UNITED STATES REPORTS

VOLUME 327

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1945

FROM JANUARY 29, 1946, TO AND INCLUDING (IN PART)
APRIL 22, 1946

WALTER WYATT
REPORTER

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1947

For sale by the Superintendent of Documents, U. S. Government Printing Office
Washington 25, D. C. - Price $2.75 (Buckram)

ERRATUM.—278 U. S. 48, line 9, "§ 1901" should be "§ 1091".

JUSTICES
OF THE
SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HARLAN FISKE STONE, CHIEF JUSTICE.[1]
HUGO L. BLACK, ASSOCIATE JUSTICE.
STANLEY REED, ASSOCIATE JUSTICE.
FELIX FRANKFURTER, ASSOCIATE JUSTICE.
WILLIAM O. DOUGLAS, ASSOCIATE JUSTICE.
FRANK MURPHY, ASSOCIATE JUSTICE.
ROBERT H. JACKSON, ASSOCIATE JUSTICE.[2]
WILEY RUTLEDGE, ASSOCIATE JUSTICE.
HAROLD H. BURTON, ASSOCIATE JUSTICE.

RETIRED

CHARLES EVANS HUGHES, CHIEF JUSTICE.
JAMES CLARK McREYNOLDS, ASSOCIATE JUSTICE.

TOM C. CLARK, ATTORNEY GENERAL.
J. HOWARD McGRATH, SOLICITOR GENERAL.
CHARLES ELMORE CROPLEY, CLERK.
THOMAS ENNALLS WAGGAMAN, MARSHAL.

---

[1] Mr. Chief Justice Stone was stricken on the bench on April 22, 1946, and passed away during the evening of the same day. See *post*, p. v. Before he was stricken, he had delivered his dissenting opinions in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 103, and *Girouard* v. *United States*, 328 U. S. 61, 70, but not the opinions of the Court in *Heiser* v. *Woodruff*, *post*, p. 726; *United States* v. *Rice*, *post*, p. 742; and *Swanson* v. *Marra Bros.*, 328 U. S. 1, which he had written and which were announced by Mr. Justice Black prior to the death of the Chief Justice.

[2] Mr. Justice Jackson was absent from the bench throughout the October Term, 1945.

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, agreeably to the Acts of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the First Circuit, FELIX FRANKFURTER, Associate Justice.

For the Second Circuit, STANLEY REED, Associate Justice.

For the Third Circuit, HAROLD H. BURTON, Associate Justice.

For the Fourth Circuit, HARLAN F. STONE, Chief Justice.

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

For the Sixth Circuit, STANLEY REED, Associate Justice.

For the Seventh Circuit, FRANK MURPHY, Associate Justice.

For the Eighth Circuit, WILEY RUTLEDGE, Associate Justice.

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

For the Tenth Circuit, WILEY RUTLEDGE, Associate Justice.

For the District of Columbia, HARLAN F. STONE, Chief Justice.

November 13, 1945.

(For the next previous allotment, see 326 U. S. p. v.)

DEATH OF MR. CHIEF JUSTICE STONE.

SUPREME COURT OF THE UNITED STATES.

TUESDAY, APRIL 23, 1946.

Present: MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, MR. JUSTICE RUTLEDGE, and MR. JUSTICE BURTON.

MR. JUSTICE BLACK said:

"Yesterday Chief Justice Harlan F. Stone passed away. His kindliness and courtesy endeared him to all of his brethren on the Court. His achievements as a lawyer won for him the respect and confidence of the American Bar. His distinguished service to this Court and to our country earned for him a high place in the affection and admiration of all the people of the Nation. Funeral ceremonies will be conducted at the Washington Cathedral Thursday at 2 p. m. Out of respect to his memory this Court will now recess until Monday, April 29, at 12 noon."

TABLE OF CASES REPORTED

691100°—47——2

TABLE OF CASES

Cited in Opinions

TABLE OF STATUTES
Cited in Opinions

(A) STATUTES OF THE UNITED STATES.

(B) Statutes of the States and Territories.

(C) Proclamations.

(D) Treaties.

(E) Foreign Statutes.

CASES ADJUDGED
IN THE
SUPREME COURT OF THE UNITED STATES
AT
OCTOBER TERM, 1945.

IN RE YAMASHITA.

NO. 61, MISC. APPLICATION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS AND WRIT OF PROHIBITION.*

Argued January 7, 8, 1946.—Decided February 4, 1946.

