Court in Nos. 138 and 369 enjoins the Board from conducting an election "in which the form of the ballot does not permit a voting employee to cast a vote against collective bargaining representation . . . ." The Association concedes that the order does not enjoin the holding of the election until the Board reconsiders its craft or class determination; nor has it petitioned here for a review of that portion of the decision. Thus, we need not reach the question of the Association's right to demand or participate in proceedings leading to such a determination.

The same is not true of United, however, for it specifically sought and was denied such relief, and it comes here contending that this denial constituted error. United argues that since the Act compels it to treat with the representative chosen by the majority of its employees in the craft or class in which the election is held, it has a direct and substantial interest in the scope of that unit; and that since the Act provides for no administrative or judicial review, due process requires that it be accorded an opportunity to participate in the proceedings by which the Board determines which employees may participate.

It also contends that the Board, in designating the employees who could participate in the election, did not do so as a result of the statutorily required investigation—

which, United contends, requires that the Board take evidence and make findings—but made an arbitrary determination, relying solely on the agreement of the unions.

United's position is that *Switchmen's Union* does not control a claim that the Board has ignored an express command of the Act. This particular question was reserved in the 1943 cases. In *General Committee* v. *Missouri-Kansas-Texas R. Co.*, 320 U. S. 323 (1943), a companion case to *Switchmen's Union*, the Court stated: "Whether judicial power may ever be exerted to require the Mediation Board to exercise the 'duty' imposed upon it under § 2, Ninth and, if so, the type or types of situations in which it may be invoked present questions not involved here." *Id.*, at 336, n. 12. We think that the Board's action here is reviewable only to the extent that it bears on the question of whether it performed its statutory duty to "investigate" the dispute.[2] Reviewing that action, however, we conclude that the contention is completely devoid of merit.

Section 2, Ninth makes it the duty of the Board to "investigate" a representation dispute and "to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names

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[2] Indeed in the keystone case dealing with the Railway Labor Act, *Virginian R. Co.* v. *System Federation No. 40, supra,* the validity of the Board's certificate was attacked because it failed to recite the number of eligible voters in the craft or class in which the election was held. The Court found it unnecessary to decide whether the certificate would be conclusive absent such a finding, but it commented:

"But we think it plain that if the Board omits to certify any of them [the facts concerning the number of eligible voters, the number participating and the choice of the majority], the omitted fact is open to inquiry by the court asked to enforce the command of the statute. . . . Such inquiry was made by the trial court, which found the number of eligible voters and thus established the correctness of the Board's ultimate conclusion." *Id.*, at 562.

of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier." This command is broad and sweeping. We should note at the outset that the Board's duty to investigate is a duty to make such investigation as the nature of the case requires.[3] An investigation is "essentially informal, not adversary"; it is "not required to take any particular form." *Inland Empire District Council* v. *Millis,* 325 U. S. 697, 706 (1945). These principles are particularly apt here where Congress has simply told the Board to investigate and has left to it the task of selecting the methods and procedures which it should employ in each case.

In dealing with the sufficiency of the investigation it is necessary to examine the experience of the Board through the years in resolving questions of craft or class appropriateness. That experience, insofar as it concerns the unit involved here, dates back to 1946 in Case No. R–1706, *supra,* when it was called upon for the first time to apply the craft or class principle of representation to the airline industry. At that time it had before it a fledgling industry, a relatively new statutory command and a huge group of employees for whom there were no recognized crafts or classes within the meaning of the Act. At least five unions were involved, all urging different employee groupings, and all of the major airlines were invited to participate in an extended public hearing. United was among those participating and in fact supported the very craft or class unit which the Board eventually decided upon and to which it has adhered here. Because it was the first time the Board had recognized such a craft or class, it cautiously provided in denying reconsideration of its determination that it was subject

[3] *Ruby* v. *American Airlines, Inc.,* 323 F. 2d 248, 255; *WES Chapter, Flight Engineers' Int'l Assn.* v. *National Mediation Board,* 114 U. S. App. D. C. 229, 232, 314 F. 2d 234, 237.

to future re-examination where to do so would further the purposes of the Act.

Thereafter began a period in which the workability of the R–1706 determination was tested in practice, and it did not go completely unchallenged. In 1948 United voluntarily recognized the Machinists as the collective bargaining representative for its ramp and stores employees. It supplied the Board with evidence upon which this recognition was based and its reasons for departing from its usual policy. It is noteworthy that the Board replied that voluntary recognition would not preclude future determination by the Board of the proper craft or class to which those employees would belong. In 1951 the determination of R–1706 withstood challenge in *Matter of Representation of Employees of Northwest Airlines, Inc.,* Case No. R–2357, 2 N. M. B. Determinations of Craft or Class 60 (1955). United submitted a statement in this proceeding, emphasizing its disagreement with the R–1706 decision and requesting that it be disregarded. The Board refused to do so, but it did reiterate what it had implied in 1947—that it was "of the opinion that upon proper application . . . it will be advisable to reexamine the determination in case R–1706 et al., with the view of making such modifications as may be found to be justified at that time." *Id.,* at 67. We note that in both cases—R–1706 and R–2357—the unions competing for representative status were in disagreement as to the appropriate unit in which elections should be held. Again in 1952, in Case No. R–2482, 2 N. M. B. Determinations of Craft or Class 72 (1955), United participated when the Air Line Dispatch Clerks Association sought to represent its general dispatch clerks, dispatch clerks A, B, and C and crew schedulers; the Brotherhood there disputed the grouping, contending that R–1706 established the scope of the election. The Board sustained this position, which was also that of

United, and held that R–1706 should be adhered to. United had argued that the dispatch clerks and schedulers were not a separate craft or class but merely components of the R–1706 unit, and that representation could be had only through investigation and election in that group. The Board ultimately discussed the application in these terms:

> "The precedents heretofore established by the Board, however, cannot be disregarded. Moreover, the record of stable industrial relations which has followed in the years since the Determination in R–1706 must be given due and careful consideration.
>
> ". . . In an industry which is still expanding, the agency charged with the duty of certifying designated representatives for collective bargaining must of necessity hesitate before acquiescing in the desires of certain employees to establish small segregated groups, because by that very course it may retard, or even destroy job opportunities. Flexibility in the use of employee talent carries just as many advantages for the employees as it does for the carrier. The Board is fully aware that the action taken herein will have, as an end result, the withholding of an immediate opportunity to select a collective-bargaining agent by this group of employees, but nevertheless, it is convinced that the basic purposes of the Railway Labor Act will be better served by adherence to the policy of preserving established crafts or classes." *Id.*, at 76.

Nor do the subsequent cases brought to our attention strip the R–1706 decision of its continuing validity. In both these matters—Cases No. C–2252 and C–2389, 3 N. M. B. Determinations of Craft or Class 16 (1961)—the Board determined that stock and storeroom employees were separate crafts or classes of employees at North Central and Trans-Texas Air Lines. Neither of these airlines

had participated in the 1946 proceedings. Both were feeder lines, and in both cases the contending unions disagreed as to the appropriate unit in which the election should be held. In any event, the Board was simply pursuing the policy it had announced when it decided R–1706—that it would re-examine craft or class determinations when it thought the purpose of the Act would be furthered thereby. This in itself belies the notion that the Board has blindly followed the R–1706 ruling.[4]

It is in light of this background that we must decide whether the Board's reaffirmation of the R–1706 determination in these cases was made after a sufficient investigation, within the meaning of the Act. We reject the contention that it adhered solely to the craft or class chosen by the unions. Time and again it has acknowledged that it has the task of determining the appropriateness of a craft or class, and nothing in this case suggests that it abdicated that responsibility here. Where units untested by actual collective bargaining have been proposed by the unions involved the Board has consistently held hearings to determine the propriety of holding elections in those crafts or classes. But where the unions have agreed and the unit they have agreed upon has been one well-established in industry bargaining circles, it has usually held elections without full-scale hearings, not simply because the unions agree but because the unit upon which they agree is one that is well-recognized under prior determinations of the Board and has proven satisfactory in actual experience. This is what it did here.

[4] It should be noted, however, that in nearly all cases subsequent to Nos. C–2252 and C–2389, the Board has held elections among clerical, office, stores, fleet and passenger service employees without re-examining that grouping and without noticeable protest. Mr. Thompson, Executive Secretary of the Board, lists 19 such cases in his affidavit in the District Court supporting the Board's motion to dismiss. This hardly supports United's contention that the Board is clinging in this case to a determination it has found obsolete.

The Board received the Brotherhood's application; it requested, received and considered statements from the carrier and the Machinists. On the basis of these preliminary actions, it scheduled an election. But it continued to correspond with United, accepting and studying its detailed application for reconsideration of the Board's decision to proceed to election in the R–1706 craft or class. Viewed alongside prior experience with the R–1706 grouping in the air transport industry this procedure clearly complied with the statutory command that the Board "investigate" the dispute. The only missing element of the required investigation is the election and that can now be held promptly.

United sought to have the District Court require the Board to hold a hearing on the craft or class issue in which it would participate as a "party in interest." But the Act does not require a hearing when the Board itself designates those who may participate in the election. It provides that "the Board shall designate who may participate in the election . . . , or *may* appoint a committee of three neutral persons who *after hearing* shall within ten days designate the employees who may participate in the election." (Emphasis supplied.) Indeed, United seems aware of this, for it stated in its brief that if "the Railway Labor Act does not specifically require a hearing, it does require an 'investigation,' " and that United must be heard in the course of that proceeding. Clearly, then, the Board cannot be required to hold a hearing.

Nor does the Act require that United be made a party to whatever procedure the Board uses to define the scope of the electorate. This status is accorded only to those organizations and individuals who seek to represent the employees, for it is the employees' representative that is to be chosen, not the carriers'. Whether and to what extent carriers will be permitted to present their views on

craft or class questions is a matter that the Act leaves solely in the discretion of the Board.

The gist of United's claim, therefore, is that it should be accorded a greater role in the Board's investigation. This argument must be rejected. Here United participated in the proceeding establishing the craft or class in question as a cognizable grouping of employees, and it has had opportunities since that time to present further evidence. It must be remembered that United is under no compulsion to reach an agreement with the certified representative. As Chief Justice Stone said in *Virginian R. Co.* v. *System Federation No. 40, supra,* "The quality of the action compelled, its reasonableness, and therefore the lawfulness of the compulsion, must be judged in the light of the conditions which have occasioned the exercise of governmental power." *Id.,* at 558–559. Likewise, as the Court observed in *Hannah* v. *Larche,* 363 U. S. 420, 442 (1960), the procedural requirements in a particular proceeding depend on "[t]he nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding . . . ." The Board, as we noted in *Switchmen's Union,* performs the "function of a referee." It does not select one organization or another; it simply investigates, defines the scope of the electorate, holds the election and certifies the winner. Thus, while the Board's investigation and resolution of a dispute in one craft or class rather than another might impose some additional burden upon the carrier, we cannot say that the latter's interest rises to a status which requires the full panoply of procedural protections. We find support for this conclusion when we consider the burden that acceptance of United's contentions would visit upon the administration of the Act. To require full-dress hearings on craft or class in each representation dispute would fly in the face of Congress' instruction that

representatives should be certified within 30 days of invocation of the Board's services. It places beyond reach the speed which the Act's framers thought an objective of the first order.

In view of these considerations, we hold that the Board performed its statutory duty to conduct an investigation and designate the craft or class in which the election should be held and that it did so in a manner satisfying any possible constitutional requirements that might exist. Its determination, therefore, is not subject to judicial review. *Switchmen's Union* v. *National Mediation Board, supra.* As was pointed out there, the "highly selective manner in which Congress has provided for judicial review of administrative orders or determinations under the Act," *id.*, at 305, indicates the confidence that it reposed in the Board. In turn the fair and equitable manner in which the Board has discharged its difficult function is attested by the admirable results it has attained.

4. The Form of the Ballot.

As we have noted the District Court enjoined the Board from conducting an election with a ballot that did not permit an employee to cast a vote against collective representation. We believe this was error. Section 2, Ninth empowers the Board to establish the rules governing elections. Moreover, it provides that in resolving representation disputes the Board is authorized "to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier." Thus, not only does the statute fail to spell out the form of any ballot that might be used but it does not even require selection by ballot. It leaves the details to the broad dis-

cretion of the Board with only the *caveat* that it "insure" freedom from carrier interference. That the details of selecting representatives were to be left for the final determination of the Board is buttressed by legislative history clearly indicating as much.[5] See Hearings on H. R. 7650, House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 34–35.

In summary, then, the selection of a ballot is a necessary incident of the Board's duty to resolve disputes. The Act expressly says as much, instructing the Board alone to establish the rules governing elections. Thus, it is clear that its decision on the matter is not subject to judicial review where there is no showing that it has acted in excess of its statutory authority.

United and the Association, however, apparently relying on *Leedom* v. *Kyne, supra,* contend that the Board has exceeded its statutory authority in selecting the proposed ballot. The argument is that § 2, Fourth, which provides that "[t]he majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class" requires a ballot with

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[5] The legislative history supports the view that the employees are to have the option of rejecting collective representation. The ballot that the Board proposes to use in future elections fully comports with this conception of the Act. Using the Board's ballot an employee may refrain from joining a union and refuse to bargain collectively. All he need do is not vote and this is considered a vote against representation under the Board's practice of requiring that a majority of the eligible voters in a craft or class actually vote for some representative before the election is valid. The practicalities of voting—the fact that many who favor some representation will not vote—are in favor of the employee who wants "no union." Indeed, the method proposed by the Board might well be more effective than providing a "no union" box, since, if one were added, a failure to vote would then be taken as a vote approving the choice of the majority of those voting. This is the practice of the National Labor Relations Board.

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a "no union" box. They urge that in *Virginian R. Co.* v. *System Federation No. 40, supra,* at 560, certification on the basis of a majority of the votes cast, rather than a majority of the eligible voters, was upheld on the ground that nonvoters "are presumed to assent to the expressed will of the majority of those voting." And they say that the Board's ballot is inconsistent with this rationale. But the Board has not followed the presumption of *Virginian R. Co.* Indeed the *caveat* on the face of the proposed ballot expressly refutes such an assumption. The Board's rule of election procedure is that no vote is a vote for no representation, and this is now made plain to the voting employees. It is, as we have said, an assumption more favorable to the employees that the Association represents. Thus, under the Board's practice a majority of the craft or class, as required by § 2, Fourth, does have the right to determine who shall be the representative of the group or, indeed, whether they shall have any representation at all.

It is also claimed that since § 9 (a) of the National Labor Relations Act, 49 Stat. 453, as amended, 61 Stat. 143, 29 U. S. C. § 159 (a) (1958 ed.) and § 2, Ninth of the Railway Labor Act are both designed to encourage collective bargaining and the National Labor Relations Board uses a ballot with a "no union" box, the Mediation Board must use one also. Even assuming that the "no union" ballot would implement the purpose of the Act, this is a far cry from saying that it is the only form of ballot that would do so. Given broad discretion as it is the Mediation Board has followed a presumption contrary to that adhered to by the Labor Relations Board. The latter has tailored its ballot to conform to the presumption of *Virginian R. Co.* If in a Labor Board election, an employee does not vote, he can safely be presumed to have acquiesced in the will of the majority of the voters. In a Mediation Board election, if the em-

ployee refuses to vote he is treated as having voted for no representation.

We venture no opinion as to whether the Board's proposed ballot will best effectuate the purposes of the Act. We do say that there is nothing to suggest that in framing it the Board has exceeded its statutory authority.

Unable to point to any specific requirement of a "no union" ballot in the Act, United and the Association are left to arguing in terms of policy and broad generalities as to what the Railway Labor Act should provide. The very nature of the arguments indicates that the Board's choice of its proposed ballot is not subject to judicial review, for it was to avoid the haggling and delays of litigation that such questions were left to the Board. These are matters for Congress and the Board rather than the courts. Here the Board—a creature of Congress—has been, as we have said, careful to provide fair, yet effective procedures and we feel certain that it will continue to do so. If its decision on the ballot is not acceptable, the place to go is to Congress, not to us.

Accordingly, we reverse the judgments in Nos. 138 and 369 and affirm the judgment in No. 139.

It is so ordered.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE STEWART, dissenting.

My dissent stems from the Court's approval of the form of ballot used by the National Mediation Board in representation elections. As I understand its opinion, the Court holds that the form of ballot devised by the Board is subject to judicial review, at least for the purpose of determining whether the Board "acted in excess of its statutory authority." With that I agree. But the Court goes on to hold that the ballot devised by the Board does conform with the statute. With that I cannot agree.

I.

Nothing decided in *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, forecloses a determination by this Court of the validity of the ballot form used by the Board. On the contrary, that case, which insulated from judicial review the Board's ultimate craft or class determinations, makes it all the more imperative that the Board be required to operate by fair and lawful procedures. Compare *Silver* v. *New York Stock Exchange,* 373 U. S. 341, 361. To say that *Switchmen's Union,* by interpreting the Railway Labor Act (44 Stat. 577, as amended) to deprive courts of jurisdiction to review class or craft determinations, also deprived courts of jurisdiction to review the fundamental procedures used by the Board in arriving at those determinations "would indeed be to 'turn the blade inward.'" *Graham* v. *Brotherhood of Firemen,* 338 U. S. 232, 237.

The ballot lies at the heart of the Board's certification mechanism. It is used day in and day out and will be used on thousands of occasions in the future. What happened in this very case illustrates the vital and salutary effect of judicial scrutiny of the Board's procedures. The ballot form which the Court of Appeals held illegal in this litigation had been used by the Board for many years. Yet the Solicitor General, as a consequence of the grant of certiorari in this case, persuaded the Board to modify the ballot to reduce its ambiguities.[1] If the Court were understood as holding today that there can be no review

[1] The Solicitor General's changes would leave the slots on the ballot intact (not supplying a "no union" box) but would append the following caption:

"INSTRUCTIONS FOR VOTING

"No employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified."

It is this revised form of ballot which the Court today approves, rather than the old form which was before the Court of Appeals.

of the ballot's structure, the Board would, of course, be free to return to the older historic form which the Solicitor General has virtually conceded is unfair and unlawful.[2]

II.

Even as revised in response to our grant of certiorari in this case, however, the form of ballot to be used by the Board continues to list spaces only for the organizations actually competing for representation, with a blank space left for writing in an unlisted organization. No space is provided for voting for "no union." Employees are still confronted with a ballot upon which they can mark a choice only among representatives, without an opportunity to mark a choice for no representative at all. This ballot form is directly attributable to the Board's view of what the bargaining pattern should be in the airline industry. The Board has stated that "the act does not contemplate that its purposes shall be achieved, nor is it clear that they can be achieved, without employee representatives . . . ." [3] As a result, the Board has designed its ballot to encourage employees to choose a labor organization to represent them collectively. I believe both the language of the Act and its legislative history belie this view and, for that reason, I would order the Board to reconsider the form of its ballot.

Section 2, Fourth provides that "Employees shall have the right to organize and bargain collectively through

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[2] Before *Switchmen's Union* there were several decisions which furnished the National Mediation Board with clarifying interpretations of the Act. The Board found these "decisions are very helpful . . . in that they serve to settle issues which, in the past, have frequently arisen to trouble the orderly and prompt adjustment of disputes over representation between different factions among employees." Annual Report of the National Mediation Board, 1938, pp. 5–6.

[3] Administration of the Railway Labor Act by the National Mediation Board, 1934–1957, p. 15.

representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class . . . ." The Act performs the function, familiar to the rest of our labor legislation, of furnishing the opportunity for majority determination within each employee group of what the nature of bargaining shall be. But the Act is not compulsory. Employees are not required to organize, nor are they required to select labor unions or anyone else as their representatives. It has always been recognized that under the law the employees have the option of rejecting collective representation.

The House Report on the bill, stated:

> "2. It [H. R. 9861] provides that the employees shall be free to join any labor union of their choice *and likewise be free to refrain from joining any union if that be their desire* and forbids interference by the carriers' officers with the exercise of said rights." (Emphasis supplied.) (H. R. Rep. No. 1944 to accompany H. R. 9861, Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 1934, p. 2.)

Much of the testimony on the bill was given by Commissioner Joseph B. Eastman, Federal Coordinator of Transportation and the principal draftsman of the legislation. His reply to a question by Congressman Huddleston reflects the contemporary understanding of the Act:

> "Commissioner EASTMAN. No; it does not require collective bargaining on the part of the employees. If the employees do not wish to organize, prefer to deal individually with the management with regard to these matters, why, that course is left open to them, or it should be." (Hearings on H. R. 7650, House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 1934, p. 57.)

And in the Senate, Senator Wagner insisted that this was the burden of the bill:

> "Senator WAGNER. . . . I didn't understand these provisions compelled an employee to join any particular union. I thought the purpose of it was just the opposite, to see that the men have absolute liberty to join or not to join any union or to remain unorganized.
>
> "Mr. CLEMENT. That is the way we hope they will read when they are finally amended." (Hearings on S. 3266, Senate Committee on Interstate Commerce, 73d Cong., 2d Sess., 1934, p. 76.)

See also Hearings, *id.*, p. 12. That legislative history is directly counter to the conception of the Act reflected by the ballot form used by the Board, and spelled out in the particularized record of the present case.[4]

The form of the ballot is markedly different from that evolved by the National Labor Relations Board under a statute which contained almost identical wording at the time the ballot was designed.[5] Originally the Labor

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[4] In a letter to United Air Lines, rejecting its objections to the form of the ballot, the Executive Secretary of the Board stated: "Introduction of a 'yes' or 'no' ballot would contribute to, if it did not actually encourage, an attempt to circumvent the mandate of Congress that representatives be designated by carriers and their employees for the purposes described in Section 2, First and Second of the Railway Labor Act . . . ." Letter to Charles Mason from Executive Secretary of the National Mediation Board, January 24, 1963.

[5] The original § 9 (c) of the Wagner Act, 49 Stat. 453, stated the Labor Board's powers in the following language:

"Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under

Board, like the Mediation Board, did not include a space for a "no union" vote. Since July 1937, however, it has consistently placed such a slot on the ballot to insure that an employee's vote for a particular representative does not spring from a feeling that the vying organizations present the only alternatives available. "The policy adopted by the Board is designed merely to make sure that the votes recorded for a particular representative express a free choice rather than a choice in default of the possibility of expressing disapproval of both or all proposed representatives." *In re Interlake Iron Corp.*, 4 N. L. R. B. 55, 61. "The Act . . . does not require an unwilling majority of employees to bargain through representatives. It merely guarantees and protects that

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section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives." Compare § 2, Ninth of the Railway Labor Act:

"If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. . . . In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. . . ." 45 U. S. C. § 152, Ninth (1958 ed.).

The similarity in the purposes of the Wagner Act and the Railway Labor Act was pointed out in the report of the House Committee on Labor which stated that "the bill is merely an amplification and further clarification of the principles enacted into law by the Railway Labor Act . . . ." H. R. Rep. No. 1147, 74th Cong., 1st Sess., p. 3. See 40 Op. Atty. Gen. 541 (Attorney General Clark).

right of a majority *if it chooses to exercise it.*" *Ibid.* (Emphasis supplied.)

Certainly the Board may use alternate devices for divining the desires of the employees. But each device must be tested within its own framework. Where the Board purports to gain its information through the traditional system of balloting the employees, all parties rely on that election to yield a meaningful result. Here the Board decided to employ the secret ballot and rely on its results exclusively. At the least then, the ballot must unambiguously convey to each employee the choices available to him under the law.[6]

Because the National Mediation Board has hewn to the mistaken belief that its duty is to encourage collective representation in the airline industry, I would remand this case to the Board for further consideration in the light of the views here expressed. I would not attempt to dictate to the Board precisely what form the ballot should ultimately take. Within a broad range, that question surely lies within the Board's discretion. But it is a question the Board should confront with a correct understanding of the law.

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[6] Prior to this litigation, the only court to consider the ballot employed by the National Mediation Board found that failure to include a "no union" slot deprived the employees of a "free choice." "It is manifest that this ballot did not present the issue to the eligible voters." *McNulty* v. *National Mediation Board,* 18 F. Supp. 494, 501 (D. C. N. D. N. Y.).

COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF NOEL ET AL.

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

No. 503. Argued April 1, 1965.—
Decided April 29, 1965.

Just prior to boarding an airplane which later crashed in flight decedent applied for flight insurance policies, naming his wife as beneficiary. The policies, which granted the insured the right to assign them or to change the beneficiary, were handed to the wife, who was paid their face value following the decedent's death from the crash. The petitioner determined that the proceeds should have been included in the estate tax return pursuant to 26 U. S. C. § 2042 (2), which requires inclusion of amounts received by beneficiaries from insurance on the life of the decedent if at his death he possessed any of the incidents of ownership. The Tax Court sustained the Commissioner's ruling, but the Court of Appeals reversed, distinguishing life insurance, payable inevitably, from accident insurance, which covers an evitable risk. *Held:*

1. In accordance with long-standing and consistent administrative interpretation deemed to have the effect of law, as applied to this substantially re-enacted statute, these insurance policies were on the "life of the decedent" within the meaning of § 2042 (2). *Ackerman* v. *Commissioner*, 15 B. T. A. 635, followed. Pp. 680–682.

2. For estate tax purposes decedent possessed incidents of ownership at the time of his death, without regard to his ability to exercise them at any given moment, as he had the power of assignment of the policy or to change the beneficiary. Pp. 682–684.

332 F. 2d 950, reversed.

John B. Jones, Jr., argued the cause for petitioner. With him on the brief were *Solicitor General Cox* and *Assistant Attorney General Oberdorfer*.

Harry Norman Ball argued the cause for respondents. With him on the brief was *Edward F. Merrey, Jr.*

MR. JUSTICE BLACK delivered the opinion of the Court.

This is a federal estate tax case, raising questions under § 2042 (2) of the Internal Revenue Code of 1954, 26 U. S. C. § 2042 (2) (1958 ed.), which requires inclusion in the gross estate of a decedent of amounts received by beneficiaries other than the executor from "insurance under policies on the life of the decedent" if the decedent "possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. . . ." [1] The questions presented in this case are whether certain flight insurance policies payable upon the accidental death of the insured were policies "on the life of the decedent" and whether at his death he had reserved any of the "incidents of ownership" in the policies.

These issues emerge from the following facts. Respondent Ruth M. Noel drove her husband from their home to New York International Airport where he was to take an airplane to Venezuela. Just before taking off, Mr. Noel signed applications for two round-trip flight insurance policies, aggregating $125,000 and naming his wife as beneficiary. Mrs. Noel testified that she paid the premiums of $2.50 each on the policies and that her husband then instructed the sales clerk to "give them to my

[1] "§ 2042. Proceeds of life insurance.

"The value of the gross estate shall include the value of all property—

"(1) Receivable by the executor.

"To the extent of the amount receivable by the executor as insurance under policies on the life of the decedent.

"(2) Receivable by other beneficiaries.

"To the extent of the amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. . . ."

wife. They are hers now, I no longer have anything to do with them." The clerk gave her the policies, which she kept. Less than three hours later Mr. Noel's plane crashed into the Atlantic Ocean and he and all others aboard were killed. Thereafter the companies paid Mrs. Noel the $125,000 face value of the policies, which was not included in the estate tax return filed by his executors. The Commissioner of Internal Revenue determined that the proceeds of the policies should have been included and the Tax Court sustained that determination, holding that the flight accident policies were insurance "on the life of the decedent"; that Mr. Noel had possessed exercisable "incidents of ownership" in the policies at his death; and that the $125,000 paid to Mrs. Noel as beneficiary was therefore includable in the gross estate. 39 T. C. 466. Although agreeing that decedent's reserved right to assign the policies and to change the beneficiary amounted to "exercisable incidents of ownership within the meaning of the statute," the Court of Appeals nevertheless reversed, holding that given "its ordinary, plain and generally accepted meaning," the statutory phrase "policies on the life of the decedent" does not apply to insurance paid on account of accidental death under policies like those here. 332 F. 2d 950. The court's reason for drawing the distinction was that under a life insurance contract an insurer "agrees to pay a specified sum upon the occurrence of an *inevitable* event," whereas accident insurance covers a risk "which is *evitable* and not likely to occur." (Emphasis supplied.) 332 F. 2d, at 952. Because of the importance of an authoritative answer to these questions in the administration of the estate tax laws, we granted certiorari to decide them. 379 U. S. 927.

I.

In 1929, 36 years ago, the Board of Tax Appeals, predecessor to the Tax Court, held in *Ackerman* v. *Commis-*

sioner, 15 B. T. A. 635, that "amounts received as accident insurance" because of the death of the insured were includable in the estate of the deceased.[2] The Board of Tax Appeals recognized that "there is a distinction between life insurance and accident insurance, the former insuring against death in any event and the latter . . . against death under certain contingencies . . . ." The Court of Appeals in the case now before us considered this distinction between an "inevitable" and an "evitable" event to be of crucial significance under the statute. The Board of Tax Appeals in *Ackerman* did not, stating "we fail to see why one is not taken out upon the life of the policy-holder as much as the other. In each case the risk assumed by the insurer is the loss of the insured's life, and the payment of the insurance money is contingent upon the loss of life." This view of the Board of Tax Appeals is wholly consistent with the language of the statute itself which makes no distinction between "policies on the life of the decedent" which are payable in all events and those payable only if death comes in a certain way or within a certain time. Even were the statutory language less clear, since the Board of Tax Appeals' *Ackerman* case it has been the settled and consistent administrative practice to include insurance proceeds for accidental death under policies like these in the estates of decedents. The Treasury Regulations remain unchanged from the time of the *Ackerman* decision [3] and from that day to this Con-

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[2] Section 302 (g) of the Revenue Act of 1924, which was applicable in *Ackerman,* provided that the estate should include all proceeds receivable by other beneficiaries "under policies taken out by the decedent upon his own life." 43 Stat. 253, 304–305.

[3] 26 CFR § 20.2042–1 (a)(1). See also Treas. Reg. 105 (1939 Code), § 81.25; Treas. Reg. 80 (1934 ed.), Art. 25; Treas. Reg. 70 (1926 ed. and 1929 ed.), Art. 25; Treas. Reg. 68 (1924 ed.), Art. 25; Treas. Reg. 63 (1922 ed.), Art. 27; and Treas. Reg. 37 (1921 ed.), Art. 32.

gress has never attempted to limit the scope of that decision or the established administrative construction of § 2042 (2), although it has re-enacted that section and amended it in other respects a number of times.[4] We have held in many cases that such a long-standing administrative interpretation, applying to a substantially re-enacted statute, is deemed to have received congressional approval and has the effect of law. See, *e. g., National Lead Co.* v. *United States,* 252 U. S. 140, 146; *United States* v. *Dakota-Montana Oil Co.,* 288 U. S. 459, 466. We hold here that these insurance policies, whether called "flight accident insurance" or "life insurance," were in effect insurance taken out on the "life of the decedent" within the meaning of § 2042 (2).

II.

The executors' second contention is that even if these were policies "on the life of the decedent," Mrs. Noel owned them completely, and the decedent therefore possessed no exercisable incident of ownership in them at the time of his death so as to make the proceeds includable in his estate. While not clearly spelled out, the contention that the decedent reserved no incident of ownership in the policies rests on three alternative claims: (a) that Mrs. Noel purchased the policies and therefore owned them; (b) that even if her husband owned the policies, he gave them to her, thereby depriving himself of power to assign the policies or to change the beneficiary; and (c) even assuming he had contractual power to assign the policies or make a beneficiary change, this power was

[4] Section 2042 was first enacted as § 402 (f) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097–1098. This section was re-enacted in § 402 (f) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 278–279; in § 302 (g) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 304–305, and the Revenue Act of 1926, c. 27, 44 Stat. 9, 70–71; and in § 811 (g) of the Internal Revenue Code of 1939.

illusory as he could not possibly have exercised it in the interval between take-off and the fatal crash in the Atlantic.

(a) The contention that Mrs. Noel bought the policies and therefore owned them rests solely on her testimony that she furnished the money for their purchase, intending thereby to preserve her right to continue as beneficiary. Accepting her claim that she supplied the money to buy the policies for her own benefit (which the Tax Court did not decide), what she bought nonetheless were policy contracts containing agreements between her husband and the companies. The contracts themselves granted to Mr. Noel the right either to assign the policies or to change the beneficiary without her consent. Therefore the contracts she bought by their very terms rebut her claim that she became the complete, unconditional owner of the policies with an irrevocable right to remain the beneficiary.

(b) The contention that Mr. Noel gave or assigned the policies to her and therefore was without power thereafter to assign them or to change the beneficiary stands no better under these facts. The contract terms provided that these policies could not be assigned nor could the beneficiary be changed without a written endorsement on the policies. No such assignment or change of beneficiary was endorsed on these policies, and consequently the power to assign the policies or change the beneficiary remained in the decedent at the time of his death.

(c) Obviously, there was no practical opportunity for the decedent to assign the policies or change the beneficiary between the time he boarded the plane and the time he died. That time was too short and his wife had the policies in her possession at home. These circumstances disabled him for the moment from exercising those "incidents of ownership" over the policies which were undoubtedly his. Death intervened before this temporary disa-

bility was removed. But the same could be said about a man owning an ordinary life insurance policy who boarded the plane at the same time or for that matter about any man's exercise of ownership over his property while aboard an airplane in the three hours before a fatal crash. It would stretch the imagination to think that Congress intended to measure estate tax liability by an individual's fluctuating, day-by-day, hour-by-hour capacity to dispose of property which he owns. We hold that estate tax liability for policies "with respect to which the decedent possessed at his death any of the incidents of ownership" depends on a general, legal power to exercise ownership, without regard to the owner's ability to exercise it at a particular moment. Nothing we have said is to be taken as meaning that a policyholder is without power to divest himself of all incidents of ownership over his insurance policies by a proper gift or assignment, so as to bar its inclusion in his gross estate under § 2042 (2). What we do hold is that no such transfer was made of the policies here involved. The judgment of the Court of Appeals is reversed and the judgment of the Tax Court is affirmed.

It is so ordered.

MR. JUSTICE DOUGLAS dissents.

WARREN TRADING POST CO. *v.* ARIZONA TAX COMMISSION ET AL.

APPEAL FROM THE SUPREME COURT OF ARIZONA.

No. 115. Argued March 9, 1965.—Decided April 29, 1965.

Appellant, the operator of a retail trading post on the Navajo Indian Reservation under a license granted by the Commissioner of Indian Affairs pursuant to 25 U. S. C. § 261, challenged the right of Arizona to levy a tax on its income from trading with reservation Indians on the reservation. The State Supreme Court upheld the tax. *Held:* Since Congress has broadly occupied the field of trading with Indians on reservations by all-inclusive regulations and statutes, the States may not impose additional burdens on the traders or the Indians, and therefore this tax may not be imposed on appellant. Pp. 686–692.

95 Ariz. 110, 387 P. 2d 809, reversed and remanded.

Edward Jacobson argued the cause and filed briefs for appellant.

Philip M. Haggerty, Assistant Attorney General of Arizona, argued the cause for appellees. With him on the brief were *Robert W. Pickrell,* Attorney General, and *Walter O. Holm,* Assistant Attorney General.

Briefs of *amici curiae,* urging reversal, were filed by *Solicitor General Cox* and *Roger P. Marquis* for the United States; by *Arthur Lazarus, Jr.,* and *Royal D. Marks* for the Association on American Indian Affairs, Inc., et al.; by *Norman M. Littell* and *Leland O. Graham* for the Navajo Tribe of Indians, and by *Edward B. Berger* for the Papago Tribe.

MR. JUSTICE BLACK delivered the opinion of the Court.

Arizona has levied a tax of 2% on the "gross proceeds of sales, or gross income" of appellant Warren Trading Post Company, which does a retail trading business with

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Indians on the Arizona part of the Navajo Indian Reservation under a license granted by the United States Commissioner of Indian Affairs pursuant to 19 Stat. 200, 25 U. S. C. § 261 (1958 ed.).[1] Appellant claimed that as applied to its income from trading with reservation Indians on the reservation the state tax was invalid as (1) in violation of Art. I, § 8, cl. 3, of the United States Constitution, which provides that "Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes"; (2) inconsistent with the comprehensive congressional plan, enacted under authority of Art. I, § 8, to regulate Indian trade and traders and to have Indian tribes on reservations govern themselves. The State Supreme Court rejected these contentions and upheld the tax, one Justice dissenting. 95 Ariz. 110, 387 P. 2d 809. The case is properly here on appeal under 28 U. S. C. § 1257 (2) (1958 ed.). Since we hold that this state tax cannot be imposed consistently with federal statutes applicable to the Indians on the Navajo Reservation, we find it unnecessary to consider whether the tax is also barred by that part of the Commerce Clause giving Congress power to regulate commerce with the Indian tribes.

The Navajo Reservation was set apart as a "permanent home" for the Navajos in a treaty made with the "Navajo nation or tribe of Indians" on June 1, 1868.[2] Long before that, in fact from the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves, free from state

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[1] Ariz. Rev. Stat. §§ 42–1309, 42–1312. The tax is applicable to "every person engaging or continuing within this state in the business of selling any tangible personal property whatever at retail," with stated exceptions. Ariz. Rev. Stat. § 42–1312. Appellant's challenge to these statutes is limited to the State's attempt to apply them to gross income from sales made on the reservation to reservation Indians.

[2] 15 Stat. 667.

interference,[3] and had exercised through statutes and treaties [4] a sweeping and dominant control over persons who wished to trade with Indians and Indian tribes. As

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[3] Arizona was admitted to the Union on its agreement that

"the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to . . . all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States . . . ." Act of June 20, 1910, 36 Stat. 557, 569. See also Act of Aug. 21, 1911, 37 Stat. 39.

Certain state laws have been permitted to apply to activities on Indian reservations, where those laws are specifically authorized by acts of Congress, or where they clearly do not interfere with federal policies concerning the reservations. See *Organized Village of Kake* v. *Egan*, 369 U. S. 60, 72–75; *Williams* v. *Lee*, 358 U. S. 217, 219–221; *Thomas* v. *Gay*, 169 U. S. 264; *Utah & N. R. Co.* v. *Fisher*, 116 U. S. 28, 31–32. Compare, *e. g.*, 18 U. S. C. § 1161 (1958 ed.) (permitting application of state liquor law standards within an Indian reservation under certain conditions); 45 Stat. 1185, as amended, 25 U. S. C. § 231 (1958 ed.) (permitting application of state health and education laws within a reservation under certain conditions); 18 U. S. C. § 1162 (1958 ed.) and 28 U. S. C. § 1360 (1958 ed.) (respectively granting certain States criminal and civil jurisdiction over offenses and causes of action involving Indians within specified Indian reservations).

[4] In 1778, in its first treaty with an Indian tribe, the United States promised to provide for the Delaware Nation

"a well-regulated trade, under the conduct of an intelligent, candid agent, with an adequate sallery, one more influenced by the love of his country, and a constant attention to the duties of his department by promoting the common interest, than the sinister purposes of converting and binding all the duties of his office to his private emolument . . . ." Treaty of Sept. 17, 1778, Art. V, 7 Stat. 13, 14. Similar provisions were found in other early treaties, concluded before the first Congress legislated on the subject of Indian trade. See United States Department of the Interior, Federal Indian Law 96 (hereafter cited as Federal Indian Law). In 1871 Congress forbade

Chief Justice John Marshall recognized in *Worcester* v. *Georgia,* 6 Pet. 515, 556–557:

> "From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate."

He went on to say that:

> "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union." *Id.,* at 557.

See also, *e. g., United States* v. *Forty-three Gallons of Whiskey,* 93 U. S. 188. In the very first volume of the federal statutes is found an Act, passed in 1790 by the first Congress, "to regulate trade and intercourse with the Indian tribes," requiring that Indian traders obtain a license from a federal official, and specifying in detail the conditions on which such licenses would be granted.[5]

Such comprehensive federal regulation of Indian traders has continued from that day to this.[6] Existing statutes make specific restrictions on trade with the Indians,[7] and

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future treaties with the Indian tribes but left the obligations of existing treaties unimpaired. 16 Stat. 544, 566, now 25 U. S. C. § 71 (1958 ed.).

[5] Act of July 22, 1790, 1 Stat. 137.

[6] See generally Federal Indian Law 94–138, 373–381.

[7] *E. g.,* 4 Stat. 729, now 25 U. S. C. § 263 (1958 ed.) (empowering the President in the public interest to forbid introduction of any or all goods into the territory of a tribe, and to revoke and refuse all licenses to trade with that tribe); 4 Stat. 729, as amended, now 25 U. S. C. § 264 (1958 ed.) (establishing penalties for trading without a license and forbidding traders to hire white persons as clerks unless licensed to do so); 18 U. S. C. § 3113 (1958 ed.) (forbidding unlawful introduction of liquor into Indian country and providing for revocation of the license of any trader violating this prohibition).

one of them, passed in 1876 and tracing back to comprehensive enactments of 1802 [8] and 1834,[9] provides that the Commissioner of Indian Affairs shall have "the sole power and authority to appoint traders to the Indian tribes" and to specify "the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." [10] Acting under authority of this statute and one added in 1901,[11] the Commissioner has promulgated detailed regulations prescribing in the most minute fashion who may qualify to be a trader and how he shall be licensed; penalties for acting as a trader without a license; conditions under which government employees may trade with Indians; articles that cannot be sold to Indians; and conduct forbidden on a licensed trader's premises.[12] He has ordered that detailed business records be kept and that government officials be allowed to inspect these records to make sure that prices charged are fair and reasonable; that traders pay Indians in money; that bonds be executed by proposed licensees; and that the governing body of an Indian reservation may assess from a trader "such fees, etc., as it may deem appropri-

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[8] Act of March 30, 1802, 2 Stat. 139.

[9] Act of June 30, 1834, 4 Stat. 729.

[10] 19 Stat. 200, 25 U. S. C. § 261 (1958 ed.), provides:

"The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians."

[11] 31 Stat. 1066, as amended, 25 U. S. C. § 262 (1958 ed.), provides:

"Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians."

[12] 25 CFR §§ 251.9, 252.6, 251.3, 252.3, 251.5, 251.8, 251.18, 251.19, 251.21, 252.15.

ate." [13] It was under these comprehensive statutes and regulations that the Commissioner of Indian Affairs licensed appellant to trade with the Indians on the Navajo Reservation. These apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders.[14] In fact, the Solicitor's Office of the Department of the Interior in 1940 [15] and again in 1943 [16] interpreted these statutes to bar States from taxing federally licensed Indian traders on their sales to reservation Indians on a reservation. We think those rulings were correct.

Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities. And in compliance with its treaty obligations the Federal Government has provided for roads, education and other services needed by the Indians.[17] We

[13] 25 CFR §§ 252.7, 251.22, 251.24, 251.10, 252.9, 252.27c. See generally 25 CFR §§ 251, 252.

[14] These statutes and regulations apply only to activities on reservations. See *Taylor* v. *United States,* 44 F. 2d 531 (C. A. 9th Cir.), cert. denied, 283 U. S. 820; 57 I. D. 124, 125.

[15] 57 I. D. 124.

[16] 58 I. D. 562.

[17] Since 1950 Congress has authorized expenditure of over $100,000,000 as part of an extensive plan to rehabilitate the Navajo and Hopi tribes of Arizona. 64 Stat. 44, as amended, 25 U. S. C. §§ 631–640 (1958 ed.). Detailed accounts of the ways in which the Federal Government has aided and supported the Navajos and other tribes may be found in Secretary of the Interior, Annual Report, 1963, pp. 11–47; *id.,* 1962, pp. 7–44; *id.,* 1961, pp. 277–318. See also Federal Indian Law 268–306; Young, The Navajo Yearbook, Report No. viii, 1951–1961, A Decade of Progress (1961).

think the assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts. This state tax on gross income would put financial burdens on appellant or the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner. And since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax.[18] Insofar as they are applied to this federally licensed Indian trader with respect to sales made to reservation

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[18] The Buck Act, now 4 U. S. C. §§ 105–110 (1964 ed.), in which Congress permitted States to levy sales or use taxes within certain federal areas, has been interpreted by what appears to be the only court to consider the question before this case, and by the Interior Department, as not applying to Indian reservations. *Your Food Stores, Inc.* v. *Village of Espanola*, 68 N. M. 327, 334, 361 P. 2d 950, 955–956; 58 I. D. 562. Cf. 4 U. S. C. § 109 (1964 ed.), excepting taxes on Indians from the scope of the Act. We think that interpretation was correct. See S. Rep. No. 1625, 76th Cong., 3d Sess., 2, 3. Moreover, we hold that Indian traders trading on a reservation with reservation Indians are immune from a state tax like Arizona's, not simply because those activities take place on a reservation, but rather because Congress in the exercise of its power granted in Art. I, § 8, has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject. Cf. *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, 651. Even assuming that the Arizona tax here is of a kind to which the Buck Act applies, nothing whatever in that Act suggests to us that Congress meant to give States new power to tax federally licensed Indian traders. See 58 I. D. 562.

Indians on the reservation, these state laws imposing taxes cannot stand. Cf. *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218. The judgment of the Supreme Court of Arizona is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

ONE 1958 PLYMOUTH SEDAN *v.* PENNSYLVANIA.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 294. Argued March 31, 1965.—Decided April 29, 1965.

State liquor enforcement officers, without a warrant, stopped and searched an automobile which was "low in the rear, quite low," and found 31 cases of liquor therein. The State filed a petition for forfeiture of the car, which the trial judge, after finding that the officers acted without probable cause, dismissed on the ground that the forfeiture depended on the admission of illegally obtained evidence in violation of the Fourth Amendment as applied to the States by the Fourteenth. The State Supreme Court, without reviewing the finding of lack of probable cause, reversed on the basis that the exclusionary rule applies only to criminal prosecutions and not to forfeitures, which it held are civil in nature. *Held:*

1. Evidence which is obtained in violation of the Fourth Amendment may not be relied on to sustain a forfeiture. *Boyd* v. *United States,* 116 U. S. 616, followed. Pp. 696–702.

(a) Statements in cases involving contraband *per se, United States* v. *Jeffers,* 342 U. S. 48, and *Trupiano* v. *United States,* 334 U. S. 699, distinguished. Pp. 698–699.

(b) A forfeiture under the circumstances present here is a penalty for a criminal offense and can result in even greater punishment than the criminal prosecution. Pp. 700–702.

2. On remand the State Supreme Court may review the trial court's finding of lack of probable cause for the search. P. 702.

414 Pa. 540, 201 A. 2d 427, reversed and remanded.

Stanford Shmukler argued the cause for petitioner. With him on the brief was *Louis Lipschitz.*

Thomas J. Shannon, Assistant Attorney General of Pennsylvania, argued the cause for respondent. With him on the brief were *Walter E. Alessandroni,* Attorney General of Pennsylvania, and *Edward Friedman* and *Frank P. Lawley,* Deputy Attorneys General.

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

At approximately 6:30 a. m. on December 16, 1960, two law enforcement officers of the Pennsylvania Liquor Control Board stationed near Camden, New Jersey, at the approach to the Benjamin Franklin Bridge, observed a 1958 Plymouth sedan bearing Pennsylvania license plates proceeding toward the bridge in the direction of Philadelphia, Pennsylvania. The officers, noting that "[t]he car was low in the rear, quite low," followed it across the bridge into Philadelphia. They stopped the automobile a short distance within the city, identified themselves and questioned the owner, George McGonigle. The officers then searched the car and, in the rear and the trunk, found 31 cases of liquor not bearing Pennsylvania tax seals. The car and liquor were seized and McGonigle was arrested and charged with violation of Pennsylvania law.[1] The officers did not have either a search or arrest warrant.

Pursuant to a Pennsylvania statute [2] the Commonwealth filed a petition for forfeiture of the automobile.[3] At the hearing McGonigle, by timely objection, sought dismissal of the forfeiture petition on the ground that the forfeiture of the automobile depended upon the admis-

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[1] See note 9, *infra,* and accompanying text.

[2] Purdon's Pa. Stat. Ann., Tit. 47, § 6–601 (1964 Cum. Supp.), which provides in pertinent part:

"No property rights shall exist in any liquor, alcohol or malt or brewed beverage illegally manufactured or possessed, or in any still, equipment, material, utensil, vehicle, boat, vessel, animals or aircraft used in the illegal manufacture or illegal transportation of liquor, alcohol or malt or brewed beverages, and the same shall be deemed contraband and proceedings for its forfeiture to the Commonwealth may, at the discretion of the board, be instituted in the manner hereinafter provided."

[3] A separate petition was filed for the forfeiture of the liquor which was upheld by the trial court. No appeal was taken from this order.

sion of evidence illegally obtained in violation of the Fourth Amendment to the Constitution as applied to the States by the Fourteenth Amendment. The trial court sustained this position and dismissed the forfeiture petition. In doing so, the trial judge made a specific finding that "[t]he seizure was founded upon evidence illegally obtained, since under the particular circumstances the officers acted without probable cause." [4] The Superior Court of Pennsylvania, an intermediate appellate court, by a 4-to-3 decision reversed the order dismissing the petition and directed that the automobile be forfeited. 199 Pa. Super. 428, 186 A. 2d 52. The Supreme Court of Pennsylvania affirmed the order of the Superior Court, one judge dissenting. 414 Pa. 540, 201 A. 2d 427.

The basis of the Pennsylvania Supreme Court's decision was that the exclusionary rule, which this Court in *Mapp* v. *Ohio*, 367 U. S. 643, 657, held "is an essential part of both the Fourth and Fourteenth Amendments," applies only to criminal prosecutions and is not applicable in a forfeiture proceeding which the Pennsylvania court deemed civil in nature. In light of this disposition of the case, the State Supreme Court did not review the trial court's finding of lack of probable cause, stating:

> "The thrust of the arguments, both of the appellant and the Commonwealth, is directed to the validity and propriety of the search and the subsequent seizure by the officers of this Plymouth automobile. In our view, such arguments are beyond the point. By reason of the nature of the present proceeding, i. e., a forfeiture procedure, we consider it unnecessary to determine the propriety and validity of the search and the seizure of this automobile." 414 Pa., at 542; 201 A. 2d, at 429.

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[4] The trial court's decision is unreported.

We granted certiorari, 379 U. S. 927, to consider the important question of whether the constitutional exclusionary rule enunciated in *Weeks* v. *United States*, 232 U. S. 383, and *Mapp* applies to forfeiture proceedings of the character involved here—a question on which there has been conflict in both state and federal decisions.[5] For the reasons set forth below, we hold that the constitutional exclusionary rule does apply to such forfeiture proceedings and consequently reverse the judgment of the Pennsylvania Supreme Court.