Prior to September 3, 1945, petitioner was the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands. On that day, he surrendered to the United States Army and became a prisoner of war. Respondent was the Commanding General of the United States Army Forces, Western Pacific, whose command embraced the Philippine Islands. Respondent appointed a military commission to try the petitioner on a charge of violation of the law of war. The gist of the charge was that petitioner had failed in his duty as an army commander to control the operations of his troops, "permitting them to commit" specified atrocities against the civilian population and prisoners of war. Petitioner was found guilty and sentenced to death. *Held:*

1. The military commission appointed to try the petitioner was lawfully created. P. 9.

(a) Nature of the authority to create military commissions for the trial of enemy combatants for offenses against the law of war, and principles governing the exercise of jurisdiction by such commissions, considered. Citing *Ex parte Quirin,* 317 U. S. 1, and other cases. Pp. 7–9.

(b) A military commission may be appointed by any field commander, or by any commander competent to appoint a general court martial, as was respondent by order of the President. P. 10.

(c) The order creating the military commission was in conformity with the Act of Congress (10 U. S. C. §§ 1471–1593) sanctioning

*Together with No. 672, *Yamashita* v. *Styer, Commanding General,* on petition for writ of certiorari to the Supreme Court of the Commonwealth of the Philippines. For earlier orders in these cases see 326 U. S. 693, 694.

the creation of such tribunals for the trial of offenses against the law of war committed by enemy combatants. P. 11.

2. Trial of the petitioner by the military commission was lawful, although hostilities had ceased. P. 12.

(a) A violation of the law of war, committed before the cessation of hostilities, may lawfully be tried by a military commission after hostilities have ceased, at least until peace has been officially recognized by treaty or proclamation by the political branch of the Government. P. 12.

(b) Trial of the petitioner by the military commission was authorized by the political branch of the Government, by military command, by international law and usage, and by the terms of the surrender of the Japanese government. P. 13.

3. The charge preferred against the petitioner was of a violation of the law of war. P. 13.

(a) The law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery; and he may be charged with personal responsibility for his failure to take such measures when violations result. Pp. 14, 16.

(b) What measures, if any, petitioner took to prevent the alleged violations of the law of war, and whether such measures as he may have taken were appropriate and sufficient to discharge the duty imposed upon him, were questions within the peculiar competence of the military officers composing the commission and were for it to decide. P. 16.

(c) Charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment. P. 17.

(d) The allegations of the charge here, tested by any reasonable standard, sufficiently set forth a violation of the law of war; and the military commission had authority to try and to decide the issue which it raised. P. 17.

4. In admitting on behalf of the prosecution a deposition and hearsay and opinion evidence, the military commission did not violate any Act of Congress, treaty or military command defining the commission's authority. Pp. 18, 23.

(a) The Articles of War, including Articles 25 and 38, are not applicable to the trial of an enemy combatant by a military commis-

sion for violations of the law of war, and imposed no restrictions upon the procedure to be followed in such trial. Pp. 19, 20.

(b) Article 63 of the Geneva Convention of 1929, which provides that "Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power," does not require that Articles 25 and 38 of the Articles of War be applied in the trial of the petitioner. Article 63 refers to sentence "pronounced against a prisoner of war" for an offense committed while a prisoner of war, and not for a violation of the law of war committed while a combatant. P. 20.

(c) The Court expresses no opinion on the question of the wisdom of considering such evidence as was received in this proceeding, nor on the question whether the action of a military tribunal in admitting evidence which Congress or controlling military command has directed to be excluded may be drawn in question by petition for habeas corpus or prohibition. P. 23.

5. On an application for habeas corpus, the Court is not concerned with the guilt or innocence of the petitioner. P. 8.

6. By sanctioning trials of enemy aliens by military commission for offenses against the law of war, Congress recognized the right of the accused to make a defense, and did not foreclose their right to contend that the Constitution or laws of the United States withhold authority to proceed with the trial. P. 9.

7. The Court does not appraise the evidence on which the petitioner here was convicted. P. 17.

8. The military commission's rulings on evidence and on the mode of conducting the proceedings against the petitioner are not reviewable by the courts, but only by the reviewing military authorities. From this viewpoint it is unnecessary to consider what, in other situations, the Fifth Amendment might require. Pp. 8, 23.