As this Court has acknowledged, "[t]he leading case on the subject of search and seizure is *Boyd* v. *United States*, 116 U. S. 616." *Carroll* v. *United States*, 267 U. S. 132, 147. See *Mapp* v. *Ohio*, *supra*, at 646–647. *Boyd* v. *United States*, 116 U. S. 616, itself was not a criminal case but was a proceeding by the United States to forfeit 35 cases of plate glass which had allegedly been imported without payment of the customs duty. The District Judge in the case entered an order compelling the owners of the plate glass to produce certain records which would aid the United States in proving its case for forfeiture. The question before the Court in *Boyd* was whether the compulsory production of a man's private papers for their evidentiary use against him in a proceeding to forfeit his property for alleged fraud against the revenue laws constituted an unreasonable search and seizure within the

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[5] See *Commonwealth* v. *One 1958 Plymouth Sedan*, 414 Pa. 540, 201 A. 2d 427; *Berkowitz* v. *United States*, 340 F. 2d 168 (C. A. 1st Cir.); *United States* v. *$5,608.30 in United States Coin and Currency*, 326 F. 2d 359 (C. A. 7th Cir.); *United States* v. *$1,058.00 in United States Currency*, 323 F. 2d 211 (C. A. 3d Cir.); *United States* v. *Carey*, 272 F. 2d 492 (C. A. 5th Cir.); *United States* v. *One 1956 Ford Tudor Sedan*, 253 F. 2d 725 (C. A. 4th Cir.); *United States* v. *Physic*, 175 F. 2d 338 (C. A. 2d Cir.); *United States* v. *Butler*, 156 F. 2d 897 (C. A. 10th Cir.); *United States* v. *One 1963 Cadillac Hardtop*, 220 F. Supp. 841 (D. C. E. D. Wis.). See also *Cleary* v. *Bolger*, 371 U. S. 392, 401, 403 (concurring opinion).

meaning of the Fourth Amendment of the Constitution. In holding that the Fourth Amendment applied and barred such attempted seizure, Mr. Justice Bradley, for the Court stated:

> "We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal. In this very case, the ground of forfeiture as declared in the 12th section of the act of 1874, on which the information is based, consists of certain acts of fraud committed against the public revenue in relation to imported merchandise, which are made criminal by the statute; and it is declared, that the offender shall be fined not exceeding $5000 nor less than $50, or be imprisoned not exceeding two years, or both; and in addition to such fine such merchandise shall be forfeited. These are the penalties affixed to the criminal acts; the forfeiture sought by this suit being one of them. If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants—that is, civil in form—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one. . . . As, therefore, suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all

the purposes of the Fourth Amendment of the Constitution . . . ." *Boyd* v. *United States, supra,* at 633–634.

This authoritative statement and the holding by the Court in *Boyd* that the Government could not seize evidence in violation of the Fourth Amendment for use in a forfeiture proceeding would seem to be dispositive of this case. The Commonwealth, however, argues that *Boyd* is factually distinguishable as it involved a subpoena sought by the Government for the production of evidence whereas the issue here is the admissibility of illegally seized evidence already in the Government's possession. Although there is this factual difference between *Boyd* and the case at bar, nevertheless the basic holding of *Boyd* applies with equal, if not greater, force to the case before us. In both the *Boyd* situation and here the essential question is whether evidence—in *Boyd* the books and records, here the results of the search of the car—the obtaining of which violates the Fourth Amendment may be relied upon to sustain a forfeiture. *Boyd* holds that it may not.

The Commonwealth further argues that *Boyd's* unequivocal statement that the Fourth Amendment applies to forfeiture proceedings as well as criminal prosecutions has been undermined by the statements of this Court in *United States* v. *Jeffers,* 342 U. S. 48, 54, and *Trupiano* v. *United States,* 334 U. S. 699, 710. *Jeffers* and *Trupiano,* unlike *Boyd,* were not forfeiture cases. They were federal criminal prosecutions. In both cases the Court held that evidence seized in violation of the Fourth Amendment was not admissible notwithstanding the fact that the evidence involved was contraband. By way of dictum, however, since the point was not before it, the Court stated in these cases that its ruling that the contraband was excludable as illegally seized did not mean that the

Government was required to return the illegally imported narcotics to Jeffers or the unregistered still, alcohol and mash to Trupiano.

The nature of the contraband involved in these cases clearly explains these statements of the Court. Both *Trupiano* and *Jeffers* concerned objects the possession of which, without more, constitutes a crime.[6] The repossession of such *per se* contraband by Jeffers and Trupiano would have subjected them to criminal penalties. The return of the contraband would clearly have frustrated the express public policy against the possession of such objects. See *United States* v. *Jeffers, supra,* at 53–54.

It is apparent that the nature of the property here, though termed contraband by Pennsylvania, is quite different. There is nothing even remotely criminal in possessing an automobile. It is only the alleged use to which this particular automobile was put that subjects Mr. McGonigle to its possible loss. And it is conceded here that the Commonwealth could not establish an illegal use without using the evidence resulting from the search which is challenged as having been in violation of the Constitution. Furthermore, the return of the automobile to the owner would not subject him to any possible criminal penalties for possession or frustrate any public policy concerning automobiles, as automobiles. This distinction between what has been described as contraband *per se* and only derivative contraband has indeed been recognized by Pennsylvania itself in its requirement of mandatory forfeiture of illegal liquor, and stills, and only discretionary forfeiture of such things as automobiles illegally used. See Purdon's Pa. Stat. Ann., Tit. 47, § 6–602 (e) (1964

[6] See, as to *Trupiano,* Internal Revenue Code of 1939, §§ 2803 (a), 2810 (a), 53 Stat. 303, 308; as to *Jeffers,* Internal Revenue Code of 1939, § 2553 (a), 53 Stat. 271; Narcotic Drugs Import and Export Act, 42 Stat. 596, 21 U. S. C. § 174 (1958 ed.).

Cum. Supp.). We, therefore, do not have a case before us in any way analogous to the contraband involved in *Jeffers* and *Trupiano* and these cases can in no way be deemed to impair the continued validity of *Boyd* which, like this case, involved property not intrinsically illegal in character.[7]

Finally as Mr. Justice Bradley aptly pointed out in *Boyd,* a forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law. In this case McGonigle, the driver and owner of the automobile, was arrested and charged with a criminal offense against the Pennsylvania liquor laws. The record does not disclose which particular offense or offenses he was charged with committing.[8] If convicted of any one of the possible offenses involved, however, he would be subject, if a

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[7] Nor has the continued validity of *Boyd* been in any way impaired by the decisions of this Court in *United States* v. *One Ford Coupe Automobile,* 272 U. S. 321, or *Dodge* v. *United States,* 272 U. S. 530. The question involved in both of these cases was not the introduction of evidence seized in violation of the Constitution but that of whether evidence seized by one without statutory authority could be used when its seizure was later ratified by an official with statutory authority. Indeed in *Dodge* v. *United States, supra,* at 532, Mr. Justice Holmes, for the Court, expressly recognized that the case did not involve exclusion of evidence obtained by an unlawful search and seizure and stated:

"The exclusion of evidence obtained by an unlawful search and seizure stands on a different ground. If the search and seizure are unlawful as invading personal rights secured by the Constitution those rights would be infringed yet further if the evidence were allowed to be used."

[8] Under Pennsylvania law on the alleged facts of this case, McGonigle presumably could have been charged with violating one or more of the following subsections of Purdon's Pa. Stat. Ann., Tit. 47, § 4–491: (2) possession or transport of liquor that has not been purchased from a Pennsylvania Liquor Store; (4) possession of untaxed liquor; (11) illegal importation of liquor into the Commonwealth.

first offender, to a minimum penalty of a $100 fine and a maximum penalty of a $500 fine.[9] In this forfeiture proceeding he was subject to the loss of his automobile, which at the time involved had an estimated value of approximately $1,000,[10] a higher amount than the maximum fine in the criminal proceeding. It would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible.[11] That the forfeiture is clearly a penalty for the criminal offense and can result in even greater punishment than the criminal prosecution has in fact been recognized by the Pennsylvania courts.

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[9] Purdon's Pa. Stat. Ann., Tit. 47, § 4–494 (a) (1964 Cum. Supp.) provides:

"Any person who shall violate any of the provisions of this article, except as otherwise specifically provided, shall be guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to pay a fine of not less than one hundred dollars ($100), nor more than five hundred dollars ($500), and on failure to pay such fine, to imprisonment for not less than one month, nor more than three months, and for any subsequent offense, shall be sentenced to pay a fine not less than three hundred dollars ($300), nor more than five hundred dollars ($500), and to undergo imprisonment for a period not less than three months, nor more than one year."

[10] See National Market Reports, Inc., Red Book, Jan. 1–Feb. 14, 1961, Region A, 114.

[11] This Court in *Boyd* v. *United States, supra,* at 638, rejected any argument that the technical character of a forfeiture as an *in rem* proceeding against the goods had any effect on the right of the owner of the goods to assert as a defense violations of his constitutional rights. The Court stated:

"[A]lthough the owner of goods, sought to be forfeited by a proceeding *in rem,* is not the nominal party, he is, nevertheless, the substantial party to the suit; he certainly is so, after making claim and defence; and, in a case like the present, he is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offence."

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In *Commonwealth* v. *One 1959 Chevrolet Impala Coupe,* involving a forfeiture in 1962, the Pennsylvania Superior Court in affirming the exercise of discretion to waive a forfeiture following a criminal prosecution, stated:

> "It seemed to the court below that to make this man pay the sum of $500.00 in fines, together with the costs of the proceeding and the storage cost for the automobile, was sufficient punishment under all the circumstances. To forfeit a 1959 Chevrolet Impala coupe in addition to the above seemed to the court below to be entirely out of proportion to the crime involved. We cannot say that the court below abused its discretion in so acting." 201 Pa. Super. 145, 150, 191 A. 2d 717, 719.

In sum, we conclude that the nature of a forfeiture proceeding, so well described by Mr. Justice Bradley in *Boyd,* and the reasons which led the Court to hold that the exclusionary rule of *Weeks* v. *United States, supra,* is obligatory upon the States under the Fourteenth Amendment, so well articulated by Mr. Justice Clark in *Mapp,* support the conclusion that the exclusionary rule is applicable to forfeiture proceedings such as the one involved here. This being the case, the judgment of the Pennsylvania Supreme Court must be reversed. Our holding frees the Pennsylvania court on remand to review the trial court's finding that the officials did not in this case have probable cause for the search involved, a question which it previously did not consider necessary to decide.[12]

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[12] The applicable standard of what constitutes probable cause, as stated by Mr. Justice Clark for the Court in *Ker* v. *California,* 374 U. S. 23, 33, "is the same under the Fourth and Fourteenth Amendments." Cf. *Beck* v. *Ohio,* 379 U. S. 89; *Aguilar* v. *Texas,* 378 U. S. 108; *Henry* v. *United States,* 361 U. S. 98; *Carroll* v. *United States,* 267 U. S. 132, 153–154.

The judgment of the Supreme Court of Pennsylvania is reversed and the cause is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, concurring.

The language of the Fourth Amendment forbids "unreasonable searches and seizures" but it does not expressly or by implication provide that evidence secured in such a way cannot be used in a prosecution against an accused. Congress could, of course, pass a law to preclude the use of evidence so secured in the federal courts, but I do not believe this Court or any other has constitutional power to pass such a law itself. See *Wolf* v. *Colorado,* 338 U. S. 25, 39 (concurring opinion). For these reasons I cannot agree that because we ourselves might believe the practice of obtaining evidence in that manner "shocks the conscience" or is "shabby" or "arbitrary," we are commanded or even authorized by the Constitution to prevent its use as evidence. That seems to me to be amending the Constitution, which is the business of the people, not interpreting it, which is the business of the courts. But the Fifth Amendment does specifically provide that "No person . . . shall be compelled in any criminal case to be a witness against himself," and this Court held in *Boyd* v. *United States,* 116 U. S. 616, 634–635, that "a compulsory production of the private books and papers of the owner of goods sought to be forfeited in . . . a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment." *Boyd* therefore stands for the constitutional principle that evidence secured by unreasonable search and seizure is compelled

evidence, and is therefore barred from use in criminal cases by the Fifth Amendment's provision that "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." See *Rochin* v. *California,* 342 U. S. 165, 174 (concurring opinion). The Court in *Boyd* thus based its exclusion of unlawfully seized evidence squarely on the specific prohibitions of the Fourth and Fifth Amendments, and not merely on the personal predilections of judges against such use.

This Court in *Mapp* v. *Ohio,* 367 U. S. 643, 646, recognized as the Court had in *Boyd* that "the Fourth and Fifth Amendments run almost into each other." 116 U. S., at 630. At the very outset of its opinion in *Mapp* this Court relied on and quoted at length from the opinion in the *Boyd* case, which had relied on the Fourth and Fifth Amendments together to forbid the use in court of evidence obtained through an unreasonable search or seizure. 367 U. S., at 646–647. Use of such evidence, the Court said in *Mapp,* would be "tantamount to coerced testimony." 367 U. S., at 656. And we said last Term in *Malloy* v. *Hogan,* 378 U. S. 1, 8:

> "*Mapp* held that the Fifth Amendment privilege against self-incrimination implemented the Fourth Amendment in such cases, and that the two guarantees of personal security conjoined in the Fourteenth Amendment to make the exclusionary rule obligatory on the States. We relied upon the great case of *Boyd* v. *United States,* 116 U. S. 616 . . . ."

It was because of the Court's reliance on the *Boyd* doctrine—which held that the Fourth and Fifth Amendments *together* barred use of unreasonably seized evidence—that I joined the Court's opinion in *Mapp.* See 367 U. S. 643, 661 (concurring opinion). And for that same reason I agree with the Court today that the Fourth Amendment's protection against unlawful search and seizure and

the Fifth Amendment's protection against compelled testimony apply in forfeiture proceedings like the one here. This was the holding in *Boyd,* which itself involved a forfeiture proceeding, and I would follow it in forfeiture proceedings as well as in criminal cases. In doing so, I recognize that this interpretation was reached in *Boyd* on the principle that "constitutional provisions for the security of person and property should be liberally construed." 116 U. S., at 635. But that interpretive principle, I think, is a desirable one if our Constitution is to be given its proper place in our Government.

I also agree with the Court that our remand expresses no view as to whether the trial court was correct in its ruling on the issue of probable cause, and that the Supreme Court of Pennsylvania is free on remand to review the trial court's finding, and that of course, as declared in *Mapp,* the standard of probable cause is the same in the state courts as in the federal courts.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 705 and 901 were intentionally omitted, in order to make it possible to publish the orders in the current advance sheets or preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM MARCH 1 THROUGH APRIL 26, 1965.

MARCH 1, 1965.

Miscellaneous Orders.

No. 18, Original. ILLINOIS *v.* MISSOURI. State of Illinois directed to file reply to response within 30 days. *William G. Clark,* Attorney General of Illinois, *Richard A. Michael,* Assistant Attorney General, and *Terence F. MacCarthy,* Special Assistant Attorney General, for plaintiff. *Norman H. Anderson,* Attorney General of Missouri, and *J. Gordon Siddens* and *Howard L. McFadden,* Assistant Attorneys General, for defendant. [For earlier order herein, see 379 U. S. 952.]

No. 17. CALHOON, PRESIDENT, OR PETERS, SECRETARY-TREASURER OF DISTRICT NO. 1, NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, AFL–CIO *v.* HARVEY ET AL. (379 U. S. 134, rehearing denied, 379 U. S. 984.) Motion of respondents to retax costs denied. *Burton H. Hall* on the motion. *David Scribner* for petitioner, in opposition.

No. 63. COMMISSIONER OF INTERNAL REVENUE *v.* BROWN ET AL. C. A. 9th Cir. (Certiorari granted, 377 U. S. 962.) Motion of Dana Latham for leave to participate in oral argument, as counsel for *amici curiae,* denied. *Dana Latham* on the motion.

No. 237. COMMISSIONER OF INTERNAL REVENUE *v.* MERRITT ET AL. C. A. 4th Cir. (Certiorari granted, 379 U. S. 886.) Motion of respondents to enlarge time for oral argument granted and 30 additional minutes allotted for that purpose. *John Y. Merrell* on the motion.

No. 82. CARRINGTON *v.* RASH ET AL. Sup. Ct. Tex. (Certiorari granted, 379 U. S. 812.) Motion of respondent Carr to file reply brief and supplemental brief granted, said briefs having been lodged with the Court on February 10, 1965, and having been fully considered by the Court in the disposition of this case. THE CHIEF JUSTICE took no part in the consideration or decision of these motions. *Waggoner Carr,* Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, and *Mary K. Wall,* Assistant Attorney General, on the motions.

No. 291. MINNESOTA MINING & MANUFACTURING CO. *v.* NEW JERSEY WOOD FINISHING CO. C. A. 3d Cir. (Certiorari granted, 379 U. S. 877.) Motion of Highland Supply Corp. for leave to file brief, as *amicus curiae,* granted. *Alex Akerman, Jr.,* and *Thomas A. Ziebarth* on the motion.

No. 422. FEDERAL TRADE COMMISSION *v.* CONSOLIDATED FOODS CORP. C. A. 7th Cir. (Certiorari granted, 379 U. S. 912.) Motion of Trabon Engineering Corp. et al. for leave to participate in oral argument, as *amici curiae,* denied. *Herbert Bruce Griswold* and *Charles B. Gordon* on the motion.

No. 443. HUGHES TOOL CO. ET AL. *v.* TRANS WORLD AIRLINES, INC.; and

No. 501. HUGHES TOOL CO. *v.* TRANS WORLD AIRLINES, INC., ET AL. C. A. 2d Cir. (Certiorari granted, 379 U. S. 912.) Motion of petitioners to consolidate cases for oral argument denied. *Paul A. Porter, Dennis G. Lyons* and *Chester C. Davis* on the motion. *John F. Sonnett* for Trans World Airlines, Inc., and *Bruce Bromley* for Equitable Life Assurance Society of the United States et al., respondents in No. 501, in opposition.

No. 948, Misc. WEISSENBORN *v.* JONES ET AL. On motion for leave to file petition for writ of mandamus. Motion to accelerate filing of briefs and to advance denied. *Lewis M. Kanner* for petitioner on the motion.

No. 873, Misc. THOMAS *v.* PATE, WARDEN. Motion for leave to file petition for writ of certiorari denied.

No. 561, Misc. ALLEN *v.* HASKINS, CORRECTIONAL SUPERINTENDENT. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se*. *William B. Saxbe,* Attorney General of Ohio, and *Leo J. Conway,* Assistant Attorney General, for respondent.

No. 562, Misc. LESTER *v.* HASKINS, CORRECTIONAL SUPERINTENDENT. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se*. *William B. Saxbe,* Attorney General of Ohio, and *Leo J. Conway,* Assistant Attorney General, for respondent.

No. 859, Misc. CANTRELL *v.* WEAKLEY, REFORMATORY SUPERINTENDENT;

No. 872, Misc. GUERRIERI *v.* MAXWELL, WARDEN, ET AL.;

No. 892, Misc. MOORE *v.* RANDOLPH, WARDEN; and

No. 894, Misc. PENRICE *v.* KLINGER, CORRECTIONAL SUPERINTENDENT. Motions for leave to file petitions for writs of habeas corpus denied.

No. 702, Misc. SMITH *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied. *Lyndol L. Young* for petitioner. *Milo V. Olson, William K. Woodburn* and *Edward D. Neuhoff* for respondent Cord.

No. 814, Misc. HERRING *v.* CALIFORNIA ET AL.;
No. 834, Misc. SPELLS *v.* WILSON, WARDEN;
No. 877, Misc. IN RE HODGE; and
No. 897, Misc. CONWAY *v.* WILSON ET AL. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied.

No. 775, Misc. WAREHOUSE UNION LOCAL 6, INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION *v.* WOLLENBERG, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied. *Aubrey Grossman* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board.

No. 801, Misc. DAVIS *v.* CECIL, CHIEF JUDGE, U. S. COURT OF APPEALS. Motion for leave to file petition for writ of mandamus denied.

No. 671, Misc. SHIELDS ET UX. *v.* BLAISDELL, MAYOR, ET AL. Motion for leave to proceed on typewritten papers granted. Motion for leave to file petition for writ of mandamus denied. *Joseph A. Ryan* for petitioners.

Certiorari Granted. (See also No. 740, *ante*, p. 127.)

No. 755. WIRTZ, SECRETARY OF LABOR *v.* STEEPLETON GENERAL TIRE CO., INC., ET AL. C. A. 6th Cir. Certiorari granted. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Solicitor General Cox, Wayne G. Barnett, Charles Donahue, Bessie Margolin* and *Caruthers G. Berger* for petitioner. *Wade H. Sides, Jr.*, for respondents. Reported below: 330 F. 2d 804.

No. 423. SHUTTLESWORTH *v.* CITY OF BIRMINGHAM. Ct. App. Ala. Certiorari granted. *Jack Greenberg, Norman Amaker, Peter A. Hall* and *Orzell Billingsley, Jr.*, for petitioner. *Earl McBee* for respondent. Reported below: 42 Ala. App. 296, 161 So. 2d 796.

No. 657. CARNATION CO. *v.* PACIFIC WESTBOUND CONFERENCE ET AL. C. A. 9th Cir. Certiorari granted. *Arthur B. Dunne* and *James R. Baird, Jr.*, for petitioner. *Edward D. Ransom* for Pacific Westbound Conference; *Herman Goldman* and *Elkan Turk, Jr.*, for Far East Conference et al.; *Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel, Irwin A. Seibel, James L. Pimper* and *Robert E. Mitchell* for the Federal Maritime Commission, respondents. Reported below: 336 F. 2d 650.

No. 733. GUNTHER *v.* SAN DIEGO & ARIZONA EASTERN RAILWAY CO. C. A. 9th Cir. Certiorari granted. *Clifton Hildebrand* for petitioner. *Waldron A. Gregory* and *William R. Denton* for respondent. Reported below: 336 F. 2d 543.

No. 754. IDAHO SHEET METAL WORKS, INC. *v.* WIRTZ, SECRETARY OF LABOR. C. A. 9th Cir. Certiorari granted limited to Question 2 presented by petition which reads as follows:

"2. Is the employer's shop a retail establishment and entitled to the exemption as such under Section 13 (a) of the Fair Labor Standards Act?"

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *T. H. Eberle* for petitioner. *Solicitor General Cox, Charles Donahue, Bessie Margolin, Robert E. Nagle* and *Caruthers G. Berger* for respondent. Reported below: 335 F. 2d 952.

Certiorari Denied. (See also No. 759, *ante,* p. 124; No. 653, Misc., *ante,* p. 126; and Misc. Nos. 814, 834, 877 and 897, *supra.*)

No. 680. GIGANTE *v.* UNITED STATES;

No. 681. GENOVESE *v.* UNITED STATES;

No. 682. EVOLA *v.* UNITED STATES;

No. 683. LESSA *v.* UNITED STATES; and

No. 692. SANTORA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Wilfred L. Davis* for petitioner in No. 680. *Edward Bennett Williams, Robert L. Weinberg* and *Wilfred L. Davis* for petitioner in No. 681. *Maurice Edelbaum* for petitioner in No. 682. *Henry K. Chapman* for petitioner in No. 683. *Herbert S. Siegal* for petitioner in No. 692. *Solicitor General Cox, Assistant Attorney General Miller, Robert S. Erdahl* and *Richard W. Schmude* for the United States. Reported below: 337 F. 2d 552.

No. 713. FORSTER MFG. CO., INC., ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 1st Cir. Certiorari denied. *Richard A. Tilden* for petitioners. *Solicitor General Cox* for respondent. Reported below: 335 F. 2d 47.

No. 715. SOCKMAN ET AL. *v.* SWITZER ET AL.; and

No. 826. SWITZER ET AL. *v.* SOCKMAN ET AL. C. C. P. A. Certiorari denied. *Benton Baker* and *Foster York* for petitioners in No. 715 and respondents in No. 826. *Albert L. Ely, Jr.,* for petitioners in No. 826 and respondents in No. 715. Reported below: 52 C. C. P. A. (Pat.) 759, 333 F. 2d 935.

No. 722. SCHWARTZ-TORRANCE INVESTMENT CORP. *v.* BAKERY & CONFECTIONERY WORKERS UNION, LOCAL NO. 31. Sup. Ct. Cal. Certiorari denied. *Joseph M. McLaughlin* and *Frederick A. Morgan* for petitioner. Reported below: 61 Cal. 2d 766, 394 P. 2d 921.

No. 723. Lake Brady Spiritualist Camp Association *v.* Dix et al. Ct. App. Ohio, Portage County. Certiorari denied. *Eugene Gressman* for petitioner. *Maurice F. Hanning* for respondents.

No. 725. Molinas *v.* New York. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Thomas R. Newman* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent. Reported below: 21 App. Div. 2d 384, 250 N. Y. S. 2d 684.

No. 727. Stanker & Galetto, Inc., et al. *v.* Earth Movers, Inc. Super. Ct. N. J. Certiorari denied. *Augustine A. Repetto* for petitioners. *M. Joseph Greenblatt* for respondent. Reported below: 84 N. J. Super. 178, 201 A. 2d 387.

No. 728. Fleming, dba Green Valley Feed Mill *v.* United States. C. A. 10th Cir. Certiorari denied. *J. R. Modrall* for petitioner. *Solicitor General Cox* for the United States. Reported below: 336 F. 2d 475.

No. 729. Stein *v.* United States. C. A. 9th Cir. Certiorari denied. *Russell E. Parsons* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Daniel H. Benson* for the United States. Reported below: 337 F. 2d 14.

No. 730. Carroll, Trustee in Bankruptcy *v.* Holliman. C. A. 10th Cir. Certiorari denied. *James R. Eagleton* for petitioner. Reported below: 336 F. 2d 425.

No. 739. Colgate-Palmolive Co. *v.* Bryan, U. S. District Judge. C. A. 2d Cir. Certiorari denied. *Edmund F. Lamb* for petitioner. *S. Hazard Gillespie, J. Roger Carroll* and *T. Richard Brown* for respondent.

No. 731. National Lead Co. *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. *Karl Riemer* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Harold C. Wilkenfeld* for respondent. Reported below: 336 F. 2d 134.

No. 734. Estate of Pierpont et al. *v.* Commissioner of Internal Revenue. C. A. 4th Cir. Certiorari denied. *John S. McDaniel, Jr.*, and *John W. Cable III* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, John B. Jones, Jr., Robert N. Anderson* and *Benjamin M. Parker* for respondent. Reported below: 336 F. 2d 277.

No. 735. Rivoli Trucking Corp. *v.* United States. Ct. Cl. Certiorari denied. *William J. Tillinghast, Jr.*, for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for the United States. Reported below: —— Ct. Cl. ——.