9. Article 60 of the Geneva Convention of 1929, which provides that "At the opening of a judicial proceeding directed against a prisoner of war, the detaining Power shall advise the representative of the protecting Power thereof as soon as possible, and always before the date set for the opening of the trial," applies only to persons who are subjected to judicial proceedings for offenses committed while prisoners of war. P. 23.

10. The detention of the petitioner for trial and his detention upon his conviction, subject to the prescribed review by the military authorities, were lawful. P. 25.

Leave and petition denied.

No. 61, Misc. Application for leave to file a petition for writs of habeas corpus and prohibition in this Court challenging the jurisdiction and legal authority of a military commission which convicted applicant of a violation of the law of war and sentenced him to be hanged. *Denied.*

No. 672. Petition for certiorari to review an order of the Supreme Court of the Commonwealth of the Philippines, 42 Off. Gaz. 664, denying an application for writs of habeas corpus and prohibition likewise challenging the jurisdiction and legal authority of the military commission which tried and convicted petitioner. *Denied.*

Colonel Harry E. Clarke, pro hac vice, Captain A. Frank Reel and *Captain Milton Sandberg* argued the cause for petitioner. With them on the brief were *Lt. Col. Walter C. Hendrix, Lt. Col. James G. Feldhaus* and *Major George F. Guy.*

Solicitor General McGrath and *Assistant Solicitor General Judson* argued the cause for respondent. With them on the brief were *The Judge Advocate General of the Army, Frederick Bernays Wiener, George Thomas Washington, David Reich, Irving Hill, Colonel William J. Hughes, Jr.* and *Captain D. C. Hill.*

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

No. 61 Miscellaneous is an application for leave to file a petition for writs of habeas corpus and prohibition in this Court. No. 672 is a petition for certiorari to review an order of the Supreme Court of the Commonwealth of the Philippines (28 U. S. C. § 349), denying petitioner's application to that court for writs of habeas corpus and prohibition. As both applications raise substantially like questions, and because of the importance and novelty of some of those presented, we set the two applications down for oral argument as one case.

From the petitions and supporting papers it appears that prior to September 3, 1945, petitioner was the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands. On that date he surrendered to and became a prisoner of war of the United States Army Forces in Baguio, Philippine Islands. On September 25th, by order of respondent, Lieutenant General Wilhelm D. Styer, Commanding General of the United States Army Forces, Western Pacific, which command embraces the Philippine Islands, petitioner was served with a charge prepared by the Judge Advocate General's Department of the Army, purporting to charge petitioner with a violation of the law of war. On October 8, 1945, petitioner, after pleading not guilty to the charge, was held for trial before a military commission of five Army officers appointed by order of General Styer. The order appointed six Army officers, all lawyers, as defense counsel. Throughout the proceedings which followed, including those before this Court, defense counsel have demonstrated their professional skill and resourcefulness and their proper zeal for the defense with which they were charged.

On the same date a bill of particulars was filed by the prosecution, and the commission heard a motion made in petitioner's behalf to dismiss the charge on the ground that it failed to state a violation of the law of war. On October 29th the commission was reconvened, a supplemental bill of particulars was filed, and the motion to dismiss was denied. The trial then proceeded until its conclusion on December 7, 1945, the commission hearing two hundred and eighty-six witnesses, who gave over three thousand pages of testimony. On that date petitioner was found guilty of the offense as charged and sentenced to death by hanging.

The petitions for habeas corpus set up that the detention of petitioner for the purpose of the trial was unlawful for

reasons which are now urged as showing that the military commission was without lawful authority or jurisdiction to place petitioner on trial, as follows:

(a) That the military commission which tried and convicted petitioner was not lawfully created, and that no military commission to try petitioner for violations of the law of war could lawfully be convened after the cessation of hostilities between the armed forces of the United States and Japan;

(b) That the charge preferred against petitioner fails to charge him with a violation of the law of war;

(c) That the commission was without authority and jurisdiction to try and convict petitioner because the order governing the procedure of the commission permitted the admission in evidence of depositions, affidavits and hearsay and opinion evidence, and because the commission's rulings admitting such evidence were in violation of the 25th and 38th Articles of War (10 U. S. C. §§ 1496, 1509) and the Geneva Convention (47 Stat. 2021), and deprived petitioner of a fair trial in violation of the due process clause of the Fifth Amendment;

(d) That the commission was without authority and jurisdiction in the premises because of the failure to give advance notice of petitioner's trial to the neutral power representing the interests of Japan as a belligerent as required by Article 60 of the Geneva Convention, 47 Stat. 2021, 2051.

On the same grounds the petitions for writs of prohibition set up that the commission is without authority to proceed with the trial.

The Supreme Court of the Philippine Islands, after hearing argument, denied the petition for habeas corpus presented to it, on the ground, among others, that its jurisdiction was limited to an inquiry as to the jurisdiction of the commission to place petitioner on trial for the offense charged, and that the commission, being validly consti-

tuted by the order of General Styer, had jurisdiction over the person of petitioner and over the trial for the offense charged.

In *Ex parte Quirin,* 317 U. S. 1, we had occasion to consider at length the sources and nature of the authority to create military commissions for the trial of enemy combatants for offenses against the law of war. We there pointed out that Congress, in the exercise of the power conferred upon it by Article I, § 8, Cl. 10 of the Constitution to "define and punish . . . Offences against the Law of Nations . . .," of which the law of war is a part, had by the Articles of War (10 U. S. C. §§ 1471–1593) recognized the "military commission" appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war. Article 15 declares that the "provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions . . . or other military tribunals." See a similar provision of the Espionage Act of 1917, 50 U. S. C. § 38. Article 2 includes among those persons subject to the Articles of War the personnel of our own military establishment. But this, as Article 12 indicates, does not exclude from the class of persons subject to trial by military commissions "any other person who by the law of war is subject to trial by military tribunals," and who, under Article 12, may be tried by court-martial, or under Article 15 by military commission.

We further pointed out that Congress, by sanctioning trial of enemy combatants for violations of the law of war by military commission, had not attempted to codify the law of war or to mark its precise boundaries. Instead, by Article 15 it had incorporated, by reference, as within the

preexisting jurisdiction of military commissions created by appropriate military command, all offenses which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction. It thus adopted the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts, and as further defined and supplemented by the Hague Convention, to which the United States and the Axis powers were parties.

We also emphasized in *Ex parte Quirin,* as we do here, that on application for habeas corpus we are not concerned with the guilt or innocence of the petitioners. We consider here only the lawful power of the commission to try the petitioner for the offense charged. In the present cases it must be recognized throughout that the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court. See *Ex parte Vallandigham,* 1 Wall. 243; *In re Vidal,* 179 U. S. 126; cf. *Ex parte Quirin, supra,* 39. They are tribunals whose determinations are reviewable by the military authorities either as provided in the military orders constituting such tribunals or as provided by the Articles of War. Congress conferred on the courts no power to review their determinations save only as it has granted judicial power "to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty." 28 U. S. C. §§ 451, 452. The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions. See *Dynes* v. *Hoover,* 20 How. 65, 81; *Runkle* v. *United States,* 122

U. S. 543, 555–556; *Carter* v. *McClaughry*, 183 U. S. 365; *Collins* v. *McDonald*, 258 U. S. 416. Cf. *Matter of Moran*, 203 U. S. 96, 105.

Finally, we held in *Ex parte Quirin, supra*, 24, 25, as we hold now, that Congress by sanctioning trials of enemy aliens by military commission for offenses against the law of war had recognized the right of the accused to make a defense. Cf. *Ex parte Kawato*, 317 U. S. 69. It has not foreclosed their right to contend that the Constitution or laws of the United States withhold authority to proceed with the trial. It has not withdrawn, and the Executive branch of the Government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus.

With these governing principles in mind we turn to the consideration of the several contentions urged to establish want of authority in the commission. We are not here concerned with the power of military commissions to try civilians. See *Ex parte Milligan*, 4 Wall. 2, 132; *Sterling* v. *Constantin*, 287 U. S. 378; *Ex parte Quirin, supra*, 45. The Government's contention is that General Styer's order creating the commission conferred authority on it only to try the purported charge of violation of the law of war committed by petitioner, an enemy belligerent, while in command of a hostile army occupying United States territory during time of war. Our first inquiry must therefore be whether the present commission was created by lawful military command and, if so, whether authority could thus be conferred on the commission to place petitioner on trial after the cessation of hostilities between the armed forces of the United States and Japan.