No. 736. J. Weingarten, Inc. *v.* Federal Trade Commission et al. C. A. 5th Cir. Certiorari denied. *Edward F. Howrey, John H. Quinn, Jr.*, and *Leon Jaworski* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Sherman L. Cohn* and *J. F. Bishop* for respondents. Reported below: 336 F. 2d 687.

No. 749. United Aircraft Corp. *v.* Lodge 743, International Association of Machinists, AFL–CIO, et al. C. A. 2d Cir. Certiorari denied. *Joseph C. Wells* and *Winthrop A. Johns* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent National Labor Relations Board; and *Plato E. Papps, Mozart G. Ratner* and *William S. Zeman* for respondent unions. Reported below: 337 F. 2d 5.

No. 738. Cascade County Consumers Association et al. *v.* Public Service Commission of Montana et al. Sup. Ct. Mont. Certiorari denied. *C. W. Leaphart* for petitioners. *Francis M. Shea, William H. Dempsey, Jr., William P. Mufich, S. B. Chase, Jr.,* and *John J. Burke, Jr.,* for respondents. Reported below: 144 Mont. 169, 394 P. 2d 856.

No. 737. Craig *v.* United States. C. A. 8th Cir. Certiorari denied. *Jack Holt, Jr.,* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 337 F. 2d 28.

No. 741. Elbert Moore, Inc. *v.* Green, Comptroller of Florida. Sup. Ct. Fla. Certiorari denied. *John R. Lawson, Jr.,* for petitioner. *James W. Kynes,* Attorney General of Florida, and *Gerald Mager,* Assistant Attorney General, for respondent. Reported below: 166 So. 2d 794.

No. 744. Atchison, Topeka & Santa Fe Railway Co. *v.* Horn. Sup. Ct. Cal. Certiorari denied. *Louis M. Welsh* and *John J. Balluff* for petitioner. *John W. Montgomery* for respondent. Reported below: 61 Cal. 2d 602, 394 P. 2d 561.

No. 745. Bishop *v.* Supreme Court of New York et al. Ct. App. N. Y. Certiorari denied. *Frank E. Visco* for petitioner. Reported below: 14 N. Y. 2d 321, 200 N. E. 2d 450; 14 N. Y. 2d 959, 202 N. E. 2d 377.

No. 751. Richards et al. *v.* United States. C. A. 9th Cir. Certiorari denied. *Raymond E. Sutton* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 336 F. 2d 678.

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No. 747. United Aircraft Corp. (Hamilton Standard Division) *v.* National Labor Relations Board. C. A. 2d Cir. Certiorari denied. *Joseph C. Wells* and *Winthrop A. Johns* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 333 F. 2d 819.

No. 752. New York Foreign Freight Forwarders & Brokers Association, Inc., et al. *v.* United States et al. C. A. 2d Cir. Certiorari denied. *Gerald H. Ullman* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, Irwin A. Seibel, Milan C. Miskovsky* and *Jerome B. Blum* for the United States et al. Reported below: 337 F. 2d 289.

No. 753. Kit Manufacturing Co., Inc. *v.* National Labor Relations Board. C. A. 9th Cir. Certiorari denied. *T. H. Eberle* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Melvin Pollack* for respondent. Reported below: 335 F. 2d 166.

No. 758. Marsh *v.* Kansas. Sup. Ct. Kan. Certiorari denied. *Donald I. Mitchell* and *Russell Shultz* for petitioner. *William M. Ferguson,* Attorney General of Kansas, and *J. Richard Foth,* Assistant Attorney General, for respondent. Reported below: 193 Kan. 302, 392 P. 2d 953.

No. 773. KWK Radio, Inc. *v.* Federal Communications Commission. C. A. D. C. Cir. Certiorari denied. *Jack P. Blume* and *Arthur M. Solomon* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Henry Geller* and *Daniel R. Ohlbaum* for respondent. Reported below: —— U. S. App. D. C. ——, 337 F. 2d 540.

No. 760. Florida National Bank of Jacksonville et al., Co-Executors *v.* United States. C. A. 3d Cir. Certiorari denied. *Samuel Lyons Sagendorph* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Loring W. Post* for the United States. Reported below: 336 F. 2d 598.

No. 762. Littwin *v.* United States. C. A. 6th Cir. Certiorari denied. *G. Edward Friar* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 338 F. 2d 141.

No. 764. L. I. Combs & Sons, Inc., et al. *v.* Schreibman. C. A. 7th Cir. Certiorari denied. *Justin Waitkus* for petitioners. *Owen W. Crumpacker* and *Harold Abrahamson* for respondent. Reported below: 337 F. 2d 410.

No. 766. Hynning *v.* Partridge. C. A. D. C. Cir. Certiorari denied. *Clifford J. Hynning, pro se,* and *Lawrence C. Moore* for petitioner. *Philip F. Herrick* for respondent. Reported below: 118 U. S. App. D. C. 331, 335 F. 2d 994.

No. 771. Peterson *v.* United States. C. A. 7th Cir. Certiorari denied. *Anna R. Lavin* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Jones, Joseph M. Howard* and *Burton Berkley* for the United States. Reported below: 338 F. 2d 595.

No. 786. Sweetlake Land & Oil Co., Inc. *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. *Norman F. Anderson* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 334 F. 2d 220.

No. 777. FLEMING *v.* WOLKE, SHERIFF. Sup. Ct. Wis. Certiorari denied. *Ray T. McCann* for petitioner. *Bronson C. La Follette,* Attorney General of Wisconsin, *William A. Platz, Robert D. Martinson* and *Le Roy L. Dalton,* Assistant Attorneys General, and *Robert P. Russell* for respondent. Reported below: 24 Wis. 2d 606, 129 N. W. 2d 841.

No. 779. SPANOS PAINTING CONTRACTORS, INC. *v.* UNION BUILDING & CONSTRUCTION CORP. C. A. 2d Cir. Certiorari denied. *Hamilton O'Dunne* for petitioner. Reported below: 334 F. 2d 457.

No. 781. DUO-BED CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. *Dale M. Stucky* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Melvin Pollack* for respondent. Reported below: 337 F. 2d 850.

No. 782. TUSCALOOSA & VICINITY DISTRICT COUNCIL OF TUSCALOOSA & SELMA, ALABAMA, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *Francis X. Ward, Bernard Dunau* and *C. Paul Barker* for petitioners. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 337 F. 2d 205.

No. 783. STOLLAR *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Charles A. Bellows* for petitioner. *Daniel P. Ward* and *Edward J. Hladis* for respondent. Reported below: 31 Ill. 2d 154, 201 N. E. 2d 97.

No. 784. BATTEN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Roland D. Hartshorn* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 790. National Flexitized Corp. et al. *v.* Flexitized, Inc., et al. C. A. 2d Cir. Certiorari denied. *Deane Ramey* for petitioners. *Robert J. Clerkin* for respondents. Reported below: 335 F. 2d 774.

No. 791. United Mine Workers of America *v.* Price et al., dba Elkhorn Coal Co. C. A. 6th Cir. Certiorari denied. *Harrison Combs* and *M. E. Boiarsky* for petitioner. *Logan E. Patterson* and *James S. Greene, Jr.*, for respondents. Reported below: 336 F. 2d 771.

No. 792. Monterey County Building & Construction Trades Council *v.* National Labor Relations Board. C. A. 9th Cir. Certiorari denied. *Louis Sherman* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Allison W. Brown, Jr.*, for respondent. Reported below: 335 F. 2d 927.

No. 794. Geoly et al. *v.* New York et al. Ct. App. N. Y. Certiorari denied. *William W. Kleinman* for petitioners. *Frank S. Hogan* and *H. Richard Uviller* for respondents.

No. 798. Tack et al. *v.* Mellon National Bank & Trust Co., Trustee, et al. Sup. Ct. Pa. Certiorari denied. *Zeno Fritz* for petitioners. *Stephen E. Nash* for respondents. Reported below: 415 Pa. 427, 203 A. 2d 538.

No. 799. Gordon et al. *v.* Massachusetts. Sup. Jud. Ct. Mass. Certiorari denied. *Paul T. Smith* for petitioners. *Edward W. Brooke,* Attorney General of Massachusetts, and *Gael Mahony* and *William B. Dockser,* Special Assistant Attorneys General, for respondent. Reported below: 348 Mass. 29, 201 N. E. 2d 504.

No. 795. Rossi *v.* Marx et al. Ct. App. N. Y. Certiorari denied. *Lucian J. Rossi,* petitioner, *pro se. Sylvan D. Freeman* for respondents.

No. 837. National Customs Brokers & Forwarders Association of America, Inc. *v.* Federal Maritime Commission et al. C. A. 2d Cir. Certiorari denied. *Charles S. Haight* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, Irwin A. Seibel, Milan C. Miskovsky* and *Jerome B. Blum* for respondents. Reported below: 337 F. 2d 289.

No. 380. Todd et al. *v.* Joint Apprenticeship Committee et al. C. A. 7th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *William R. Ming, Jr.,* and *George N. Leighton* for petitioners. *George S. Hoban* for Joint Apprenticeship Committee et al.; *Paul R. Conaghan* for Bethlehem Steel Co.; and *Bernard M. Mamet* for Local Union No. 1, respondents. *Solicitor General Cox* filed a memorandum for the United States. Reported below: 332 F. 2d 243.

No. 785. Downs et al. *v.* Board of Education of Kansas City, Kansas, et al. C. A. 10th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Robert L. Carter* and *Maria L. Marcus* for petitioners. Reported below: 336 F. 2d 988.

No. 787. Switzerland Co. et al. *v.* Udall, Secretary of the Interior, et al. C. A. 4th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Richard E. Thigpen* for petitioners. *Solicitor General Cox* and *Roger P. Marquis* for respondents. Reported below: 337 F. 2d 56.

No. 732. Reich et al. *v.* Webb et al. C. A. 9th Cir. Motion of Beverly Hills Federal Savings & Loan Association to be added as party respondent granted. Certiorari denied. *Jack Corinblit* for petitioners. *Solicitor General Cox* for the Federal Home Loan Bank Board, *Rodney K. Potter* for Lytton Financial Corp. et al., *John P. Pollock* for Webb et al., and *Robert B. Hankins, Harold David Cohen, Thomas N. Dowd* and *Glen R. Miller* for Beverly Hills Federal Savings & Loan Association, respondents. Reported below: 336 F. 2d 153.

No. 743. Levine *v.* United States. C. A. 5th Cir. Motion to waive timeliness of filing petition for writ of certiorari denied. Certiorari denied. *Nicholas J. Capuano* for petitioner. *Solicitor General Cox* for the United States. Reported below: 334 F. 2d 83.

No. 746. Alexander et al. *v.* Todman, Supervisor of Elections, et al. C. A. 3d Cir. Certiorari denied. Mr. Justice Goldberg took no part in the consideration or decision of this petition. *William H. D. Cox* for petitioners. *Alfred L. Scanlan, David B. Isbell* and *John L. Maduro* for respondents. Reported below: 337 F. 2d 962.

No. 757. Trice, Executrix *v.* Commercial Union Assurance Co., Ltd., et al. C. A. 6th Cir. Motion of petitioner to strike portions of respondents' brief denied. Motion of Fyke Farmer to strike portions of opinion of District Court denied. Certiorari denied. *Fyke Farmer* for petitioner. *Lon P. MacFarland* and *Joe W. Henry, Jr.*, for respondents. Reported below: 334 F. 2d 673.

No. 441, Misc. Burdette *v.* Harris, Warden. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent.

No. 796. AWARE, INC., ET AL. *v.* FAULK. Ct. App. N. Y. Motions of petitioners for leave to proceed without certifying record and to dispense with printing petition for writ of certiorari granted. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Henry S. Middendorf, Jr.,* for petitioners. *Louis Nizer* for respondent.

No. 802. KINNEAR-WEED CORP. *v.* INGRAHAM, U. S. DISTRICT JUDGE. C. A. 5th Cir. Motion of petitioner to strike brief of Humble Oil & Refining Co. et al. denied. Certiorari denied. *William E. Kinnear* for petitioner. *Garrett R. Tucker, Jr., Cornelius O. Ryan* and *William J. Merrill* for Humble Oil & Refining Co. et al.

No. 32, Misc. MEATON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg, Jerome Nelson* and *Jerome M. Feit* for the United States. Reported below: 328 F. 2d 379.

No. 272, Misc. WOYKOVSKY *v.* CHAPPELL, CHAIRMAN, U. S. BOARD OF PAROLE, ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondents. Reported below: —— U. S. App. D. C. ——, 336 F. 2d 927.

No. 596, Misc. MCGANN *v.* FEDERAL PRISON INDUSTRIES ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for respondents.

No. 622, Misc. SHROUT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States.

No. 398, Misc. GARELLI ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Charles B. Evins* and *R. Eugene Pincham* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 333 F. 2d 649.

No. 479, Misc. BRADY *v.* CAMERON, HOSPITAL SUPERINTENDENT, ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondents.

No. 535, Misc. LEE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, and *James T. Carlisle*, Assistant Attorney General, for respondent. Reported below: 166 So. 2d 131.

No. 563, Misc. MURRAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for the United States. Reported below: 334 F. 2d 616.

No. 636, Misc. PROCTOR *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *A. Alvis Layne* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: —— U. S. App. D. C. ——, 338 F. 2d 533.

No. 640, Misc. DI SILVESTRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Douglas* and *Morton Hollander* for the United States.

No. 645, Misc. JONES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 646, Misc. NUTLEY ET AL. *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. *Jack McManus* for petitioners. *George Thompson,* Attorney General of Wisconsin, and *William A. Platz, Betty R. Brown* and *Warren H. Resh,* Assistant Attorneys General, for respondent. Reported below: 24 Wis. 2d 527, 129 N. W. 2d 155.

No. 658, Misc. MERTZ *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 269 Minn. 312, 130 N. W. 2d 631.

No. 659, Misc. POLIZZANO *v.* UNITED STATES;
No. 660, Misc. BARCELLONA *v.* UNITED STATES;
No. 712, Misc. MAZZIE *v.* UNITED STATES; and
No. 798, Misc. DI PALERMO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Allen S. Stim* for petitioner in No. 659, Misc. *William J. Manning* for petitioner in No. 660, Misc. Petitioner *pro se* in No. 712, Misc. *Albert J. Krieger* for petitioners in No. 798, Misc. *Solicitor General Cox, Assistant Attorney General Miller, Robert S. Erdahl* and *Richard W. Schmude* for the United States. Reported below: 337 F. 2d 552.

No. 661, Misc. HUNTER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Mabel D. Haden* 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. ——, 338 F. 2d 283.

No. 699, Misc. NOLAN *v.* STEINHAUSER, ACTING WARDEN. C. A. 8th Cir. Certiorari denied.

No. 663, Misc. THOMPSON *v.* ANDERSON, JAIL SUPERINTENDENT. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Doar* and *Harold H. Greene* for respondent.

No. 664, Misc. HUFFMAN *v.* MARONEY, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 669, Misc. BRADLEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States.

No. 670, Misc. PULASKI *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Petitioner *pro se*. *Bronson C. La Follette*, Attorney General of Wisconsin, and *William A. Platz, Betty R. Brown* and *Harold H. Persons*, Assistant Attorneys General, for respondent. Reported below: 24 Wis. 2d 450, 129 N. W. 2d 204.

No. 677, Misc. LAWSON *v.* UNITED STATES. C. A. 3d 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: 337 F. 2d 800.

No. 688, Misc. BLAIR *v.* DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Certiorari denied. *James J. Laughlin* for petitioner. *Chester H. Gray, Milton D. Korman, Hubert B. Pair* and *Ted D. Kuemmerling* for the District of Columbia, and *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States.

No. 694, Misc. DOBY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Orville A. Harlan* for petitioner. Reported below: 383 S. W. 2d 418.

No. 703, Misc. GILCREASE *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL. C. A. 9th Cir. Certiorari denied.

No. 713, Misc. BASILONE *v.* MAXWELL, WARDEN. Sup. Ct. Ohio. Certiorari denied. Reported below: 177 Ohio St. 12, 201 N. E. 2d 525.

No. 718, Misc. PUTNAM *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 729, Misc. SWICEGOOD *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 733, Misc. BARRON *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 238 Ore. 527, 395 P. 2d 158.

No. 734, Misc. MYLES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *De Long Harris* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States.

No. 738, Misc. CAREY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 739, Misc. JORDAN *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 193 Kan. 664, 396 P. 2d 342.

No. 746, Misc. MCCOY *v.* MAXWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 742, Misc. UNDERWOOD ET AL. *v.* BOMAR, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 335 F. 2d 783.

No. 747, Misc. HANSEN *v.* BURKE, WARDEN. Sup. Ct. Wis. Certiorari denied.

No. 752, Misc. STILTNER *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL. Sup. Ct. Wash. Certiorari denied.

No. 753, Misc. LEHMAN *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 51 Ill. App. 2d 163, 200 N. E. 2d 528.

No. 754, Misc. LAWRENCE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 756, Misc. RAWLS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 330 F. 2d 777.

No. 758, Misc. TEEL *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 759, Misc. BRYAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 760, Misc. OPPEL *v.* MARYLAND. C. A. 4th Cir. Certiorari denied.

No. 782, Misc. COHEN *v.* CURTIS PUBLISHING CO. ET AL. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Edward C. Stringer* for respondents. Reported below: 333 F. 2d 974.

No. 761, Misc. WANSLEY *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *Len W. Holt, Arthur Kinoy, Robert E. Knowlton* and *William M. Kunstler* for petitioner. Reported below: 205 Va. 412, 419, 137 S. E. 2d 865, 870.

No. 762, Misc. JAMES *v.* MAINE ET AL. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 160 Me. 362, 204 A. 2d 187.

No. 763, Misc. MORRIS *v.* WHITE ET AL. Ct. Civ. App. Tex., 4th Sup. Jud. Dist. Certiorari denied. Reported below: 380 S. W. 2d 916.

Nos. 764, Misc., 767, Misc., 768, Misc., 769, Misc., 774, Misc., and 776, Misc. FAIR *v.* FAIR. Sup. Ct. Fla. Certiorari denied.

No. 766, Misc. WELTER *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. *Vaughn S. Conway* for petitioner. Reported below: 24 Wis. 2d 527, 129 N. W. 2d 155.

No. 770, Misc. STONE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 335 F. 2d 86.

No. 777, Misc. CARLUCCI *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 780, Misc. TAYLOR *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 170 So. 2d 843.

No. 781, Misc. BICKLEY ET AL. *v.* DUNBAR, CORRECTIONS DIRECTOR. Sup. Ct. Cal. Certiorari denied.

No. 771, Misc. CARCERANO *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 238 Ore. 208, 390 P. 2d 923.

No. 772, Misc. GREENWELL *v.* ANDERSON, JAIL SUPERINTENDENT. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for respondent.

No. 773, Misc. LA ROSE *v.* MCCAULEY, DISTRICT ATTORNEY. Sup. Ct. Wis. Certiorari denied.

No. 787, Misc. SILVA *v.* COX, WARDEN. Sup. Ct. N. M. Certiorari denied.

No. 789, Misc. KELLY *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA. C. A. 7th Cir. Certiorari denied.

No. 793, Misc. BROWN *v.* CALIFORNIA. Dist. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 795, Misc. GORECKI *v.* BURKE, WARDEN. Sup. Ct. Wis. Certiorari denied.

No. 797, Misc. MCGRANE *v.* WARDEN, CLINTON PRISON. C. A. 2d Cir. Certiorari denied.

No. 799, Misc. PETERSON *v.* LANE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 800, Misc. BERGER ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *John A. Dillon* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 338 F. 2d 485.

No. 796, Misc. CASE *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 177 Neb. 774, 131 N. W. 2d 191.

No. 803, Misc. THOMAS *v.* TEXAS. C. A. 5th Cir. Certiorari denied.

No. 805, Misc. BRADY *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Sup. Ct. Pa. Certiorari denied. Petitioner *pro se*. *D. J. C. O'Donnell* for respondent.

No. 806, Misc. HAYNES *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: 339 F. 2d 30.

No. 809, Misc. BRADY *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 810, Misc. EX PARTE HINTON. Sup. Ct. N. M. Certiorari denied.

No. 812, Misc. TURNER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 819, Misc. STILTNER *v.* WASHINGTON ET AL. Sup. Ct. Wash. Certiorari denied.

No. 820, Misc. LOMAX *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 833, Misc. SCHLUTTIG *v.* CONTINENTAL HOTEL ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *John F. Cooney* for respondents.

No. 817, Misc. FRYE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 337 F. 2d 385.

No. 826, Misc. SMITH *v.* ILLINOIS ET AL. Cir. Ct., Edgar County, Ill. Certiorari denied.

No. 840, Misc. MARION ET AL. *v.* CITY OF LANDER, WYOMING, ET AL. Sup. Ct. Wyo. Certiorari denied. *John J. Spriggs, Sr.*, and *John J. Spriggs, Jr.*, for petitioners. *Thomas A. Nicholas* and *W. J. Nicholas* for respondents. Reported below: 394 P. 2d 910.

No. 846, Misc. DULACY *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. *Robert A. Cohen* for petitioner.

No. 847, Misc. GEORGE *v.* RANDOLPH, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 855, Misc. BURNS *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 339 F. 2d 883.

No. 566, Misc. RALPH *v.* PEPERSACK, WARDEN. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Edward L. Genn* and *Lawrence Speiser* for petitioner. *Thomas B. Finan*, Attorney General of Maryland, and *Robert F. Sweeney*, Assistant Attorney General, for respondent. Reported below: 335 F. 2d 128.

No. 291, Misc. CANTU *v.* UNITED STATES. C. A. 5th Cir. Certiorari and other relief denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 9, Misc. CABEY *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se.* *James C. Crumlish, Jr.,* and *Gordon Gelfond* for respondent.

No. 642, Misc. WALKER *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Oberdorfer, I. Henry Kutz* and *George F. Lynch* for respondents. Reported below: 333 F. 2d 768.

Rehearing Denied.

No. 456, October Term, 1963. ETCHEVERRY *v.* UNITED STATES, 375 U. S. 930, 989; 376 U. S. 939. Motion for leave to file third petition for rehearing denied.

No. 6. HENRY *v.* MISSISSIPPI, 379 U. S. 443;

No. 38. CITY OF EL PASO *v.* SIMMONS, 379 U. S. 497;

No. 40. STANFORD *v.* TEXAS, 379 U. S. 476;

No. 49. COX *v.* LOUISIANA, 379 U. S. 559;

No. 415. GOLDNER *v.* SILVER, DISTRICT ATTORNEY, KINGS COUNTY, NEW YORK, 379 U. S. 959;

Nos. 510 and 542. GIANFRANCESCO *v.* OHIO, 379 U. S. 932;

No. 547. KEHOE *v.* BOYLE, EXECUTOR, ET AL., 379 U. S. 959;

No. 556. SAKRETE OF NORTHERN CALIFORNIA, INC. *v.* NATIONAL LABOR RELATIONS BOARD, 379 U. S. 961;

No. 581. LOCKLIN ET AL., DBA RADIANT COLOR CO. *v.* SWITZER BROTHERS, INC., ET AL., 379 U. S. 962;

No. 601. ESTES *v.* UNITED STATES, 379 U. S. 964; and

No. 614. SPECTOR *v.* UNITED STATES, 379 U. S. 966. Petitions for rehearing denied.

No. 641. PIERRE ET AL. *v.* JORDAN, SECRETARY OF STATE OF CALIFORNIA, ET AL., 379 U. S. 974;

No. 687. INDUSTRIAL SHOE MACHINERY CORP. *v.* UNITED SHOE MACHINERY CORP., 379 U. S. 990;

No. 701. TURKEL ET AL. *v.* FOOD AND DRUG ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, 379 U. S. 990;

No. 711. FRY, ALIAS GRADY *v.* UNITED STATES, 379 U. S. 973; and

No. 716. INDUSTRIAL INSTRUMENT CORP. *v.* FOXBORO CO., 379 U. S. 1000. Petitions for rehearing denied.

No. 418. CHESTER PARK APARTMENTS, INC. *v.* UNITED STATES, 379 U. S. 901. Motion for leave to file petition for rehearing denied.

No. 597. CUFF ET UX. *v.* VAN BOGART, 379 U. S. 964; and

No. 604. WATWOOD *v.* REAL ESTATE COMMISSION OF THE DISTRICT OF COLUMBIA, 379 U. S. 965. Motions to dispense with printing petitions granted. Petitions for rehearing denied.

No. 22, Misc. BURKE ET AL. *v.* UNITED STATES, 379 U. S. 849;

No. 317, Misc. WILLIAMS *v.* UNITED STATES, 379 U. S. 976;

No. 380, Misc. BOGAN *v.* WILKINS, WARDEN, 379 U. S. 976;

No. 385, Misc. STELLO *v.* UNITED STATES, 379 U. S. 974;

No. 470, Misc. GENSBURG *v.* HEINZE, WARDEN, ET AL., 379 U. S. 1001; and

No. 506, Misc. PRICE *v.* UNITED STATES, 379 U. S. 977. Petitions for rehearing denied.

No. 537, Misc. McCoy *v.* Randolph, Warden, 379 U. S. 996;

No. 541, Misc. Epps *v.* New York, 379 U. S. 940;

No. 546, Misc. Arbuckle *v.* Illinois, 379 U. S. 978;

No. 598, Misc. Williamson et al. *v.* Gilmer et al., 379 U. S. 955;

No. 599, Misc. Scott *v.* Anderson, Jail Superintendent, 379 U. S. 955;

No. 601, Misc. Hlozansky *v.* Cox, Penitentiary Superintendent, 379 U. S. 981;

No. 609, Misc. Farrell *v.* Burke, Warden, 379 U. S. 981;

No. 610, Misc. Hickock *v.* Crouse, Warden, 379 U. S. 982;

No. 614, Misc. Smith *v.* Crouse, Warden, 379 U. S. 982;

No. 625, Misc. Gratter *v.* Nash, Warden, 379 U. S. 954;

No. 626, Misc. Leeper *v.* Anderson, Jail Superintendent, 379 U. S. 955; and

No. 693, Misc. Hymes *v.* Dunbar, Corrections Director, et al., 379 U. S. 954. Petitions for rehearing denied.