The authority to create the commission. General Styer's order for the appointment of the commission was made by him as Commander of the United States Army Forces, Western Pacific. His command includes, as part

of a vastly greater area, the Philippine Islands, where the alleged offenses were committed, where petitioner surrendered as a prisoner of war, and where, at the time of the order convening the commission, he was detained as a prisoner in custody of the United States Army. The congressional recognition of military commissions and its sanction of their use in trying offenses against the law of war to which we have referred, sanctioned their creation by military command in conformity to long-established American precedents. Such a commission may be appointed by any field commander, or by any commander competent to appoint a general court-martial, as was General Styer, who had been vested with that power by order of the President. 2 Winthrop, Military Law and Precedents, 2d ed., *1302; cf. Article of War 8.

Here the commission was not only created by a commander competent to appoint it, but his order conformed to the established policy of the Government and to higher military commands authorizing his action. In a proclamation of July 2, 1942 (56 Stat. 1964), the President proclaimed that enemy belligerents who, during time of war, enter the United States, or any territory or possession thereof, and who violate the law of war, should be subject to the law of war and to the jurisdiction of military tribunals. Paragraph 10 of the Declaration of Potsdam of July 26, 1945, declared that ". . . stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners." U. S. Dept. of State Bull., Vol. XIII, No. 318, pp. 137–138. This Declaration was accepted by the Japanese government by its note of August 10, 1945. U. S. Dept. of State Bull., Vol. XIII, No. 320, p. 205.

By direction of the President, the Joint Chiefs of Staff of the American Military Forces, on September 12, 1945, instructed General MacArthur, Commander in Chief, United States Army Forces, Pacific, to proceed with the trial, be-

fore appropriate military tribunals, of such Japanese war criminals "as have been or may be apprehended." By order of General MacArthur of September 24, 1945, General Styer was specifically directed to proceed with the trial of petitioner upon the charge here involved. This order was accompanied by detailed rules and regulations which General MacArthur prescribed for the trial of war criminals. These regulations directed, among other things, that review of the sentence imposed by the commission should be by the officer convening it, with "authority to approve, mitigate, remit, commute, suspend, reduce or otherwise alter the sentence imposed," and directed that no sentence of death should be carried into effect until confirmed by the Commander in Chief, United States Army Forces, Pacific.

It thus appears that the order creating the commission for the trial of petitioner was authorized by military command, and was in complete conformity to the Act of Congress sanctioning the creation of such tribunals for the trial of offenses against the law of war committed by enemy combatants. And we turn to the question whether the authority to create the commission and direct the trial by military order continued after the cessation of hostilities.

An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war. *Ex parte Quirin, supra,* 28. The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war. That sanction is without qualification as to the exercise of this authority so

long as a state of war exists—from its declaration until peace is proclaimed. See *United States* v. *Anderson,* 9 Wall. 56, 70; *The Protector,* 12 Wall. 700, 702; *McElrath* v. *United States,* 102 U. S. 426, 438; *Kahn* v. *Anderson,* 255 U. S. 1, 9–10. The war power, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy, at least in ways Congress has recognized, the evils which the military operations have produced. See *Stewart* v. *Kahn,* 11 Wall. 493, 507.

We cannot say that there is no authority to convene a commission after hostilities have ended to try violations of the law of war committed before their cessation, at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government. In fact, in most instances the practical administration of the system of military justice under the law of war would fail if such authority were thought to end with the cessation of hostilities. For only after their cessation could the greater number of offenders and the principal ones be apprehended and subjected to trial.

No writer on international law appears to have regarded the power of military tribunals, otherwise competent to try violations of the law of war, as terminating before the formal state of war has ended.[1] In our own military his-

[1] The Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties of the Versailles Peace Conference, which met after cessation of hostilities in the First World War, were of the view that violators of the law of war could be tried by military tribunals. See Report of the Commission, March 9, 1919, 14 Am. J. Int. L. 95, 121. See also memorandum of American commissioners concurring on this point, *id.,* at p. 141. The treaties of peace concluded after World War I recognized the right of the Allies and of the United States to try such offenders before military tribunals. See Art. 228 of Treaty of Versailles, June 28, 1919; Art. 173 of Treaty of

tory there have been numerous instances in which offenders were tried by military commission after the cessation of hostilities and before the proclamation of peace, for offenses against the law of war committed before the cessation of hostilities.[2]

The extent to which the power to prosecute violations of the law of war shall be exercised before peace is declared rests, not with the courts, but with the political branch of the Government, and may itself be governed by the terms of an armistice or the treaty of peace. Here, peace has not been agreed upon or proclaimed. Japan, by her acceptance of the Potsdam Declaration and her surrender, has acquiesced in the trials of those guilty of violations of the law of war. The conduct of the trial by the military commission has been authorized by the political branch of the Government, by military command, by international law and usage, and by the terms of the surrender of the Japanese government.