No. 628, Misc. Leser et al. *v.* United States, 379 U. S. 983. Petition for rehearing and for other relief denied.

March 2, 1965.

Dismissal Under Rule 60.

No. 390. Ozark Butane Co., Inc. *v.* Oklahoma Liquefied Petroleum Gas Board et al. Appeal from D. C. W. D. Okla. Dismissed pursuant to Rule 60 of the Rules of this Court. *Morris J. Levin* and *William A. Roberts* for appellant. *Charles R. Nesbitt,* Attorney General of Oklahoma, and *Lee W. Cook,* Assistant Attorney General, for appellees.

MARCH 8, 1965.

Miscellaneous Orders.

No. 245. WATERMAN STEAMSHIP CORP. *v.* UNITED STATES. C. A. 5th Cir. (Certiorari granted, 379 U. S. 927.) Joint motion to remove case from summary calendar granted and 15 additional minutes allotted to each side for oral argument. *John W. McConnell, Jr.,* for petitioner. *Solicitor General Cox* for the United States.

No. 300. FORTSON, SECRETARY OF STATE OF GEORGIA, ET AL. *v.* TOOMBS ET AL. (379 U. S. 621.) Motion of appellees to retax costs granted and it is ordered that the judgment of this Court be amended to provide that appellants shall recover one-half of their costs. *Francis Shackelford, Emmet J. Bondurant II, J. Quentin Davidson, Edward S. White, Israel Katz* and *Hamilton Lokey* for appellees on the motion. *Eugene Cook,* Attorney General of Georgia, and *E. Freeman Leverett,* Deputy Assistant Attorney General, for appellants, in opposition.

No. 345. MARYLAND FOR THE USE OF LEVIN ET AL. *v.* UNITED STATES. C. A. 3d Cir. (Certiorari granted, 379 U. S. 877.) Motion of petitioners to remove case from summary calendar denied. *Theodore E. Wolcott* on the motion.

No. 814. LANDON *v.* NORTHERN NATURAL GAS CO. C. A. 10th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 815. COMISARIA GENERAL DE ABASTECIMIENTOS Y TRANSPORTES *v.* VICTORY TRANSPORT INC. C. A. 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 348. LEH ET AL. *v.* GENERAL PETROLEUM CORP. ET AL. C. A. 9th Cir. (Certiorari granted, 379 U. S. 877.) Upon consideration of the motion of petitioner Leh for leave to proceed further herein *in forma pauperis*, it is ordered that the case be heard on the typewritten record. *Maxwell Keith* for petitioner Leh on the motion. *Howard Painter, Francis R. Kirkham, William E. Mussman, Thomas E. Haven, George W. Jansen, Jack E. Woods, Moses Lasky, Wayne H. Knight* and *Edmund D. Buckley* for respondents.

No. 355. SUSSER ET AL. *v.* CARVEL CORP. ET AL. C. A. 2d Cir. (Certiorari granted, 379 U. S. 885.) Motion of International Franchise Association, Inc., for leave to file a brief, as *amicus curiae*, granted. *Jerrold G. Van Cise* on the motion.

No. 422. FEDERAL TRADE COMMISSION *v.* CONSOLIDATED FOODS CORP. C. A. 7th Cir. (Certiorari granted, 379 U. S. 912.) Motion of Eaton Manufacturing Co. for leave to file a brief, as *amicus curiae*, granted. *Thomas V. Koykka* and *Edward D. Crocker* on the motion.

No. 819. LINN *v.* UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 114, ET AL. C. A. 6th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

Probable Jurisdiction Noted.

No. 835. HARPER ET AL. *v.* VIRGINIA BOARD OF ELECTIONS ET AL. Appeal from D. C. E. D. Va. Motion to advance denied. Probable jurisdiction noted. *Lawrence Speiser* and *Allison W. Brown, Jr.*, for appellants. *Robert Y. Button*, Attorney General of Virginia, and *Richard N. Harris*, Assistant Attorney General, for appellees. Reported below: 240 F. Supp. 270.

Certiorari Granted. (See also No. 346, Misc., *ante,* p. 253; No. 465, Misc., *ante,* p. 254; and No. 486, Misc., *ante,* p. 250.)

No. 632. SNAPP *v.* NEAL, STATE AUDITOR, ET AL. Sup. Ct. Miss. Certiorari granted. *Leon D. Hubert, Jr.,* for petitioner. *Joe T. Patterson,* Attorney General of Mississippi, and *Martin R. McLendon,* Assistant Attorney General, for respondents. Reported below: 250 Miss. 597, 164 So. 2d 752.

No. 817. SEGAL, DBA SEGAL COTTON PRODUCTS, ET AL. *v.* ROCHELLE, TRUSTEE IN BANKRUPTCY. C. A. 5th Cir. Certiorari granted. *Henry Klepak* for petitioners. *Marvin S. Sloman* for respondent. Reported below: 336 F. 2d 298.

No. 803. CALIFORNIA *v.* BUZARD. Sup. Ct. Cal. Certiorari granted. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Edsel W. Haws,* Deputy Attorney General, for petitioner. *C. Ray Robinson* for respondent. Reported below: 61 Cal. 2d 833, 395 P. 2d 593.

No. 671. UNITED GAS IMPROVEMENT CO. ET AL. *v.* CALLERY PROPERTIES, INC., ET AL.;

No. 678. PUBLIC SERVICE COMMISSION OF NEW YORK *v.* CALLERY PROPERTIES, INC., ET AL.;

No. 714. OCEAN DRILLING & EXPLORATION CO. *v.* FEDERAL POWER COMMISSION ET AL.; and

No. 756. FEDERAL POWER COMMISSION *v.* CALLERY PROPERTIES, INC., ET AL. C. A. 5th Cir. Motion of Consolidated Edison Co. of New York, Inc., et al., for leave to file a brief, as *amici curiae,* in No. 671, granted. Certiorari granted. Cases consolidated and a total of four hours allotted for oral argument. *William T. Coleman, Jr., Samuel Graff Miller, Richardson Dilworth, Harold E.*

Kohn, Bertram D. Moll and *Vincent P. McDevitt* for United Gas Improvement Co. et al., petitioners in No. 671. *Kent H. Brown* and *Morton L. Simons* for Public Service Commission of New York, petitioner in No. 678 and respondent in No. 714. *J. Evans Attwell, J. A. O'Connor, Jr., and H. Y. Rowe* for Ocean Drilling & Exploration Co., petitioner in No. 714 and respondent in Nos. 671, 678 and 756. *Solicitor General Cox, Frank Goodman, Richard A. Solomon, Howard E. Wahrenbrock* and *Josephine H. Klein* for the Federal Power Commission, petitioner in No. 756. *Solicitor General Cox, Richard A. Solomon, Howard E. Wahrenbrock* and *Josephine H. Klein* for the Federal Power Commission, respondent in No. 714. *Richard F. Generelly* for Callery Properties, Inc., respondent in Nos. 671, 678 and 756. *Robert W. Henderson, Thomas G. Crouch* and *Paul W. Hicks* for Sands et al., respondents in Nos. 671, 678 and 756. *Herbert W. Varner, Murray Christian* and *Roland B. Voight* for Superior Oil Co., respondent in Nos. 671, 678 and 756. *Chauncey P. Williams, Jr., Edward S. Kirby, James R. Lacey, Edwin F. Russell, Harry G. Hill, Jr.,* and *Barbara M. Suchow* for Consolidated Edison Co. of New York, Inc., et al., as *amici curiae,* in support of the petition in No. 671. Reported below: 335 F. 2d 1004.

Certiorari Denied. (See also No. 848, Misc., *ante,* p. 250.)

No. 804. Transocean Air Lines et al. *v.* Cooper, U. S. District Judge. C. A. 2d Cir. Certiorari denied. *James V. Joy, Jr.,* and *Joseph L. Alioto* for petitioners. *Solicitor General Cox* and *Ralph S. Spritzer* for respondent.

No. 813. Dyer *v.* Murray, Trustee, et al. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 158 Me. 98, 179 A. 2d 307.

No. 805. WOODRING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Arthur T. Bridgett* and *Thomas M. Jenkins* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 337 F. 2d 235.

No. 809. GOLDBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioner. *Solicitor General Cox* for the United States. Reported below: 337 F. 2d 404.

No. 811. TENNANT, ALIAS ENGLE *v.* SHRIVER, TRUSTEE IN BANKRUPTCY. C. A. 6th Cir. Certiorari denied. *Ernestine B. Powell* for petitioner. *Leonard A. Weakley* for respondent.

No. 812. THOMERSON *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. *James H. Bateman* and *William C. Wilson* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Thomas E. Fox,* Assistant Attorney General, for respondent. Reported below: 214 Tenn. 694, 383 S. W. 2d 25.

No. 816. WAITE *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *Thomas Keister Greer* for petitioner.

No. 818. SCOTT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioners *pro se. Solicitor General Cox, Assistant Attorney General Douglas, Alan S. Rosenthal* and *David L. Rose* for the United States. Reported below: 337 F. 2d 471.

No. 823. MCGAVIC *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Frank E. Haddad, Jr.,* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 337 F. 2d 317.

No. 821. SAVELLI *v.* BOARD OF MEDICAL EXAMINERS OF CALIFORNIA. Dist. Ct. App. Cal., 1st App. Dist. Certiorari denied. *J. Albert Hutchinson* for petitioner. *Thomas C. Lynch,* Attorney General of California, and *Gerald F. Carreras* and *John Carl Porter,* Deputy Attorneys General, for respondent. Reported below: 229 Cal. App. 2d 124, 40 Cal. Rptr. 171.

No. 822. GROSSMAN *v.* STUBBS ET AL. Sup. Ct. N. J. Certiorari denied.

No. 824. PAN AMERICAN-GRACE AIRWAYS, INC., ET AL. *v.* CIVIL AERONAUTICS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. *Howard C. Westwood, William H. Allen* and *Frank H. Strickler* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum* and *O. D. Ozment* for the Civil Aeronautics Board, and *G. Nathan Calkins, Jr.,* and *Amy Scupi* for Lufthansa German Airlines, respondents. Reported below: —— U. S. App. D. C. ——, 342 F. 2d 905.

No. 827. CHASE CAPITAL CORP., DBA QUAIL VALLEY COUNTRY CLUB *v.* BUMB, RECEIVER-TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Thomas S. Tobin* for respondent. Reported below: 336 F. 2d 1000.

No. 828. CHAMBLISS ET AL. *v.* COCA-COLA BOTTLING CORP. C. A. 6th Cir. Certiorari denied. *John A. Chambliss* and *Sizer Chambliss* for petitioners. *Leonard A. Weakley* for respondent. Reported below: 337 F. 2d 950.

No. 218, Misc. EDWARDS *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Louis J. Lefkowitz,* Attorney General of New York, and *Philip Kahaner, Mortimer Sattler* and *Joel Lewittes,* Assistant Attorneys General, for respondent.

No. 830. Local 25, Marine Division, International Union of Operating Engineers, AFL–CIO, et al. *v.* American Dredging Co. C. A. 3d Cir. Certiorari denied. *Marshall J. Seidman* for petitioners. *Herman Lazarus* and *Harvey B. Levin* for respondent. Reported below: 338 F. 2d 837.

No. 356, Misc. Johnson *v.* United States. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 334 F. 2d 880.

No. 591, Misc. Kirk *v.* Santo, Judge, et al. Sup. Ct. Colo. Certiorari denied. Petitioner *pro se*. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *James W. Creamer, Jr.,* Assistant Attorney General, for respondents.

No. 635, Misc. Jackson *v.* United States. C. A. D. C. Cir. Certiorari denied. *Michael A. Schuchat* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Daniel H. Benson* for the United States. Reported below: —— U. S. App. D. C. ——, 337 F. 2d 136.

No. 655, Misc. Erving *v.* Sigler, Warden. Dist. Ct. Lancaster County, Neb. Certiorari denied.

No. 757, Misc. Krepel *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 807, Misc. Lockhart *v.* Myers, Correctional Superintendent. Sup. Ct. Pa. Certiorari denied. Petitioner *pro se*. *Joseph M. Smith* and *James C. Crumlish, Jr.,* for respondent.

No. 779, Misc. BOONE *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 788, Misc. CISNEROS *v.* COX, WARDEN. Sup. Ct. N. M. Certiorari denied.

No. 804, Misc. KELLY *v.* NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied.

No. 808, Misc. WILLIAMS *v.* PATE, WARDEN. Crim. Ct. Cook County, Ill. Certiorari denied.

No. 811, Misc. PUGACH *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 815, Misc. GEETER *v.* DUNBAR, CORRECTIONS DIRECTOR. Sup. Ct. Cal. Certiorari denied.

No. 821, Misc. STURGES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 823, Misc. MINCHELLA *v.* LEVIN, CHIEF JUDGE, U. S. DISTRICT COURT. C. A. 6th Cir. Certiorari denied.

No. 829, Misc. FRITZ *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 25 Wis. 2d 91, 130 N. W. 2d 279.

No. 831, Misc. THOMAS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 31 Ill. 2d 212, 201 N. E. 2d 413.

No. 841, Misc. LAMBORN *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Wilson Bucher* for respondents.

No. 837, Misc. LUFT *v.* KROPP, WARDEN. Sup. Ct. Mich. Certiorari denied.

No. 844, Misc. MENCHER *v.* WARDEN, QUEENS HOUSE OF DETENTION. Ct. App. N. Y. Certiorari denied.

No. 850, Misc. HENSLER *v.* WARDEN, QUEENS HOUSE OF DETENTION. C. A. 2d Cir. Certiorari denied.

No. 852, Misc. ROSS *v.* COURTNEY, POSTMASTER, ET AL. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for respondents.

No. 858, Misc. DASH *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 864, Misc. CORSO *v.* MURPHY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 879, Misc. MILLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 339 F. 2d 704.

No. 899, Misc. DOBRANSKI *v.* LONG ISLAND RAILROAD CO. C. A. 2d Cir. Certiorari denied. *Milford J. Meyer* for petitioner. *William L. F. Gardiner* for respondent.

No. 528, Misc. BLACKBURN *v.* MARYLAND. Ct. App. Md. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *E. Clinton Bamberger, Jr.*, for petitioner. *Thomas B. Finan*, Attorney General of Maryland, and *Franklin Goldstein*, Assistant Attorney General, for respondent. Reported below: 235 Md. 497, 201 A. 2d 824.

No. 904, Misc. RINDGO *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 849, Misc. CARSON *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Robert Matthews,* Attorney General of Kentucky, and *George F. Rabe,* Assistant Attorney General, for respondent. Reported below: 382 S. W. 2d 85.

Rehearing Denied.

No. 647. BORUM *v.* WISCONSIN EX REL. AMERICAN MOTORS CORP. ET AL., 379 U. S. 968;

No. 674. JACUZZI BROS., INC., ET AL. *v.* LANDON, INC., 379 U. S. 988;

No. 378, Misc. OTTO *v.* SOMERS, MAYOR, ET AL., 379 U. S. 1002;

No. 475, Misc. LA CLAIR *v.* UNITED STATES, 379 U. S. 1002;

No. 706, Misc. SMITH *v.* NEW JERSEY, 379 U. S. 1005; and

No. 588. RUSS *v.* SOUTHERN RAILWAY CO., 379 U. S. 991. Petitions for rehearing denied.

MARCH 9, 1965.

Dismissal Under Rule 60.

No. 3. ARATANI ET AL. *v.* KENNEDY, ATTORNEY GENERAL. C. A. D. C. Cir. Writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Thomas H. Carolan* and *Philip W. Amram* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for respondent. Reported below: 115 U. S. App. D. C. 97, 317 F. 2d 161, 323 F. 2d 427.

MARCH 15, 1965.

Miscellaneous Orders.

No. 292. ATLANTIC REFINING CO. *v.* FEDERAL TRADE COMMISSION; and

No. 296. GOODYEAR TIRE & RUBBER CO. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. (Certiorari granted, 379 U. S. 943.) Motion of respondent to consolidate these cases for oral argument granted. *Solicitor General Cox* on the motion.

No. 355. SUSSER ET AL. *v.* CARVEL CORP. ET AL. C. A. 2d Cir. (Certiorari granted, 379 U. S. 885.) Petitioners ordered to show cause on or before Thursday, March 25, 1965, why writ in proceeding should not be dismissed for want of prosecution.

No. 496. GRISWOLD ET AL. *v.* CONNECTICUT. Appeal from Sup. Ct. Err. Conn. (Probable jurisdiction noted, 379 U. S. 926.) Motion of Dr. John M. Adams et al. for leave to file brief, as *amici curiae,* granted. Motion of Catholic Council on Civil Liberties for leave to file brief, as *amicus curiae,* granted. Motion of Planned Parenthood Federation of America, Inc., for leave to file brief, as *amicus curiae,* granted. Motion of Planned Parenthood Federation of America, Inc., for leave to participate in oral argument, as *amicus curiae,* denied. *Whitney North Seymour* for Adams et al. *Alfred L. Scanlan* for Catholic Council on Civil Liberties. *Morris L. Ernst, Harriet F. Pilpel* and *Nancy F. Wechsler* for Planned Parenthood Federation of America, Inc.

No. 789. HOWELL *v.* OHIO. Sup. Ct. Ohio. Motion of petitioner to consolidate for argument with No. 202, or for alternative relief, denied. *Bernard A. Berkman* on the motion.

Nos. 948 and 949. UNITED STATES *v.* PRICE ET AL. Appeals from D. C. S. D. Miss. Motion of United States as to consolidating cases deferred awaiting timely filing of responses to jurisdictional statement; in all other respects motion denied. *Solicitor General Cox, Acting Assistant Attorney General Doar, Ralph S. Spritzer, Louis F. Claiborne, Harold H. Greene* and *Howard A. Glicksten* for the United States.

No. 856, Misc. WALKER *v.* PATE, WARDEN, ET AL.;
No. 871, Misc. GIBSON *v.* MAXWELL, WARDEN;
No. 919, Misc. SCHUMANN *v.* UNITED STATES;
No. 921, Misc. PENNINGTON *v.* WARDEN, U. S. PENITENTIARY; and
No. 969, Misc. IN RE DUVAL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 857, Misc. BOWENS *v.* PATE, WARDEN;
No. 922, Misc. HITCHCOCK *v.* EYMAN, WARDEN; and
No. 952, Misc. TARPLEY *v.* WILKINS, WARDEN. 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.

Probable Jurisdiction Noted.

No. 820. UNITED STATES *v.* GENERAL MOTORS CORP. ET AL. Appeal from D. C. S. D. Cal. Probable jurisdiction noted. *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum* and *Donald L. Hardison* for the United States. *Homer I. Mitchell, Warren M. Christopher, Marcus Mattson, Aloysius F. Power, Robert A. Nitschke* and *Nicholas J. Rosiello* for General Motors Corp., and *Victor R. Hansen* and *Glenn S. Roberts* for Losor Chevrolet Dealers Association et al., appellees.

Certiorari Granted. (See also No. 340, Misc., *ante,* p. 259; No. 397, Misc., *ante,* p. 260; and No. 476, Misc., *ante,* p. 262.)

No. 172. UNITED STATES *v.* ROMANO ET AL. C. A. 2d Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 330 F. 2d 566.

No. 527. HANNA MINING CO. ET AL. *v.* DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL–CIO, ET AL. Sup. Ct. Wis. Certiorari granted. *Lucian Y. Ray* for petitioners. *Lee Pressman, David Scribner* and *Joan Stern Kiok* for respondents. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* filed a memorandum for the United States. *James P. Garner, Albert J. Williams* and *Raymond T. Jackson* for Columbia Transportation Division of Oglebay Norton Co. et al., as *amici curiae,* in support of the petition. Reported below: 23 Wis. 2d 433, 127 N. W. 2d 393.

No. 780. ROSENBLATT *v.* BAER. Sup. Ct. N. H. Certiorari granted. Counsel directed in addition to argue question whether, at time of respondent's employment as supervisor of recreation area, he was a "public official" under decisions of this Court in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, and *Garrison* v. *Louisiana,* 379 U. S. 64. *Conrad E. Snow* for petitioner. *Stanley M. Brown* for respondent. Reported below: 106 N. H. 26, 203 A. 2d 773.

Certiorari Denied. (See also No. 794, Misc., *ante,* p. 261; and Misc. Nos. 857, 922 and 952, *supra.*)

No. 348, Misc. SCIFO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Henry Rothblatt* for petitioner.

No. 145. IGOE, U. S. DISTRICT JUDGE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Anna R. Lavin* for petitioner. *Solicitor General Cox* for the United States. Reported below: 331 F. 2d 766.

No. 193. ROMANO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *W. Paul Flynn, Bernard P. Kopkind* and *Charles L. Flynn* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 330 F. 2d 566.

No. 234. ROTH ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *David A. Field* and *William Esbitt* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 333 F. 2d 450; 333 F. 2d 455.

No. 286. HALL ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Wesley R. Asinof, Joseph H. Davis* and *J. Sewell Elliott* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 330 F. 2d 558.

No. 561. DUPLESHIN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. *H. Alva Brumfield* and *Garland R. Rolling* for petitioner. *Jack P. F. Gremillion,* Attorney General of Louisiana, *M. E. Culligan,* Assistant Attorney General, and *Frank H. Langridge* for respondent.

No. 836. BROWN ET AL. *v.* OHIO POWER CO. Sup. Ct. Ohio. Certiorari denied. Petitioners *pro se. John G. Ketterer* for respondent. Reported below: 177 Ohio St. 45, 201 N. E. 2d 879.

No. 788. MINNESOTA EX REL. JENSON *v.* CIVIL SERVICE COMMISSION OF THE CITY OF MINNEAPOLIS ET AL. Sup. Ct. Minn. Certiorari denied. *James Malcolm Williams* for petitioner. *Arvid M. Falk* for respondents. Reported below: 268 Minn. 536, 130 N. W. 2d 143.

No. 833. MATTHEW ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Lucius A. Buck* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Benjamin M. Parker* for respondent. Reported below: 335 F. 2d 231.

No. 839. SMITH *v.* LOUISVILLE TRUST CO. ET AL., ADMINISTRATORS. C. A. 6th Cir. Certiorari denied. *Walter B. Smith* for petitioner. *R. Lee Blackwell* for respondents. Reported below: 330 F. 2d 483.

No. 840. NOBLE DRILLING CORP. *v.* SAUNIER. C. A. 5th Cir. Certiorari denied. *W. Ford Reese* for petitioner. *John P. Nelson* for respondent. Reported below: 335 F. 2d 62.

No. 841. MARIANO *v.* CONNECTICUT. Sup. Ct. Err. Conn. Certiorari denied. *Richard S. Weinstein* for petitioner. *John F. McGowan* for respondent. Reported below: 152 Conn. 85, 203 A. 2d 305.

No. 842. PAN-AMERICAN LIFE INSURANCE CO. *v.* BOTANA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *James A. Dixon* and *Sam Daniels* for petitioner. *Milton Kelner* for respondent. Reported below: 163 So. 2d 767.

No. 846. MATSON NAVIGATION CO. *v.* HUFF. C. A. 9th Cir. Certiorari denied. *J. Stewart Harrison* for petitioner. *William A. Lahanier* for respondent. Reported below: 338 F. 2d 205.

No. 845. NORTHERN METAL CO. *v.* PENNSYLVANIA BOARD OF FINANCE & REVENUE. Sup. Ct. Pa. Certiorari denied. *Morris Wolf, Marvin Comisky* and *Raymond J. Bradley* for petitioner. *Walter E. Alessandroni,* Attorney General of Pennsylvania, and *Vincent X. Yakowicz,* Deputy Attorney General, for respondent. Reported below: 416 Pa. 75, 204 A. 2d 467.

No. 850. CONTINENTAL GRAIN CO. *v.* CITY OF BUFFALO ET AL. C. A. 2d Cir. Certiorari denied. *David S. Jackson, Wilbur H. Hecht* and *John J. Sullivan* for petitioner. *Edward J. Desmond* and *John E. Drury, Jr.,* for the City of Buffalo; *Lee C. Hinslea* and *Lucian Y. Ray* for Kinsman Transit Co.; and *Scott H. Elder* and *Robert M. Hitchcock* for Midland Steamship Line, Inc., respondents. Reported below: 338 F. 2d 708.

No. 800. GATE FILM CLUB *v.* PESCE. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Emanuel Redfield* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Ruth Kessler Toch,* Assistant Solicitor General, for respondent.

No. 844. HARMON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Carlton S. Roeser* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 339 F. 2d 354.

No. 813, Misc. BLUE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States. Reported below: —— U. S. App. D. C. ——, 342 F. 2d 894.

No. 171, Misc. SORENSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 330 F. 2d 1018.

No. 258, Misc. MCCLURE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 332 F. 2d 19.

No. 547, Misc. STADTER *v.* UNITED STATES;

No. 555, Misc. EHLEN *v.* UNITED STATES; and

No. 644, Misc. WRIGHT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States in Nos. 547, Misc., and 555, Misc. *Solicitor General Cox* for the United States in No. 644, Misc. Reported below: 336 F. 2d 326.

No. 631, Misc. COCHRAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 336 F. 2d 799.

No. 822, Misc. ARBUCKLE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *John R. Snively* for petitioner. Reported below: 31 Ill. 2d 163, 201 N. E. 2d 102.

No. 816, Misc. GUERRIERI *v.* OHIO ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 830, Misc. BORSEY *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 498, Misc. JORDAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 336 F. 2d 147.

No. 828, Misc. LEMONS *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: 337 F. 2d 619.

No. 866, Misc. HAGHIGHI ET AL. *v.* ARIZONA ET AL. Sup. Ct. Ariz. Certiorari denied.

No. 867, Misc. SCHLUETER *v.* EYMAN, WARDEN, ET AL. Sup. Ct. Ariz. Certiorari denied.

No. 868, Misc. TAYLOR *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 907, Misc. HILLERY *v.* WILSON, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 910, Misc. GANDY *v.* WATKINS, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 920, Misc. RUARK *v.* COLORADO. Sup. Ct. Colo. Certiorari denied.

Rehearing Denied.

No. 548. ROBINSON *v.* ILLINOIS HIGH SCHOOL ASSOCIATION ET AL., 379 U. S. 960; and

No. 564. TISONE *v.* OHIO, 379 U. S. 644. Petitions for rehearing denied.

No. 104, Misc. JACK *v.* WASHINGTON, 379 U. S. 856 Motion for leave to file petition for rehearing denied.

MARCH 23, 1965.

Dismissal Under Rule 60.

No. 549, Misc. CORLEY *v.* NEW YORK. Ct. App. N. Y. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court.

MARCH 29, 1965.

Miscellaneous Orders.

No. 291. MINNESOTA MINING & MANUFACTURING CO. *v.* NEW JERSEY WOOD FINISHING CO. C. A. 3d Cir. (Certiorari granted, 379 U. S. 877.) Motion of respondent to advance granted and case set for argument during week of April 26. *Albert G. Besser* on the motion. *Sidney P. Howell, Jr.,* for petitioner.

No. 292. ATLANTIC REFINING CO. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. (Certiorari granted, 379 U. S. 943.) Motion of Automotive Service Industry Association for leave to file brief, as *amicus curiae,* granted. *Harold T. Halfpenny* and *Mary M. Shaw* on the motion. *Frederic L. Ballard, Jr.,* and *Charles I. Thompson, Jr.,* for petitioner, in opposition.

No. 355. SUSSER ET AL. *v.* CARVEL CORP. ET AL. C. A. 2d Cir. (Certiorari granted, 379 U. S. 885.) Rule to show cause (*ante,* p. 939) discharged. Case returned to argument calendar and set for argument on Thursday, April 29, 1965.

No. 496. GRISWOLD ET AL. *v.* CONNECTICUT. Appeal from Sup. Ct. Err. Conn. (Probable jurisdiction noted, 379 U. S. 926.) Motion of American Civil Liberties Union et al. for leave to file brief, as *amici curiae,* granted. *Melvin L. Wulf* and *Jerome E. Caplan* on the motion.

No. 657. CARNATION CO. *v.* PACIFIC WESTBOUND CONFERENCE ET AL. C. A. 9th Cir. (Certiorari granted, *ante,* p. 905.) Motion of *Herman Goldman* for leave to withdraw his appearance as counsel for respondents granted.

No. 1139, Misc. IN RE DISBARMENT OF HARRIS. It is ordered that Eldon C. Harris of West Yellowstone, Montana, be suspended from the practice of the law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of the law in this Court.

No. 1140, Misc. IN RE DISBARMENT OF HAMMETT. It is ordered that Bernard J. Hammett of Washington, District of Columbia, be suspended from the practice of the law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of the law in this Court.

No. 643, Misc. LEDFORD *v.* NORTH CAROLINA. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se.* *Thomas Wade Bruton,* Attorney General of North Carolina, for respondent.

No. 521, Misc. GAJEWSKI *v.* UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se.* *Solicitor General Cox* for respondent.

No. 519, Misc. MEADOWS *v.* BOLES, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied. Petitioner *pro se.* *C. Donald Robertson,* Attorney General of West Virginia, and *George H. Mitchell,* Assistant Attorney General, for respondent.

No. 974, Misc. BLAKE *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Motion for leave to file petition for writ of habeas corpus denied.

No. 938, Misc. BOWENS *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS. 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. 627, Misc. JACKSON *v.* SINCLAIR, PRISON SUPERINTENDENT. Motion for leave to file petition for writ of injunction denied. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, and *James G. Mahorner*, Assistant Attorney General, for respondent.

No. 605, Misc. CLINE *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO; and

No. 786, Misc. KEENE *v.* ALABAMA. Motions for leave to file petitions for writs of mandamus denied.

Certiorari Granted. (See also Nos. 89 and 90, *ante*, p. 356; and No. 307, *ante*, p. 359.)

No. 778. CALMAR, INC. *v.* COOK CHEMICAL CO.; and

No. 810. COLGATE-PALMOLIVE CO. *v.* COOK CHEMICAL CO. C. A. 8th Cir. Certiorari granted. Cases consolidated and one hour allotted for oral argument for both cases. *Abe Fortas*, *Victor H. Kramer*, *Dennis G. Lyons* and *Francis G. Cole* for petitioner in No. 778. *George H. Mortimer* for petitioner in No. 810. *Robert D. Hovey* and *Vernon B. Kassebaum* for respondent in both cases. Reported below: 336 F. 2d 110.

No. 906. UNITED STATES *v.* ADAMS ET AL. Ct. Cl. Certiorari granted. *Solicitor General Cox*, *Assistant Attorney General Douglas*, *Sherman L. Cohn* and *Edward Berlin* for the United States. *John A. Reilly* for respondents. Reported below: 165 Ct. Cl. 576, 330 F. 2d 622.

No. 883. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 133, UAW, AFL–CIO *v.* Fafnir Bearing Co. et al. C. A. 2d Cir. Certiorari granted. *Joseph L. Rauh, Jr., John Silard, Stephen I. Schlossberg, Benjamin Rubenstein* and *William S. Zeman* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent National Labor Relations Board. Reported below: 339 F. 2d 801.

No. 909. United States et al. *v.* Wilson & Co., Inc., et al. C. A. 7th Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Henry Geller* and *Daniel R. Ohlbaum* for the United States et al. *James E. Knox, Jr.*, for Wilson & Co., Inc., et al., and *Kenneth F. Burgess, Howard J. Trienens* and *Gary L. Cowan* for American Telephone & Telegraph Co. et al., respondents. Reported below: 335 F. 2d 788.

Certiorari Denied. (See also Misc. Nos. 519 and 938, *supra.*)

No. 474. Pan-American World Airways, Inc., et al. *v.* O'Hearne, Deputy Commissioner, Fifth Compensation District, Department of Labor, Bureau of Employees' Compensation. C. A. 4th Cir. Certiorari denied. *John W. Winston* for petitioners. *Solicitor General Cox* for respondent. Reported below: 335 F. 2d 70.

No. 825. Eber Bros. Wine & Liquor Corp. *v.* United States. Ct. Cl. Certiorari denied. *Justin N. Feldman, Herbert Prashker* and *Robert B. Shapiro* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Morton Hollander* for the United States. Reported below: —— Ct. Cl. ——, 337 F. 2d 624.

No. 765. Wilson & Co., Inc., et al. *v.* United States et al. C. A. 7th Cir. Certiorari denied. *Charles A. Bane, Sharon L. King* and *James E. Knox, Jr.*, for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Henry Geller* and *Daniel R. Ohlbaum* for the United States et al., and *John H. Waters, Herbert G. Telsey* and *William A. McSwain* for Western Union Telegraph Co., respondents. Reported below: 335 F. 2d 788.

No. 851. Piper *v.* United States. C. A. 5th Cir. Certiorari denied. *Harold A. Chamberlain* for petitioner. *Solicitor General Cox* for the United States. Reported below: 338 F. 2d 1005.

No. 852. Pan American World Airways, Inc., et al. *v.* O'Keeffe, Deputy Commissioner, Department of Labor. C. A. 5th Cir. Certiorari denied. *Charles Cook Howell* and *Luke G. Galant* for petitioners. *Solicitor General Cox* for respondent. Reported below: 338 F. 2d 319.

No. 853. Sterger et al. *v.* Wisconsin. Sup. Ct. Wis. Certiorari denied. *Dominic Frinzi* for petitioners. *Bronson C. La Follette,* Attorney General of Wisconsin, and *William A. Platz* and *Harold H. Persons,* Assistant Attorneys General, for respondent. Reported below: 25 Wis. 2d 394, 130 N. W. 2d 816.

No. 854. Swain, Executrix, et al. *v.* Boeing Airplane Co. C. A. 2d Cir. Certiorari denied. *Stuart M. Speiser* for petitioners. *Wilbur H. Hecht* for respondent. Reported below: 337 F. 2d 940.

No. 874. Benson *v.* California et al. C. A. 9th Cir. Certiorari denied. Reported below: 336 F. 2d 791.

No. 855. HUMBLE OIL & REFINING CO. *v.* INDEPENDENT INDUSTRIAL WORKERS' UNION. C. A. 5th Cir. Certiorari denied. *Charles Janvier* for petitioner. Reported below: 337 F. 2d 321.

No. 857. SENECA NATION OF INDIANS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Arthur Lazarus, Jr.*, for petitioner. *Solicitor General Cox, Roger P. Marquis* and *Edmund B. Clark* for the United States. Reported below: 338 F. 2d 55.

No. 860. WOODMAR REALTY CO. *v.* MCLEAN, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 7th Cir. Certiorari denied. *Owen W. Crumpacker, Harold Abrahamson* and *Milton K. Joseph* for petitioner. *Porter R. Draper* for respondents.

No. 861. MINICHELLO ET AL. *v.* SAXON, COMPTROLLER OF THE CURRENCY, ET AL. C. A. 3d Cir. Certiorari denied. *Arthur D. Dalessandro* and *Conrad A. Falvello* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander* and *David L. Rose* for respondent Saxon. Reported below: 337 F. 2d 75.

No. 863. MERCURY METALCRAFT CO. *v.* MCCARTY. Sup. Ct. Mich. Certiorari denied. *Cass S. Jaros* and *Marjorie S. Jaros* for petitioner. Reported below: 372 Mich. 567, 127 N. W. 2d 340.

No. 865. PATSIS, AKA NICKAS *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for respondent. Reported below: 337 F. 2d 733.

No. 878. SULLIVAN *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *De Long Harris* for petitioner.

No. 866. WALSH, TRUSTEE IN BANKRUPTCY *v.* LOCKHART ASSOCIATES. C. A. 5th Cir. Certiorari denied. *Louis A. Sabatino* for petitioner. Reported below: 339 F. 2d 417.

No. 868. JAMY CORP. *v.* RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Austin H. Peck, Jr.*, for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Jones, Meyer Rothwacks* and *George F. Lynch* for respondent. Reported below: 337 F. 2d 11.

No. 871. CAUER ET AL. *v.* BRENNER, COMMISSIONER OF PATENTS. C. C. P. A. Certiorari denied. *Robert H. Rines, David Rines* and *Nelson H. Shapiro* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for respondent. Reported below: 52 C. C. P. A. (Pat.) 713, 332 F. 2d 831.

No. 875. MAYS *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. *John Gavin* for petitioner. *William B. Holst* for respondent. Reported below: 65 Wash. 2d 58, 395 P. 2d 758.

No. 876. ATHENIAN REALTY CORP. *v.* SOUTHWESTERN BELL TELEPHONE CO. ET AL. C. A. 5th Cir. Certiorari denied. *Freeman L. Mittenthal* for petitioner. *F. Mark Garlinghouse* and *Ed Gossett* for respondents.

No. 880. LIFSHUTZ *v.* MARYLAND. Ct. App. Md. Certiorari denied. *Joseph J. Lyman* and *Jack H. Olender* for petitioner. Reported below: 236 Md. 428, 204 A. 2d 541.

No. 884. IN RE ANDRADA. Sup. Ct. Cal. Certiorari denied. *Phill Silver* for petitioner.

No. 881. GRAHAM *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of L. A. Certiorari denied. Petitioner *pro se*. *Roger Arnebergh, Philip E. Grey* and *Wm. E. Doran* for respondent.

No. 885. CORO, INC. *v.* FEDERAL TRADE COMMISSION. C. A. 1st Cir. Certiorari denied. *Marshall C. Berger* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Jerry Z. Pruzansky* and *James McI. Henderson* for respondent. Reported below: 338 F. 2d 149.

No. 887. NEW YORK CENTRAL RAILROAD CO. *v.* SOUTHERN RAILWAY CO. C. A. 7th Cir. Certiorari denied. *Richard J. Murphy* for petitioner. *W. Graham Claytor, Jr., James A. Bistline, William H. Allen* and *Norman J. Gundlach* for respondent. Reported below: 338 F. 2d 667.

No. 888. CRAWFORD TRANSPORT CO., INC. *v.* CHRYSLER CORP. ET AL. C. A. 6th Cir. Certiorari denied. *James Park, Sr.*, for petitioner. *Frederick T. Shea* for Chrysler Corp., and *Dudley B. Tenney* for Commercial Carriers, Inc., respondents. Reported below: 338 F. 2d 934.

No. 889. ZIM ISRAEL NAVIGATION CO., LTD. *v.* UNITED STATES LINES CO. C. A. 2d Cir. Certiorari denied. *David C. Wood* for petitioner. *John F. Gerity* for respondent. Reported below: 336 F. 2d 150.

No. 895. MICHAELS ENTERPRISES, INC., ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Morris A. Shenker* and *Murry L. Randall* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 340 F. 2d 1.

No. 890. VILLAGE ON THE HILL, INC. *v.* MASSACHUSETTS TURNPIKE AUTHORITY ET AL. Sup. Jud. Ct. Mass. Certiorari denied. *Louis Winer* for petitioner. *John L. Murphy* for Massachusetts Turnpike Authority, and *Robert Haydock, Jr.*, for Rivett Lathe & Grinder, Inc., respondents. Reported below: 348 Mass. 107, 202 N. E. 2d 602.

No. 892. HEAVENLY CREATIONS, INC., ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 2d Cir. Certiorari denied. *Maximilian Bader* and *I. Walton Bader* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Jerry Z. Pruzansky, James McI. Henderson* and *Miles J. Brown* for respondent. Reported below: 339 F. 2d 7.

No. 896. D'ANGIOLILLO, AKA BUICK, ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jonathan L. Rosner* and *Ralph L. Pliskin* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 340 F. 2d 453.

No. 897. CASIDA ET AL. *v.* INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO, ET AL. Ct. Civ. App. Tex., 7th Sup. Jud. Dist. Certiorari denied. *Albert Smith* and *Walter H. E. Jaeger* for petitioners. *J. Albert Woll, Theodore J. St. Antoine* and *L. N. D. Wells, Jr.*, for respondents. Reported below: 376 S. W. 2d 814.

No. 709, Misc. BLANN *v.* PATUXENT INSTITUTION DIRECTOR. Ct. App. Md. Certiorari denied. *Spencer W. Reeder* for petitioner. *Thomas B. Finan*, Attorney General of Maryland, and *Robert C. Murphy*, Deputy Attorney General, for respondent. Reported below: 235 Md. 661, 202 A. 2d 722.

No. 898. APPLEMAN ET UX. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *John Alan Appleman, pro se,* for petitioners. *Solicitor General Cox* and *Assistant Attorney General Oberdorfer* for the United States. Reported below: 338 F. 2d 729.

No. 643. PIOCHE MINES CONSOLIDATED, INC., ET AL. *v.* DOLMAN, ET AL.; and

No. 808. DOLMAN ET AL. *v.* PIOCHE MINES CONSOLIDATED, INC., ET AL. C. A. 9th Cir. Motions of Katherine Hansbrough and Lawrence Rust Lee to strike unauthorized appearances and for other relief denied. Certiorari denied. Movants *pro se. Charles O. Bruce* for petitioners in No. 643 and respondents in No. 808. *Arthur H. Connolly, Jr.,* and *James Farraher* for respondents in No. 643. *George T. Davis* for petitioners in No. 808. Reported below: 333 F. 2d 257.

No. 140, Misc. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States.

No. 443, Misc. TUCKER *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se. Thomas C. Lynch,* Attorney General of California, and *Edsel W. Haws* and *Raymond M. Momboisse,* Deputy Attorneys General, for respondents.

No. 500, Misc. AGNELLO *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. Petitioner *pro se. William G. Clark,* Attorney General of Illinois, for respondent.

No. 902, Misc. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States. Reported below: 338 F. 2d 990.

No. 504, Misc. FERRARIO *v.* SIGLER, WARDEN. Sup. Ct. Neb. Certiorari denied. Petitioner *pro se*. *Clarence A. H. Meyer*, Attorney General of Nebraska, and *Melvin Kent Kammerlohr*, Assistant Attorney General, for respondent.

No. 536, Misc. STALVEY *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, and *George R. Georgieff*, Assistant Attorney General, for respondent.

No. 679, Misc. PARKER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, and *Edsel W. Haws* and *Raymond M. Momboisse*, Deputy Attorneys General, for respondent.

No. 724, Misc. BLOCKER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 727, Misc. BEUF *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Petitioner *pro se*. *David Diamond* for respondent.

No. 765, Misc. CURA *v.* UNITED STATES. C. A. 9th 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: 338 F. 2d 165.

No. 818, Misc. TAPIA *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 338 F. 2d 416.

773-301 O-65-53

No. 862, Misc. CURTIS *v.* BENNETT, WARDEN, ET AL. Sup. Ct. Iowa. Certiorari denied. Reported below: 256 Iowa 1164, 131 N. W. 2d 1.

No. 863, Misc. CALI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *John M. Hall* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 338 F. 2d 974.

No. 870, Misc. THOMPSON *v.* NORFOLK & WESTERN RAILWAY CO. Sup. Ct. App. Va. Certiorari denied. *Louis B. Fine* and *Howard I. Legum* for petitioner.

No. 880, Misc. STEBBINS *v.* UNITED STATES. Ct. Cl. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 898, Misc. GILES *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 903, Misc. HIPP *v.* BROUGH, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 905, Misc. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 338 F. 2d 996.

No. 913, Misc. BAKER *v.* LANE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 915, Misc. ARDELEAN *v.* RUAN TRANSPORT CO. OF LEMONT, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *William H. Clark* for respondents.

No. 881, Misc. HAMPTON *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Petitioner *pro se*. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *James W. Creamer, Jr.,* Assistant Attorney General, for respondent.

No. 917, Misc. BERRY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 338 F. 2d 605.

No. 925, Misc. ROHRLICH *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 929, Misc. HUIZAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 339 F. 2d 173.

Rehearing Denied.

No. 585. FEDERAL POWER COMMISSION *v.* AMERADA PETROLEUM CORP. ET AL., 379 U. S. 687;

No. 32, Misc. MEATON *v.* UNITED STATES, *ante,* p. 916;

No. 640, Misc. DI SILVESTRO *v.* UNITED STATES, *ante,* p. 917; and

No. 701, Misc. BROWNE *v.* WISCONSIN, 379 U. S. 1004. Petitions for rehearing denied.

MARCH 30, 1965.

Dismissal Under Rule 60.

No. 287, Misc. SISK *v.* LANE, WARDEN. C. A. 7th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Petitioner *pro se*. *Edwin K. Steers,* Attorney General of Indiana, for respondent. Reported below: 331 F. 2d 235.

APRIL 5, 1965.

Miscellaneous Orders.

No. —. IN RE SIMMONS. Greenberry Simmons, Esquire, of Louisville, Kentucky, having resigned as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice in this Court.

No. 202. GRIFFIN *v.* CALIFORNIA. Sup. Ct. Cal. (Certiorari granted, 377 U. S. 989; argued March 9, 1965.) Motion of petitioner to file supplemental brief, after argument, granted. THE CHIEF JUSTICE took no part in the consideration or decision of this motion. *Morris Lavine* on the motion.

No. 939, Misc. LEE *v.* RANDOLPH, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 953, Misc. WELSH *v.* KROPP, WARDEN. 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.

Probable Jurisdiction Noted.

No. 858. MISHKIN *v.* NEW YORK. Appeal from Ct. App. N. Y. Probable jurisdiction noted. *Emanuel Redfield* for appellant. *Frank S. Hogan* and *H. Richard Uviller* for appellee.

Certiorari Granted.

No. 919. HAZELTINE RESEARCH, INC., ET AL. *v.* LADD, COMMISSIONER OF PATENTS. C. A. D. C. Cir. Certiorari granted. *Laurence B. Dodds* and *George R. Jones* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for respondent. Reported below: — U. S. App. D. C. —, 340 F. 2d 786.

No. 807. GINZBURG ET AL. *v.* UNITED STATES. C. A. 3d Cir. Motion of Lillian Maxine Serett for leave to file brief, as *amicus curiae,* granted. Certiorari granted. *David I. Shapiro* and *Sidney Dickstein* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. *Melvin L. Wulf* for the American Civil Liberties Union et al.; *Edward de Grazia* for Boyle et al.; *Irwin Karp* for the Authors League of America, Inc.; and *Stanley Fleishman* and *Sam Rosenwein* for Serett, as *amici curiae,* in support of the petition. Reported below: 338 F. 2d 12.

Certiorari Denied. (See also No. 953, Misc., *supra.*)

No. 829. ROWE *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Penrose Lucas Albright* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for the United States. Reported below: —— Ct. Cl. ——.

No. 859. FRAZELL ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *W. Scott Wilkinson* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Harry Baum* for the United States. Reported below: 335 F. 2d 487.

No. 872. ALLEN, ADMINISTRATRIX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Martin J. Jarvis* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Richard S. Salzman* for the United States. Reported below: 338 F. 2d 160.

No. 894. HARTGRAVES *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Julius Lucius Echeles* for petitioner. *Daniel P. Ward* and *Elmer C. Kissane* for respondent. Reported below: 31 Ill. 2d 375, 202 N. E. 2d 33.

No. 873. China Liquor Distributing Co. et al. *v.* United States. C. C. P. A. Certiorari denied. *Abraham Gottfried* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for the United States. Reported below: 52 C. C. P. A. (Cust.) 1.

No. 900. Keller & Goetz, Inc. *v.* United States. C. A. 2d Cir. Certiorari denied. *DeBanks M. Henward III* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Morton K. Rothschild* for the United States. Reported below: 337 F. 2d 858.

No. 903. Biggers et al. *v.* City of Houston. Ct. Civ. App. Tex., 1st Sup. Jud. Dist. Certiorari denied. *Fentress Bracewell* and *William H. White* for petitioners. *John Wildenthal, Jr.*, for respondent. Reported below: 380 S. W. 2d 700.

No. 905. United States *v.* National Presto Industries, Inc. Ct. Cl. Certiorari denied. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for the United States. *Robert E. Sher* and *Abraham J. Harris* for respondent. Reported below: —— Ct. Cl. ——, 338 F. 2d 99.

No. 907. Dobkin *v.* District of Columbia. C. A. D. C. Cir. Certiorari denied. *Raymond W. Bergan* for petitioner. *Chester H. Gray, Milton D. Korman, Hubert B. Pair* and *John R. Hess* for respondent.

No. 908. Gargano *v.* United States. C. A. 6th Cir. Certiorari denied. *William J. Dammarell* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 338 F. 2d 893.

No. 911. HASTINGS *v.* MANN, TRADING AS MANN'S HARBOR MARINA. C. A. 4th Cir. Certiorari denied. *Walter B. Martin, Jr.*, for petitioner. *Gerald F. White* for respondent. Reported below: 340 F. 2d 910.

No. 912. OLYMPIC FINANCE CO. *v.* THYRET, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. *Albert M. Herzig* for petitioner. *Irwin R. Buchalter* for respondent. Reported below: 337 F. 2d 62.

No. 913. ROMA ET AL. *v.* MUNICIPAL CIVIL SERVICE COMMISSION, CITY OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied. *John H. Mariano* for petitioners. *Leo A. Larkin* and *Seymour B. Quel* for Municipal Civil Service Commission et al.; *Louis J. Lefkowitz*, Attorney General of New York, and *Samuel A. Hirshowitz*, First Assistant Attorney General, for State Civil Service Commission; and *Helen R. Cassidy* and *James P. McMahon* for New York City Transit Authority, respondents.

No. 915. SCOVILE *v.* WATSON ET AL. C. A. 7th Cir. Certiorari denied. *James W. Oberfell* for petitioner. *Eugene Cotton* and *Richard F. Watt* for respondents. Reported below: 338 F. 2d 678.

No. 916. ROSSI *v.* MALKIN ET AL., DBA FISK BUILDING ASSOCIATES. Ct. App. N. Y. Certiorari denied. *Lucian J. Rossi*, petitioner, *pro se*.

No. 917. PAULING *v.* MISEVIC, STATE HOSPITAL SUPERINTENDENT. Sup. Ct. Ill. Certiorari denied. Reported below: 32 Ill. 2d 11, 203 N. E. 2d 393.

No. 920. ANGIULO *v.* MULLINS, SPECIAL AGENT, INTERNAL REVENUE SERVICE. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for respondent. Reported below: 338 F. 2d 820.

No. 928. RUPE ET AL., TRUSTEES, ET AL. *v.* WALLACE ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. *Claude A. Roth* for petitioners. *Robert A. Sprecher* for respondents. Reported below: 51 Ill. App. 2d 164, 201 N. E. 2d 158.

No. 931. STATE CORPORATION COMMISSION OF KANSAS ET AL. *v.* BARTLETT & CO., GRAIN. C. A. 10th Cir. Certiorari denied. *Robert C. Londerholm,* Attorney General of Kansas, and *Byron M. Gray* for petitioners. *Charles B. Blackmar* and *Erle W. Francis* for respondent. Reported below: 338 F. 2d 495.

No. 936. BIRD ET AL. *v.* MCCORD ET VIR. C. A. D. C. Cir. Certiorari denied. *Herbert P. Leeman* for petitioners.

No. 944. F. & W. CORP. *v.* LOKEY, TRUSTEE IN BANKRUPTCY. C. A. 5th Cir. Certiorari denied. *Alexander E. Wilson, Jr.,* for petitioner. Reported below: 338 F. 2d 341.

No. 945. STATES STEAMSHIP CO. *v.* AMERICAN SMELTING & REFINING CO. C. A. 9th Cir. Certiorari denied. *Graydon S. Staring* for petitioner. *William Garth Symmers* and *Frederick Fish* for respondent. Reported below: 339 F. 2d 66.