The charge. Neither congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge preferred against him is of a violation of the law of war. The charge, so far as now relevant, is that petitioner, between October 9, 1944 and September 2, 1945, in the Philippine Islands, "while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to

---

St. Germain, Sept. 10, 1919; Art. 157 of Treaty of Trianon, June 4, 1920.

The terms of the agreement which ended hostilities in the Boer War reserved the right to try, before military tribunals, enemy combatants who had violated the law of war. 95 British and Foreign State Papers (1901–1902) 160. See also trials cited in Colby, War Crimes, 23 Michigan Law Rev. 482, 496–7.

[2] See cases mentioned in *Ex parte Quirin, supra,* p. 32, note 10, and in 2 Winthrop, *supra,* *1310–1311, n. 5; 14 Op. A. G. 249 (Modoc Indian Prisoners).

control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he . . . thereby violated the laws of war."

Bills of particulars, filed by the prosecution by order of the commission, allege a series of acts, one hundred and twenty-three in number, committed by members of the forces under petitioner's command during the period mentioned. The first item specifies the execution of "a deliberate plan and purpose to massacre and exterminate a large part of the civilian population of Batangas Province, and to devastate and destroy public, private and religious property therein, as a result of which more than 25,000 men, women and children, all unarmed noncombatant civilians, were brutally mistreated and killed, without cause or trial, and entire settlements were devastated and destroyed wantonly and without military necessity." Other items specify acts of violence, cruelty and homicide inflicted upon the civilian population and prisoners of war, acts of wholesale pillage and the wanton destruction of religious monuments.

It is not denied that such acts directed against the civilian population of an occupied country and against prisoners of war are recognized in international law as violations of the law of war. Articles 4, 28, 46, and 47, Annex to the Fourth Hague Convention, 1907, 36 Stat. 2277, 2296, 2303, 2306–7. But it is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged as against him. But this overlooks the fact that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by "permitting them to commit" the extensive and widespread atrocities specified. The question then is whether the law of war imposes

on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result. That this was the precise issue to be tried was made clear by the statement of the prosecution at the opening of the trial.

It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.

This is recognized by the Annex to the Fourth Hague Convention of 1907, respecting the laws and customs of war on land. Article 1 lays down as a condition which an armed force must fulfill in order to be accorded the rights of lawful belligerents, that it must be "commanded by a person responsible for his subordinates." 36 Stat. 2295. Similarly Article 19 of the Tenth Hague Convention, relating to bombardment by naval vessels, provides that commanders in chief of the belligerent vessels "must see that the above Articles are properly carried out." 36 Stat. 2389. And Article 26 of the Geneva Red Cross Convention of 1929, 47 Stat. 2074, 2092, for the amelioration of the condition of the wounded and sick in armies in the field, makes it "the duty of the commanders-in-chief of the bel-

ligerent armies to provide for the details of execution of the foregoing articles, [of the convention] as well as for unforeseen cases . . ." And, finally, Article 43 of the Annex of the Fourth Hague Convention, 36 Stat. 2306, requires that the commander of a force occupying enemy territory, as was petitioner, "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognized, and its breach penalized by our own military tribunals.[3] A like principle has been applied so as to impose liability on the United States in international arbitrations. *Case of Jeannaud,* 3 Moore, International Arbitrations, 3000; *Case of The Zafiro,* 5 Hackworth, Digest of International Law, 707.

We do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution. There is no contention that the present charge, thus read, is without the support of evidence, or that the commission held petitioner responsible for failing to take measures which were beyond his control or inappropriate for a commanding officer to take in the circum-

[3] Failure of an officer to take measures to prevent murder of an inhabitant of an occupied country committed in his presence. Gen. Orders No. 221, Hq. Div. of the Philippines, August 17, 1901. And in Gen. Orders No. 264, Hq. Div. of the Philippines, September 9, 1901, it was held that an officer could not be found guilty for failure to prevent a murder unless it appeared that the accused had "the power to prevent" it.