No. 1030. COVEY OIL CO. ET AL. *v.* CONTINENTAL OIL CO. ET AL. C. A. 10th Cir. Certiorari denied. *Richard L. Bird, Jr.,* and *John J. Hickey* for petitioners. Reported below: 340 F. 2d 993.

No. 99, Misc. CHASTAIN ET AL. *v.* VULCAN MATERIAL CO. ET AL. Sup. Ct. Tenn. Certiorari denied. *J. Hamilton Cunningham* for petitioners. *Herbert S. Thatcher* and *S. D. Fuston* for respondents.

No. 910. Burton Mercantile & Gin Co., Inc. *v.* Wirtz, Secretary of Labor. C. A. 8th Cir. Certiorari denied. Mr. Justice Goldberg took no part in the consideration or decision of this petition. *Wayne Boyce* and *Fred M. Pickens, Jr.*, for petitioner. *Solicitor General Cox, Charles Donahue, Bessie Margolin, Robert E. Nagle* and *Isabelle R. Cappello* for respondent. Reported below: 338 F. 2d 414.

No. 921. Dall *v.* Pearson et al. C. A. D. C. Cir. Certiorari denied. Mr. Justice Goldberg took no part in the consideration or decision of this petition. *James P. Donovan* and *John W. Wood* for petitioner. *John Donovan* for Pearson et al., and *William R. Glendon* for Washington Post Co., respondents.

No. 523, Misc. Lowder *v.* Iowa. Sup. Ct. Iowa. Certiorari denied. *David G. Bleakley* for petitioner. *Lawrence F. Scalise,* Attorney General of Iowa, and *Don R. Bennett,* Assistant Attorney General, for respondent. Reported below: 256 Iowa 853, 129 N. W. 2d 11.

No. 572, Misc. Rhoads *v.* Randolph, Warden. Cir. Ct. Randolph County, Ill. Certiorari denied. Petitioner *pro se. William G. Clark,* Attorney General of Illinois, and *Richard A. Michael* and *John J. O'Toole,* Assistant Attorneys General, for respondent.

No. 573, Misc. Sitton *v.* Sitton. Sup. Ct. Cal. Certiorari denied.

No. 589, Misc. Hassell *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: 336 F. 2d 684.

No. 632, Misc. WATSON *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Petitioner *pro se*. *Duke W. Dunbar*, Attorney General of Colorado, *Frank E. Hickey*, Deputy Attorney General, and *James W. Creamer, Jr.*, Assistant Attorney General, for respondent. Reported below: 155 Colo. —, 394 P. 2d 737.

No. 825, Misc. GUY *v.* TAHASH, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 861, Misc. BROWN *v.* SUPERIOR COURT OF THE COUNTY OF LOS ANGELES. Sup. Ct. Cal. Certiorari denied.

No. 874, Misc. JACKSON *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 876, Misc. GRIFFIN *v.* IOWA. Sup. Ct. Iowa. Certiorari denied.

No. 882, Misc. SYMONS *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 883, Misc. DAVIS *v.* MARYLAND. Ct. App. Md. Certiorari denied. *Robert C. Heeney* and *John F. McAuliffe* for petitioner. Reported below: 236 Md. 389, 204 A. 2d 76.

No. 886, Misc. JAMES *v.* ANDERSON, JAIL SUPERINTENDENT, ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 888, Misc. NASTASIO, AKA NOLETTI *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 893, Misc. GRAVES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Peter Sanchez-Navarro, Jr.*, for petitioner. *Waggoner Carr*, Attorney General of Texas, *Hawthorne Phillips*, First Assistant Attorney General, *Stanton Stone*, Executive Assistant Attorney General, and *Howard M. Fender* and *Lonny F. Zwiener*, Assistant Attorneys General, for respondent. Reported below: 382 S. W. 2d 486.

No. 895, Misc. JEDBY *v.* CARTER, ACTING WARDEN. Sup. Ct. Mo. Certiorari denied.

No. 896, Misc. YARBROUGH *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 31 Ill. 2d 472, 202 N. E. 2d 487.

No. 909, Misc. STAMPER *v.* SCHUBERT, STATE HOSPITAL SUPERINTENDENT. C. A. 7th Cir. Certiorari denied.

Rehearing Denied.

No. 553. WINKLE *v.* BANNAN, WARDEN, 379 U. S. 645;

No. 743. LEVINE *v.* UNITED STATES, *ante*, p. 915;

No. 759, Misc. BRYAN *v.* UNITED STATES, *ante*, p. 921; and

No. 823, Misc. MINCHELLA *v.* LEVIN, CHIEF JUDGE, U. S. DISTRICT COURT, *ante*, p. 936. Petitions for rehearing denied.

Dismissal Under Rule 60.

No. 741, Misc. MEEKS *v.* ILLINOIS. Sup. Ct. Ill. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Petitioner *pro se*. *William G. Clark*, Attorney General of Illinois, and *Edward A. Berman*, Assistant Attorney General, for respondent.

APRIL 26, 1965.

Miscellaneous Orders.

No. 17, Original. NEBRASKA *v.* IOWA.

IT IS ORDERED that the Honorable Walter L. Pope, Senior Judge of the United States Court of Appeals for the Ninth Circuit, be, and he is hereby appointed Special Master in this case in the place of the Honorable J. Warren Madden, resigned. The Special Master shall have authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court hereafter may direct.

IT IS FURTHER ORDERED that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein. [For earlier orders herein, see 379 U. S. 876, 911, 985, 996.]

No. 120, Misc. SHEFFIELD *v.* EYMAN, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied. Petitioner *pro se.* *Robert W. Pickrell,* former Attorney General of Arizona, *Darrell F. Smith,* Attorney General, *William E. Eubank,* Chief Assistant Attorney General, and *Sidney M. Rosen* and *Robert S. Murlless,* Assistant Attorneys General, for respondents.

No. 18, Original. ILLINOIS *v.* MISSOURI. Motion for leave to file bill of complaint granted and State of Missouri allowed sixty days to answer. *William G. Clark,* Attorney General of Illinois, *Richard A. Michael,* Assistant Attorney General, and *Terence F. MacCarthy,* Special Assistant Attorney General, for plaintiff. *Norman H. Anderson,* Attorney General of Missouri, and *J. Gordon Siddens* and *Howard L. McFadden,* Assistant Attorneys General, for defendant. [For earlier orders herein, see 379 U. S. 952; *ante,* p. 901.]

No. 644. UNITED GAS IMPROVEMENT CO. *v.* CONTINENTAL OIL CO. ET AL.; and

No. 693. FEDERAL POWER COMMISSION *v.* MARR ET AL. C. A. 5th Cir. (Certiorari granted, 379 U. S. 958.) Motion of Southern California Gas Co. et al. for leave to file brief, as *amici curiae,* in Nos. 644 and 693 granted. Motion of State of California et al. for leave to file brief, as *amici curiae,* in No. 693 granted. *John Ormasa, L. T. Rice, J. David Mann, Jr.,* and *John E. Holtzinger, Jr.,* for Southern California Gas Co. et al. *Richard E. Tuttle* and *J. Calvin Simpson* for State of California et al.

No. 1023. UNITED STATES *v.* GUEST ET AL. Appeal from D. C. M. D. Ga. Motion of appellee Lackey for appointment of counsel granted and *Charles J. Bloch, Esquire,* of Macon, Georgia, a member of the Bar of this Court, appointed to serve as counsel for appellee Lackey in this case.

No. 981, Misc. SULLIVAN *v.* HEINZE, WARDEN;

No. 1002, Misc. LORENZANA *v.* RODRIGUEZ, WARDEN;

No. 1020, Misc. MORGAN *v.* UNITED STATES;

No. 1022, Misc. BUSH *v.* MAXWELL, WARDEN; and

No. 1029, Misc. GIBSON *v.* FLORIDA ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 722, Misc. CRAWFORD *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied. *Richard A. Baenen* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Doar, Harold H. Greene* and *Gerald P. Choppin* for the United States.

No. 948, Misc. WEISSENBORN *v.* JONES ET AL. Motion for leave to file petition for writ of mandamus denied. *Lewis M. Kanner* for petitioner.

No. 955, Misc. BRULOTTE ET AL. *v.* POWELL, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied. *Arlington C. White, Margaret E. White* and *Cutler W. Halverson* for petitioners.

No. 525, Misc. DUDA, AMBASSADOR OF CZECHOSLOVAK SOCIALIST REPUBLIC *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND. Motion for leave to file petition for writ of prohibition and/or mandamus denied. *Leonard B. Boudin* and *Victor Rabinowitz* for petitioner. *William A. Grimes* for Flota Maritima Browning de Cuba, S. A. *Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander* and *John C. Eldridge* for the United States, as *amicus curiae,* in opposition.

Question as to Jurisdiction Postponed.

Nos. 948 and 949. UNITED STATES *v.* PRICE ET AL. Appeals from D. C. S. D. Miss. Further consideration of question of jurisdiction postponed to hearing of cases on merits. Motion to consolidate granted and a total of two hours allotted for oral argument. *Solicitor General Cox, Acting Assistant Attorney General Doar, Ralph S. Spritzer, Louis F. Claiborne, Harold H. Greene* and *Howard A. Glickstein* for the United States.

Certiorari Granted. (See also No. 56, *ante,* p. 523; No. 58, *ante,* p. 519; No. 91, *ante,* p. 522; No. 181, *ante,* p. 524; No. 229, *ante,* p. 525; and No. 260, Misc., *ante,* p. 527.)

No. 932. BRENNER, COMMISSIONER OF PATENTS *v.* MANSON. C. C. P. A. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Douglas, Sherman L. Cohn* and *Edward Berlin* for petitioner. *Dean Laurence, Herbert I. Sherman* and *John L. White,* for respondent. Reported below: 52 C. C. P. A. (Pat.) 739, 333 F. 2d 234.

No. 959. EVANS ET AL. *v.* NEWTON ET AL. Sup. Ct. Ga. Certiorari granted. *Jack Greenberg, James M. Nabrit III, Michael Meltsner* and *Donald L. Hollowell* for petitioners. C. *Baxter Jones* for respondents. Reported below: 220 Ga. 280, 138 S. E. 2d 573.

No. 742. KATCHEN *v.* LANDY, TRUSTEE IN BANKRUPTCY. C. A. 10th Cir. Certiorari granted. *Fred M. Winner* for petitioner. *Robert B. Rottman* for respondent. Reported below: 336 F. 2d 535.

Certiorari Denied. (See also No. 194, Misc., *ante,* p. 521; and No. 120, Misc., *supra.*)

No. 397. FANECA *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. *Charles A. Carter* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for the United States et al. Reported below: 332 F. 2d 872.

No. 726. MARDEROSIAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Leo Patrick McGowan* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 337 F. 2d 759.

No. 801. WARD ET AL. *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. *James M. Nabrit III* for petitioners. *Jack P. F. Gremillion,* Attorney General of Louisiana, *M. E. Culligan,* Assistant Attorney General, and *John Hunter,* Special Assistant Attorney General, for respondent. Reported below: 246 La. 766, 167 So. 2d 359.

No. 847. BROTHERHOOD OF RAILROAD TRAINMEN ET AL. *v.* DENVER & RIO GRANDE WESTERN RAILROAD CO.; and

No. 993. DENVER & RIO GRANDE WESTERN RAILROAD CO. *v.* BROTHERHOOD OF RAILROAD TRAINMEN ET AL. C. A. 10th Cir. Certiorari denied. *Edward J. Hickey, Jr.,* and *James L. Highsaw, Jr.,* for petitioners in No. 847. *Ray Garrett* and *Walter J. Cummings, Jr.,* for respondent in No. 847. *Walter J. Cummings, Jr.,* for petitioner in No. 993. Reported below: 338 F. 2d 407.

No. 869. IN RE THOMSON. C. C. P. A. Certiorari denied. *Louis Quarles* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Sherman L. Cohn* and *Edward Berlin* for the Commissioner of Patents. Reported below: 52 C. C. P. A. (Pat.) 770, 336 F. 2d 604.

No. 870. SEEBACH *v.* CULLEN, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL. C. A. 9th Cir. Certiorari denied. *Claude L. Dawson* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander* and *John C. Eldridge* for respondents. Reported below: 338 F. 2d 663.

No. 886. BOEING CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *David E. Wagoner* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Gilbert E. Andrews* for the United States. Reported below: —— Ct. Cl. ——, 338 F. 2d 342.

No. 879. BISHOP ET AL. *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *James R. Willis* for petitioners. *John T. Corrigan* and *Harvey R. Monck* for respondent.

No. 882. WHITE ET AL. *v.* O'HEARNE, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, FOURTH COMPENSATION DISTRICT, DEPARTMENT OF LABOR, ET AL. C. A. 4th Cir. Certiorari denied. *Bernard G. Link* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander* and *Robert V. Zener* for the Deputy Commissioner; and *Thomas E. Cinnamond* for Maryland Shipbuilding & Drydock Co., respondents. Reported below: 338 F. 2d 464.

No. 893. HOFFMAN *v.* CHRYSLER CORP. ET AL.; and

No. 954. EZZES *v.* DANN ET AL. Sup. Ct. Del. Certiorari denied. *Maximilian Bader* and *I. Walton Bader* for petitioner in No. 893. *James J. Leff* for petitioner in No. 954. *Francis S. Bensel, David W. Peck, Howard T. Milman, S. Samuel Arsht, Milton Pollack* and *Robert H. Richards, Jr.*, for Chrysler Corp. et al.; *Norman S. Nemser, Stanley Nemser* and *William E. Taylor, Jr.*, for Gallo et al.; and *Lewis M. Dabney, Jr., Herbert Robinson* and *Daniel O. Hastings* for Reiver et al., respondents in both cases. Respondent Dann, *pro se*, in support of petitions for certiorari. Reported below: —— Del. ——, 205 A. 2d 343.

No. 940. LOCAL 780, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES & MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL–CIO, ET AL. *v.* RADIO CORP. OF AMERICA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. *Bernard M. Mamet* for petitioners. *William A. Gillen* and *Granville M. Alley, Jr.*, for respondent. Reported below: 160 So. 2d 150.

No. 929. GULFPORT SHIPBUILDING CORP. ET AL. *v.* VALLOT ET AL. C. A. 5th Cir. Certiorari denied. *E. D. Vickery* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Richard S. Salzman* for respondent Deputy Commissioner, Bureau of Employees' Compensation, Department of Labor. Reported below: 334 F. 2d 358.

No. 930. MCCALL, ADMINISTRATRIX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Edgar Horton Smith* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Morton Hollander* for the United States. Reported below: 338 F. 2d 589.

No. 937. BENNETT *v.* CO-ORDINATING COMMITTEE ON DISCIPLINE. Ct. App. N. Y. Certiorari denied. *Leonard Feldman* for petitioner. *Angelo T. Cometa* for respondent.

No. 939. AULET *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Howard T. Savage* and *Samuel Adam* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 339 F. 2d 934.

No. 942. GILVIN-TERRILL, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *Wales H. Madden, Jr.,* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 338 F. 2d 971.

No. 947. SAMS ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Vincent M. Casey* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Daniel H. Benson* for the United States. Reported below: 340 F. 2d 1014.

No. 943. Cooks et al. *v.* Brotherhood of Railway Carmen of America, Local No. 991 & Local No. 783, et al. C. A. 5th Cir. Certiorari denied. *Roberson L. King* for petitioners. *Richard R. Lyman* for Brotherhood of Railway Carmen of America, and *Hugh M. Patterson* for Texas & New Orleans Railroad Co., respondents. Reported below: 338 F. 2d 59.

No. 952. Spomar *v.* United States. C. A. 7th Cir. Certiorari denied. *William A. Barnett* for petitioner. *Solicitor General Cox* for the United States. Reported below: 339 F. 2d 941.

No. 953. Hunter *v.* United States. C. A. 9th Cir. Certiorari denied. *Russell E. Parsons* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 340 F. 2d 425.

No. 955. Larkin, dba Larkin Co. *v.* United Association of Journeymen & Apprentices of Plumbing & Pipefitting Industry of United States and Canada, AFL–CIO, Local 53, et al. C. A. 1st Cir. Certiorari denied. Reported below: 338 F. 2d 335.

No. 960. Pennco Engineering Co. *v.* Allied Chemical Corp. C. A. 4th Cir. Certiorari denied. *Ralph H. Hudson* and *Zachary T. Wobensmith 2nd* for petitioner. *Maxwell Barus* for respondent. Reported below: 339 F. 2d 260.

No. 962. Donovan *v.* United States. C. A. 7th Cir. Certiorari denied. *George F. Callaghan* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Philip R. Monahan* for the United States. Reported below: 339 F. 2d 404.

No. 956. United Packinghouse, Food & Allied Workers, AFL–CIO *v.* Wilson & Co., Inc. C. A. 7th Cir. Certiorari denied. *Eugene Cotton* and *Richard F. Watt* for petitioner. *Charles A. Bane* and *James E. Knox, Jr.*, for respondent. Reported below: 340 F. 2d 958.

No. 961. Kovens et al. *v.* United States. C. A. 5th Cir. Certiorari denied. *W. G. Ward* and *Chester Bedell* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 338 F. 2d 611.

No. 963. International Brotherhood of Pulp, Sulphite & Paper Mill Workers, AFL–CIO, et al. *v.* Solo Cup Co. Ct. App. Md. Certiorari denied. *Edward William Smith* and *Claude L. Callegary* for petitioners. *Robert L. Sullivan, Jr.*, for respondent. Reported below: 237 Md. 479, 205 A. 2d 213.

No. 964. Welfare Finance Corp. et al. *v.* Tanenbaum Textile Co., Inc. Sup. Ct. Ohio. Certiorari denied. *Isidore H. Wachtel* and *Harry M. Wasserman* for petitioners. *Milton H. Schmidt* for respondent. Reported below: 177 Ohio St. 54, 201 N. E. 2d 886.

No. 965. John T. Clark & Son *v.* Cunard Steam-Ship Co., Ltd., et al.; and

No. 970. David Crystal, Inc. *v.* Cunard Steam-Ship Co., Ltd., et al. C. A. 2d Cir. Certiorari denied. *Horace T. Atkins* for petitioner in No. 965. *John L. Quinlan* for David Crystal, Inc., petitioner in No. 970 and respondent in No. 965. *William J. Tillinghast, Jr.*, for Penson & Co., respondent in No. 965. Reported below: 339 F. 2d 295.

No. 966. HAMMAN ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Herbert L. Faulkner* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph M. Howard* for the United States. Reported below: 340 F. 2d 145.

No. 969. REYNOLDS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Frederick M. Schlater* and *Arthur E. McInerney* for petitioner. *Solicitor General Cox* and *Assistant Attorney General Oberdorfer* for the United States. Reported below: 338 F. 2d 1.

No. 973. BATH *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. *George H. Mason* for petitioner. *Edward W. Brooke,* Attorney General of Massachusetts, and *Warren K. Kaplan,* Assistant Attorney General, for respondent. Reported below: 348 Mass. 78, 202 N. E. 2d 249.

No. 990. GALAMISON ET AL. *v.* NEW YORK. C. A. 2d Cir. Certiorari denied. *William M. Kunstler, Arthur Kinoy, William H. Booth, Stanley Faulkner, Paul O'Dwyer, Leon Quat, Oliver C. Sutton, Percy Sutton, Philip Roache* and *Charles T. McKinney* for petitioners. *Louis J. Lefkowitz,* Attorney General of New York, *Mortimer Sattler,* Assistant Attorney General, *Frank D. O'Connor, Isidore Dollinger, Harvey B. Ehrlich, Irving Anolik, Frank S. Hogan* and *H. Richard Uviller* for respondent. Reported below: 342 F. 2d 255.

No. 891. WYMAN, COURT-APPOINTED COUNSEL FOR ZUNIGA *v.* ILLINOIS. Sup. Ct. Ill. Motion to dispense with printing petition for writ of certiorari granted. Certiorari denied. Petitioner *pro se. Daniel P. Ward* and *Edward J. Hladis* for respondent. Reported below: 31 Ill. 2d 429, 202 N. E. 2d 31.

No. 974. D'ELIA *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Thomas J. O'Sullivan* for respondents. Reported below: 338 F. 2d 701.

No. 976. SCADUTO *v.* ORLANDO, DBA A. J. ORLANDO CONTRACTING CO. C. A. 2d Cir. Certiorari denied. *Leo H. Raines* for petitioner. *John F. Cogan, Jr.*, for for respondent. Reported below: 340 F. 2d 293.

No. 977. BENDELARI *v.* UNITED STATES. Ct. Cl. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 985. ELY ET AL. *v.* OFFICIAL CREDITORS' COMMITTEE OF FOX MARKETS, INC. C. A. 9th Cir. Certiorari denied. *John J. Quinn, Jr.*, for petitioners. *Charles J. Katz* for respondent. Reported below: 337 F. 2d 461.

No. 980. LEWIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *James C. Britt* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 338 F. 2d 137.

No. 996. COMULADA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Albert J. Krieger* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 340 F. 2d 449.

No. 35, Misc. TRUMAN *v.* BOLES, WARDEN. Sup. Ct. App. W. Va. Certiorari denied. Petitioner *pro se*. *C. Donald Robertson*, Attorney General of West Virginia, and *George H. Mitchell*, Assistant Attorney General, for respondent.

No. 1020. GIANNAKOUROS ET AL. *v.* ORIENTAL TANKER CORP., S. A., ET AL. C. A. 4th Cir. Certiorari denied. *Donald S. Sherwood* for petitioners. *Walter B. Martin, Jr.*, for respondents. Reported below: 338 F. 2d 649.

No. 922. SIOPES *v.* UNITED STATES. Ct. Cl. Motion to dispense with printing petition for writ of certiorari granted. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 941. STEWART, TRUSTEE *v.* PHOENIX TITLE & TRUST CO. C. A. 9th Cir. Motion to dispense with printing petition for writ of certiorari granted. Certiorari denied. *David W. Richter* for petitioner. *J. Mercer Johnson* for respondent. Reported below: 337 F. 2d 978.

No. 899. MURPHY OIL CORP. *v.* UNITED STATES. C. A. 8th Cir. Motions of Ashland Oil & Refining Co. and Richard A. Freling for leave to file briefs, as *amici curiae*, granted. Certiorari denied. *Vester T. Hughes, Jr., J. A. O'Connor, Jr.*, and *William J. Wynne* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Melva M. Graney* and *Thomas L. Stapleton* for the United States. *Richard A. Freling, pro se; W. M. Sutton* for Shamrock Oil & Gas Corp.; and *Fred M. Vinson, Jr.*, and *James A. Anderson III* for Ashland Oil & Refining Co., as *amici curiae*, in support of the petition. Reported below: 337 F. 2d 677.

No. 914. KOTULA, DBA ALBANY MOTOR SALES *v.* FORD MOTOR CO. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Wayne G. Popham* for petitioner. *Michael J. Doherty* and *Francis D. Butler* for respondent. Reported below: 338 F. 2d 732.

No. 975. COY *v.* UNITED STATES. Ct. Cl. Motions to dispense with printing petition for writ of certiorari and petitioner's reply brief granted. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Douglas, Sherman L. Cohn* and *Jack H. Weiner* for the United States.

No. 979. DYKE WATER CO. ET AL. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Alvin Landis* for petitioners. *Richard E. Tuttle* and *J. Thomason Phelps* for respondents.

No. 237, Misc. STEPHENS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *William VanDercreek* for petitioner. *Waggoner Carr,* Attorney General of Texas, and *Gilbert J. Pena* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondent. Reported below: 377 S. W. 2d 189.

No. 240, Misc. ROBERTS *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: 332 F. 2d 892.

No. 278, Misc. GREEN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 334 F. 2d 733.

No. 514, Misc. BOYLE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Petitioner *pro se*. *William I. Siegel* for respondent.

No. 320, Misc. MACON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Petitioner *pro se*. *Edwin K. Steers*, Attorney General of Indiana, for respondent. Reported below: 245 Ind. 269, 195 N. E. 2d 352, 198 N. E. 2d 229.

No. 359, Misc. NORTON ET AL. *v.* MCSHANE ET AL. C. A. 5th Cir. Certiorari denied. *Hartwell Davis* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for respondents. Reported below: 332 F. 2d 855.

No. 375, Misc. POST *v.* BOLES, WARDEN. C. A. 4th Cir. Certiorari denied. *Thomas B. Miller* and *Jeremy C. McCamic* for petitioner. Reported below: 332 F. 2d 738.

No. 420, Misc. MILLER *v.* BLALOCK, STATE HOSPITAL SUPERINTENDENT. Sup. Ct. App. Va. Certiorari denied. Petitioner *pro se*. *Reno S. Harp III, Curtis R. Mann* and *W. Luke Witt*, Assistant Attorneys General of Virginia, for respondent.

No. 444, Misc. GONZALEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Petitioner *pro se*. *Waggoner Carr*, Attorney General of Texas, *Hawthorne Phillips*, First Assistant Attorney General, *Stanton Stone*, Executive Assistant Attorney General, and *Howard M. Fender* and *Allo B. Crow, Jr.*, Assistant Attorneys General, for respondent. Reported below: 379 S. W. 2d 352.

No. 574, Misc. HUBER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *Doris H. Maier*, Assistant Attorney General, and *Roger E. Venturi*, Deputy Attorney General, for respondent.

No. 428, Misc. THOMAS *v.* NEW YORK. App Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Petitioner *pro se.* *Isidore Dollinger* and *Walter E. Dillon* for respondent.

No. 575, Misc. MCCORMICK *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se.* *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Edward A. Hinz, Jr.,* Deputy Attorney General, for respondent.

No. 616, Misc. MCBRIDE *v.* FAY, WARDEN. Ct. App. N. Y. Certiorari denied. Petitioner *pro se.* *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Iris A. Steel,* Deputy Assistant Attorney General, for respondent.

No. 650, Misc. ARNOLD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Daniel H. Benson* for the United States. Reported below: 336 F. 2d 347.

No. 668, Misc. VANLEEWARD *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. *Donald L. Hollowell* for petitioner. *Eugene Cook,* Attorney General of Georgia, and *Albert Sidney Johnson,* Assistant Attorney General, for respondent. Reported below: 220 Ga. 135, 137 S. E. 2d 452.

No. 744, Misc. COX *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Petitioner *pro se.* *William M. Ferguson,* Attorney General of Kansas, and *J. Richard Foth* and *Richard H. Seaton,* Assistant Attorneys General, for respondent. Reported below: 193 Kan. 571, 396 P. 2d 326.

No. 682, Misc. CONNOR *v.* ANDERSON, JAIL SUPERINTENDENT, ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Doar, Harold H. Greene* and *Howard A. Glickstein* for respondents.

No. 714, Misc. BAKER, ALIAS GRAY *v.* UNITED STATES BOARD OF PAROLE. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Doar* and *Harold H. Greene* for respondent. Reported below: 337 F. 2d 622.

No. 723, Misc. WHITT *v.* WEAKLEY, REFORMATORY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Doar, Harold H. Greene* and *David Rubin* for respondent.

No. 745, Misc. CONKLIN *v.* LAVALLEE, WARDEN. C. A. 2d Cir. 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. 792, Misc. STANFORD *v.* TAYLOR, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Doar* and *Harold H. Greene* for respondent. Reported below: 337 F. 2d 176.

No. 836, Misc. SIMMONS, AKA HAROLD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Norman Zolot* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 338 F. 2d 804.

No. 832, Misc. MITCHELL *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. *John S. Connolly* for petitioner. *Robert W. Mattson,* Attorney General of Minnesota, for respondent. Reported below: 268 Minn. 513, 130 N. W. 2d 128.

No. 842, Misc. HALASZ *v.* BURKE, WARDEN. Sup. Ct. Wis. Certiorari denied.

No. 854, Misc. MORGAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Monroe H. Freedman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States.

No. 887, Misc. HARDY ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Edward G. Howard* and *Carl V. Lyon* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: —— U. S. App. D. C. ——, 343 F. 2d 233.

No. 908, Misc. BURTON *v.* TARTAR, JUDGE. Ct. App. Ky. Certiorari denied. Reported below: 385 S. W. 2d 168.

No. 911, Misc. FAIR *v.* DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT. Sup. Ct. Fla. Certiorari denied.

No. 916, Misc. CALDWELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States. Reported below: 338 F. 2d 385.

No. 900, Misc. LEMONS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Daniel H. Benson* for the United States. Reported below: 339 F. 2d 761.

No. 906, Misc. PROSTOK *v.* BURKE, WARDEN. Sup. Ct. Wis. Certiorari denied.

No. 918, Misc. KOSTAL *v.* TINSLEY, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *John P. Moore,* Assistant Attorney General, for respondent. Reported below: 337 F. 2d 845.

No. 923, Misc. KNIGHT *v.* RAGEN, DIRECTOR OF PUBLIC SAFETY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 337 F. 2d 425.

No. 926, Misc. O'KEEFE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 263 N. C. 53, 138 S. E. 2d 767.

No. 935, Misc. JOHNSON *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 936, Misc. STANMORE *v.* COLORADO. Sup. Ct. Colo. Certiorari denied.

No. 937, Misc. HEAD *v.* HEINZE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 940, Misc. STREETER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

Nos. 943, Misc., and 1011, Misc. FAIR *v.* FAIR. Sup. Ct. Fla. Certiorari denied.

No. 944, Misc. IN RE GINGER. Sup. Ct. Mich. Certiorari denied.

No. 945, Misc. WOOD *v.* MAINE ET AL. Sup. Jud. Ct. Me. Certiorari denied. Petitioner *pro se*. *Richard J. Dubord,* Attorney General of Maine, *George C. West,* Deputy Attorney General, and *John W. Benoit,* Assistant Attorney General, for respondents. Reported below: 161 Me. 13, 206 A. 2d 223.

No. 956, Misc. HOLMES *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. *William Earl Badgett* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Marne S. Matherne,* Assistant Attorney General, for respondent.

No. 958, Misc. LLUVERAS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 963, Misc. MCCOY *v.* MARYLAND. Ct. App. Md. Certiorari denied. *Howard J. Needle* for petitioner. Reported below: 236 Md. 632, 204 A. 2d 565.

Nos. 970, Misc., and 971, Misc. PEEL *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. *Harry W. Fogle* for petitioner. Reported below: No. 970, Misc., 150 So. 2d 281; No. 971, Misc., 154 So. 2d 910.

No. 973, Misc. MORPHEW *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 201 N. E. 2d 696.

No. 959, Misc. Rose *v.* California. App. Dept., Super. Ct. Cal., County of L. A. Certiorari denied.

No. 978, Misc. Tyson *v.* New Jersey. Sup. Ct. N. J. Certiorari denied. Reported below: 43 N. J. 411, 204 A. 2d 864.

No. 962, Misc. Regalado *v.* California. Dist. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 980, Misc. Van Duyne *v.* New Jersey. Sup. Ct. N. J. Certiorari denied. Reported below: 43 N. J. 369, 204 A. 2d 841.

No. 985, Misc. Vejar *v.* Dunbar, Corrections Director, et al. Sup. Ct. Cal. Certiorari denied.

No. 987, Misc. Horney et vir *v.* World Island Estates, Inc. Ct. App. N. Y. Certiorari denied. Petitioners *pro se*. *William L. F. Gardiner* for respondent.

No. 988, Misc. James *v.* United States. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 1004, Misc. Latham et al. *v.* Crouse, Warden. C. A. 10th Cir. Certiorari denied. *Lawrence Speiser* and *Bernard Roazen* for petitioners. *Robert C. Londerholm,* Attorney General of Kansas, and *J. Richard Foth* and *Park McGee,* Assistant Attorneys General, for respondent. Reported below: 338 F. 2d 658.

No. 1018, Misc. Nelson *v.* Rhay, Penitentiary Superintendent, et al. Super. Ct. Wash., Walla Walla County. Certiorari denied.

No. 1013, Misc. FICEK *v.* SOUTHERN PACIFIC CO. C. A. 9th Cir. Certiorari denied. *Charles O. Porter* for petitioner. *Waldron A. Gregory* for respondent. Reported below: 338 F. 2d 655.

No. 1006, Misc. YATES *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 386 S. W. 2d 450.

No. 1010, Misc. CHAMPAGNE *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1014, Misc. PEEPLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Murray L. Williams* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 341 F. 2d 60.

No. 1019, Misc. THALIS *v.* THALIS ET AL. C. A. D. C. Cir. Certiorari denied.

No. 1024, Misc. CONNOR *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 1027, Misc. VINCENT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 337 F. 2d 891.

No. 843, Misc. WHALEY *v.* SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO ET AL. Dist. Ct. App. Cal., 1st App. Dist. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

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No. 796. AWARE, INC., ET AL. *v.* FAULK, *ante*, p. 916;

No. 813. DYER *v.* MURRAY, TRUSTEE, ET AL., *ante*, p. 932;

No. 822. GROSSMAN *v.* STUBBS ET AL., *ante*, p. 934;

No. 844. HARMON *v.* UNITED STATES, *ante*, p. 944;

No. 677, Misc. LAWSON *v.* UNITED STATES, *ante*, p. 919;

No. 728, Misc. BONANNO *v.* LOUISIANA, *ante*, p. 126;

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No. 822, Misc. ARBUCKLE *v.* ILLINOIS, *ante*, p. 945; and

No. 840, Misc. MARION ET AL. *v.* CITY OF LANDER, WYOMING, ET AL., *ante*, p. 925. Petitions for rehearing denied.

No. 34. UDALL, SECRETARY OF THE INTERIOR *v.* TALLMAN ET AL., *ante*, p. 1. Petition for rehearing denied. MR. JUSTICE DOUGLAS and MR. JUSTICE HARLAN took no part in the consideration or decision of this petition.

No. 585. FEDERAL POWER COMMISSION *v.* AMERADA PETROLEUM CORP. ET AL., 379 U. S. 687, *ante*, p. 959. Motion for leave to file second petition for rehearing denied.

No. 827. CHASE CAPITAL CORP., DBA QUAIL VALLEY COUNTRY CLUB *v.* BUMB, RECEIVER-TRUSTEE IN BANKRUPTCY, *ante*, p. 934. Motion to dispense with printing petition for rehearing granted. Petition for rehearing denied.

No. 642, Misc. WALKER *v.* INTERNAL REVENUE SERVICE ET AL., *ante*, p. 926. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

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4. *National Labor Relations Act — Lockout by members of employer association—Whipsaw strike—Hiring of temporary employees.*—Lockout of employees by members of employer group and subsequent operations with temporary help in face of struck employer's continued operations during whipsaw strike did not violate § 8 (a) (3) of the Act since there was no hostile motive and the slight tendency to discourage union membership is justified by the service of significant legitimate business ends. Labor Board v. Brown, p. 278.

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5. *Representation dispute—Ballot prescribed by the National Mediation Board.*—The Board's decision as to the form of the ballot is not subject to judicial review, and in view of long-established election procedures the District Court erred in enjoining the Board from holding an election with a ballot not providing a space for a vote against collective representation. Railway Clerks v. Employees Assn., p. 650.

LEASES. See **Taxes**, 1, 4–5.

LESSER-INCLUDED OFFENSE. See **Procedure**, 5.

LIBEL. See **Constitutional Law**, IV.

LICENSED DEALER. See **Constitutional Law**, I, 2; **Indians.**

LIQUOR. See **Constitutional Law**, V, 1.

LOCKOUTS. See **Administrative Procedure**, 1; **Labor**, 3–4.

LONGSHOREMEN'S & HARBOR WORKERS' COMPENSATION ACT. See **Administrative Procedure**, 3; **Workmen's Compensation**, 2.

LOUISIANA. See **Constitutional Law**, III, 2–3; **Decree**; **Evidence**; **Procedure**, 1; **Voting**, 2.

MANAGERIAL DECISIONS. See **Labor**, 2.

MARYLAND. See **Constitutional Law**, III, 1.

MASSACHUSETTS. See **Service of Process.**

MENTAL INSTITUTIONS. See **Jurisdiction.**

MERGERS. See **Antitrust Acts**, 1–2.

MILITARY SERVICE. See **Conscientious Objectors**; **Constitutional Law**, II, 1; **Universal Military Training and Service Act.**

MINERAL LEASING ACT. See **Public Lands.**

MINING. See **Taxes**, 1.

MISDEMEANOR. See **Procedure**, 5.

MISREPRESENTATION. See **Procedure**, 6; **Remedies**; **Unfair Competition.**

MISSISSIPPI. See **Constitutional Law**, IV; **Defendants**; **Voting**, 1.

MOCK-UPS. See **Procedure**, 6; **Remedies**; **Unfair Competition.**

MONOPOLIES. See **Antitrust Acts**, 1–2.

MOTION PICTURES. See **Constitutional Law**, III, 1.

NATIONAL LABOR RELATIONS ACT. See **Administrative Procedure**, 1–2; **Labor**, 1–4.

NATIONAL LABOR RELATIONS BOARD.

Jurisdiction over radio stations—Integrated enterprise of single employer.—Although the Board declines jurisdiction over radio stations with yearly gross receipts below $100,000, it takes jurisdiction where several nominally separate entities comprise an integrated enterprise of a single employer having receipts in excess thereof; and where, as here, the Board will assert jurisdiction, state jurisdiction must yield. Radio Union v. Broadcast Serv., p. 255.

NATIONAL MEDIATION BOARD. See **Judicial Review; Labor**, 5.

NAVAJO RESERVATION. See **Indians.**

NEGROES. See **Constitutional Law**, II, 2; **Decree; Defendants; Evidence; Juries**, 2; **Voting**, 1–2.

NOTICE. See **Constitutional Law**, I, 1; **Procedure**, 4.

OBSCENITY. See **Constitutional Law**, III, 1.

OFFENSES. See **Procedure**, 5.

OHIO. See **Federal Employers' Liability Act.**

OIL AND GAS LEASES. See **Public Lands.**

ORDERS. See **Procedure**, 6; **Remedies; Unfair Competition.**

PARENT AND CHILD. See **Constitutional Law**, I, 1; **Procedure**, 4.

PENNSYLVANIA. See **Constitutional Law**, V, 1.

PEREMPTORY CHALLENGES. See **Constitutional Law**, II, 2; **Juries**, 2.

PERSONAL INJURIES. See **Workmen's Compensation**, 1.

PETIT JURIES. See **Constitutional Law**, II, 2; **Juries**, 2.

POLL TAX. See **Constitutional Law**, VIII; **Procedure**, 2.

PRESUMPTIONS. See **Criminal Law; Trial.**

PROBABLE CAUSE. See **Constitutional Law**, V, 2.

PROCEDURE. See also **Constitutional Law**, I, 1; III, 2–3; VI–VIII; **Decree; Defendants; Evidence; Federal Employers' Liability Act; Juries**, 1; **Remedies; Service of Process; Trial by Jury; Unfair Competition; Voting**, 1–2; **Workmen's Compensation**, 1.

1. *District Courts—Abstention—Statute discouraging protected activities.*—Abstention is inappropriate where a state statute is justifiably attacked on its face or as applied for the purpose of discouraging protected activities. Dombrowski v. Pfister, p. 479.

PROCEDURE—Continued.

2. *District Courts—Abstention—Unambiguous state statutes.*—The District Court did not abuse its discretion in refusing to abstain since the state statutes are clear and unambiguous, the rights involved are fundamental civil rights, and the statutory deadline was approaching. Harman v. Forssenius, p. 528.

3. *State courts—Self-Incrimination Clause—Comment on defendant's failure to testify.*—Comment by prosecutor or judge to jury on defendant's failure to testify in state criminal trial violates the Self-Incrimination Clause of the Fifth Amendment as made applicable to the States by the Fourteenth. Griffin v. California, p. 609.

4. *State courts—Subsequent hearing—Burden of proof.*—A hearing subsequently granted petitioner did not remove denial of due process in lack of notice of prior adoption proceeding since he was forced to assume burdens of proof which, had he been accorded notice in earlier proceeding, would have rested on moving parties. Armstrong v. Manzo, p. 545.

5. *Instructions to jury—Lesser-included offense.*—A lesser-included offense instruction is proper only where the charged greater offense requires the jury to find a disputed factual element not required for conviction of the lesser offense, and since here there were no disputed issues which would justify instructions to the jury that it could find that petitioner had committed all the elements of 26 U. S. C. §§ 7203 and 7207 without having violated § 7201, petitioner was not entitled to lesser-included offense instructions. Sansone v. United States, p. 343.

6. *Timeliness of petition for certiorari—Federal Trade Commission orders—Second judgment of Court of Appeals.*—Time for filing petition for certiorari under 28 U. S. C. § 2101 (c) commenced on the date of the second judgment by the Court of Appeals, since the Commission's second order was a good-faith attempt to incorporate the principles of the court's first mandate and the court's second opinion resolved a genuine ambiguity in the first. FTC v. Colgate-Palmolive Co., p. 374.

PROSECUTORS. See **Constitutional Law**, VI; **Procedure**, 3.

PUBLIC LANDS.

Oil and gas leases—Executive and Public Land Orders—Interpretation of Secretary of the Interior.—The Secretary of the Interior has consistently and publicly interpreted Executive and Public Land Orders not to bar the issuance of oil and gas leases on public lands in Alaska and a number of leases have been developed at great expense in reliance thereon; and since his interpretation, although not the only permissible one, is reasonable, courts must respect it. Udall v. Tallman, p. 1.

PUBLIC OFFICERS. See **Constitutional Law,** IV.

RACIAL DISCRIMINATION. See **Constitutional Law,** II, 2; **Decree; Defendants; Evidence; Juries,** 2; **Voting,** 1–2.

RADIO STATIONS. See **National Labor Relations Board.**

RAILROADS. See **Antitrust Acts,** 3; **Rules.**

RAILWAY LABOR ACT. See **Judicial Review; Labor,** 5.

RECIPROCAL BUYING. See **Antitrust Acts,** 1–2.

REGISTRATION. See **Subversive Activities Control Act.**

RELIGION. See **Conscientious Objectors; Universal Military Training and Service Act.**

REMEDIES. See also **Procedure,** 6; **Unfair Competition; Workmen's Compensation,** 1.

Discretion of Federal Trade Commission—Scope of orders.—The order here was as specific as circumstances permitted and was well within the Commission's wide discretion to determine the type of order needed to cope with the unfair practices found. FTC v. Colgate-Palmolive Co., p. 374.

REPRESENTATION. See **Judicial Review; Labor,** 5.

RESIDENCE. See **Constitutional Law,** VIII; **Procedure,** 2.

RULES. See also **Antitrust Acts,** 3; **Defendants; Service of Process; Trial by Jury; Voting,** 1.

Federal Rules of Criminal Procedure—Bill of particulars.—Since an amended bill of particulars may be filed under Rule 7 (f) of the Federal Rules of Criminal Procedure, the case is vacated and remanded. United States v. Boston & M. R. Co., p. 157.

RULES ENABLING ACT. See **Service of Process.**

SALES. See **Antitrust Acts,** 3; **Constitutional Law,** I, 2; **Rules; Taxes,** 2, 4–5.

SANDPAPER. See **Procedure,** 6; **Remedies; Unfair Competition.**

SEARCH AND SEIZURE. See **Constitutional Law,** V.

SECRETARY OF THE INTERIOR. See **Public Lands.**

SELECTIVE SERVICE. See **Conscientious Objectors; Universal Military Training and Service Act.**

SELF-INCRIMINATION CLAUSE. See **Constitutional Law,** VI; **Procedure,** 3.

SERVICEMEN. See **Constitutional Law,** II, 1.

SERVICE OF PROCESS.

Federal civil action—Diversity jurisdiction—Federal Rules of Civil Procedure.—In a civil action in federal court where jurisdiction is based on diversity of citizenship, service of process shall be made as set forth in Federal Rule of Civil Procedure 4 (d) (1) rather than in manner prescribed by state law. Hanna v. Plumer, p. 460.

SHAVING CREAM. See **Procedure,** 6; **Remedies; Unfair Competition.**

SHIPYARDS. See **Labor,** 3.

SIMULATIONS. See **Procedure,** 6; **Remedies; Unfair Competition.**

SIXTH AMENDMENT. See **Constitutional Law,** VII.

STALE RECORD. See **Subversive Activities Control Act.**

STATE TAXES. See **Constitutional Law,** I, 2; **Taxes,** 2; **Indians.**

STATUTE OF LIMITATIONS. See **Federal Employers' Liability Act.**

STATUTORY PRESUMPTIONS. See **Criminal Law; Trial.**

STILLS. See **Constitutional Law,** V, 2; **Criminal Law; Trial.**

STRIKES. See **Administrative Procedure,** 1; **Labor,** 3–4.

STRUCK-JURY SYSTEM. See **Constitutional Law,** II, 2; **Juries,** 2.

SUBVERSIVE ACTIVITIES CONTROL ACT.

Order to register—Stale record.—Court of Appeals' judgment affirming Subversive Activities Control Board's order that petitioner register as a Communist-front organization is vacated, in view of the staleness of the record. American Committee v. SACB, p. 503; Brigade Veterans v. SACB, p. 513.

SUBVERSIVE ORGANIZATIONS. See **Constitutional Law,** III, 2–3; **Procedure,** 1; **Subversive Activities Control Act.**

SUPPORT AND MAINTENANCE. See **Constitutional Law,** I, 1; **Jurisdiction; Procedure,** 4.

TAXES. See also **Constitutional Law,** I, 2; **Indians; Procedure,** 5.

1. *Depletion deduction—Lessees of coal lands—Contract miners.*—Under 26 U. S. C. § 611 (b), read in the light of § 631 (c), the lessee in a typical lessor-lessee arrangement is entitled to the entire depletion deduction, which is allowed only to the owner of an economic interest in the mineral deposits; and contract coal miners without more are not entitled to a tax allowance. Paragon Coal Co. v. Commissioner, p. 624.

TAXES—Continued.

2. *District of Columbia franchise tax—Income apportioned on basis of sales.*—Since most States imposing corporate income taxes apportion corporate income by giving equal weight to geographical distribution of plant, payroll, and sales, the use of a formula based wholly on sales will result in multiple taxation and unfair allocation of corporate income, as well as contravene the language of the District of Columbia franchise tax statute. GMC v. District of Columbia, p. 553.

3. *Estate taxes—Proceeds of flight insurance policy.*—Proceeds of flight insurance policy should be included in estate tax return since policy was on the life of the decedent within the meaning of 26 U. S. C. § 2042 (2) and decedent possessed incidents of ownership at the time of his death for estate tax purposes. Commissioner v. Noel, p. 678.

4. *Internal Revenue Code—Capital gains—Sale of company to charitable organization.*—Transaction by which a charitable organization acquired title to company stock and assets in return for its promise to pay over money from the operating profits, constituted a sale under local law and within the meaning of § 1222 (3) of the Code. Commissioner v. Brown, p. 563.

5. *Sale of company—Capital gains—Shifting of risk.*—The fact that there was no risk-shifting does not mean that the transaction was not a sale but a device to collect future earnings at capital gains rates for which the price set was excessive. Commissioner v. Brown, p. 563.

TAX EXEMPTIONS. See **Taxes**, 4–5.

TELEVISION ADVERTISING. See **Procedure**, 6; **Remedies**; **Unfair Competition.**

TEMPORARY EMPLOYEES. See **Administrative Procedure**, 1; **Labor**, 4.

TEXAS. See **Constitutional Law**, I, 1; II, 1; VII, 1; **Procedure**, 4.

TEXTILE MILLS. See **Labor**, 2.

TRADERS. See **Indians.**

TRIAL. See also **Constitutional Law**, II, 2; VI–VII; **Criminal Law**; **Juries**, 1.

Statutory presumption—Powers of trial judge—Instructions to jury.—Statute authorizing jury to infer guilt from defendant's unexplained presence at illegal still deprives trial judge of none of his normal powers with respect to submitting case to jury or granting judgment notwithstanding verdict nor does it prevent the jury from

TRIAL—Continued.

being instructed on standards for reasonable doubt. United States v. Gainey, p. 64.

TRIAL BY JURY.

Right of federal criminal defendant to waive—Federal Rules of Criminal Procedure.—Defendant in a federal criminal case does not have an absolute right to be tried by the court without a jury, and though he may waive his constitutional right to a jury trial such waiver may be conditioned upon approval of the court and the consent of the Government, as set forth in Federal Rule of Criminal Procedure 23 (a). Patton v. United States, p. 24.

TRIAL JURIES. See **Constitutional Law**, II, 2; **Juries**, 2.

TWENTY-FOURTH AMENDMENT. See **Constitutional Law**, VIII; **Procedure**, 2.

UNFAIR COMPETITION. See also **Procedure**, 6; **Remedies.**

Deceptive practices—Undisclosed use of mock-ups—Television advertising.—It is a material deceptive practice to convey to television viewers the false impression that they are seeing an actual test or demonstration which proves a product claim when they are not because of the undisclosed use of mock-ups. FTC v. Colgate-Palmolive Co., p. 374.

UNIONS. See **Administrative Procedure**, 1–2; **Judicial Review**; **Labor**, 1–5.

UNIVERSAL MILITARY TRAINING AND SERVICE ACT. See also **Conscientious Objectors.**

Conscientious objectors—"Religious training and belief."—The test of religious belief within the meaning of the exemption in § 6 (j) of the Act is whether it is a sincere belief occupying in the life of its possessor a place parallel to that filled by the God of those admittedly qualified for the exemption. United States v. Seeger, p. 163.

VENUE. See **Defendants**; **Federal Employers' Liability Act**; **Voting**, 1.

VIRGINIA. See **Constitutional Law**, VIII; **Procedure**, 2.

VOTING. See also **Constitutional Law**, II, 1; VIII; **Decree**; **Defendants**; **Evidence**; **Procedure**, 2.

1. *Right to vote without racial distinction—Suit by Attorney General to protect that right.*—The right to vote without racial distinction is guaranteed by 42 U. S. C. § 1971 (a), and 1971 (c) authorizes the Attorney General to sue to protect that right, and to make the State a defendant whether or not the office of registrar is vacant. United States v. Mississippi, p. 128.

VOTING—Continued.

2. *Right to vote without racial distinction—Suit by Attorney General to protect voting rights.*—The Attorney General has power to sue a State and its officials to protect voting rights guaranteed to Negroes by 42 U. S. C. § 1971 (a) and the Fourteenth and Fifteenth Amendments. Louisiana v. United States, p. 145.

WAIVER. See **Trial by Jury.**

WAR. See **Conscientious Objectors; Universal Military Training and Service Act.**

WARRANTS. See **Constitutional Law,** V.

WHIPSAW STRIKE. See **Administrative Procedure,** 1; **Labor,** 4.

WITNESSES. See **Constitutional Law,** VII.

WORDS.

1. *"Religious training and belief."*—§ 6 (j), Universal Military Training and Service Act, 50 U. S. C. App. § 456 (j). United States v. Seeger, p. 163.

2. *"Substantial interest."*—§ 10, Clayton Act, 15 U. S. C. § 20. United States v. Boston & M. R. Co., p. 157.

WORKMEN'S COMPENSATION. See also **Administrative Procedure,** 3.

1. *Choice of remedy by State where employee resides and is injured—Full Faith and Credit Clause.*—Alabama, where employee resides and was injured, may adopt such choice of remedy as it desires and is free to adopt and enforce the remedy provided by Georgia without any requirement imposed by the Full Faith and Credit Clause that special Georgia compensation board procedure be followed. Crider v. Zurich Ins. Co., p. 39.

2. *Longshoremen's & Harbor Workers' Compensation Act—Course of employment—Deputy Commissioner's order.*—Deputy Commissioner's award of damages pursuant to the Act based on a finding that death at an overseas base was in course of employment should be upheld since the holding is not irrational or without substantial evidence. O'Keeffe v. Smith Associates, p. 359.

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