stances.[4] We do not here appraise the evidence on which petitioner was convicted. We do not consider what measures, if any, petitioner took to prevent the commission, by the troops under his command, of the plain violations of the law of war detailed in the bill of particulars, or whether such measures as he may have taken were appropriate and sufficient to discharge the duty imposed upon him. These are questions within the peculiar competence of the military officers composing the commission and were for it to decide. See *Smith* v. *Whitney*, 116 U. S. 167, 178. It is plain that the charge on which petitioner was tried charged him with a breach of his duty to control the operations of the members of his command, by permitting them to commit the specified atrocities. This was enough to require the commission to hear evidence tending to establish the culpable failure of petitioner to perform the duty imposed on him by the law of war and to pass upon its sufficiency to establish guilt.

Obviously charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment. Cf. *Collins* v. *McDonald, supra,* 420. But we conclude that the allegations of the charge, tested by any reasonable standard, adequately allege a violation of the law of war and that the

[4] In its findings the commission took account of the difficulties "faced by the Accused with respect not only to the swift and overpowering advance of American forces, but also to the errors of his predecessors, weaknesses in organization, equipment, supply . . ., training, communication, discipline and morale of his troops," and the "tactical situation, the character, training and capacity of staff officers and subordinate commanders as well as the traits of character . . . of his troops." It nonetheless found that petitioner had not taken such measures to control his troops as were "required by the circumstances." We do not weigh the evidence. We merely hold that the charge sufficiently states a violation against the law of war, and that the commission, upon the facts found, could properly find petitioner guilty of such a violation.

commission had authority to try and decide the issue which it raised. Cf. *Dealy* v. *United States,* 152 U. S. 539; *Williamson* v. *United States,* 207 U. S. 425, 447; *Glasser* v. *United States,* 315 U. S. 60, 66, and cases cited.

The proceedings before the commission. The regulations prescribed by General MacArthur governing the procedure for the trial of petitioner by the commission directed that the commission should admit such evidence "as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man," and that in particular it might admit affidavits, depositions or other statements taken by officers detailed for that purpose by military authority. The petitions in this case charged that in the course of the trial the commission received, over objection by petitioner's counsel, the deposition of a witness taken pursuant to military authority by a United States Army captain. It also, over like objection, admitted hearsay and opinion evidence tendered by the prosecution. Petitioner argues, as ground for the writ of habeas corpus, that Article 25 [5] of the Articles of War prohibited the reception in evidence by the commission of depositions on behalf of the prosecution in a capital case, and that Article 38 [6] prohibited the reception of hearsay and of opinion evidence.

[5] Article 25 provides: "A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, . . . *Provided,* That testimony by deposition may be adduced for the defense in capital cases."

[6] Article 38 provides: "The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall insofar as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: *Provided,* That nothing contrary to or inconsistent with these articles shall be so prescribed: . . ."

We think that neither Article 25 nor Article 38 is applicable to the trial of an enemy combatant by a military commission for violations of the law of war. Article 2 of the Articles of War enumerates "the persons . . . subject to these articles," who are denominated, for purposes of the Articles, as "persons subject to military law." In general, the persons so enumerated are members of our own Army and of the personnel accompanying the Army. Enemy combatants are not included among them. Articles 12, 13 and 14, before the adoption of Article 15 in 1916, made all "persons subject to military law" amenable to trial by courts-martial for any offense made punishable by the Articles of War. Article 12 makes triable by general court-martial "any other person who by the law of war is subject to trial by military tribunals." Since Article 2, in its 1916 form, includes some persons who, by the law of war, were, prior to 1916, triable by military commission, it was feared by the proponents of the 1916 legislation that in the absence of a saving provision, the authority given by Articles 12, 13 and 14 to try such persons before courts-martial might be construed to deprive the non-statutory military commission of a portion of what was considered to be its traditional jurisdiction. To avoid this, and to preserve that jurisdiction intact, Article 15 was added to the Articles.[7] It declared that "The provisions of these articles

[7] General Crowder, the Judge Advocate General, who appeared before Congress as sponsor for the adoption of Article 15 and the accompanying amendment of Article 25, in explaining the purpose of Article 15, said:

"Article 15 is new. We have included in article 2 as subject to military law a number of persons who are also subject to trial by military commission. A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law. As long as the articles embraced them in the designation 'persons subject to military law,' and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their trial by court-martial, [Arts. 12, 13, and 14] it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced: . . ." (Sen. R. 130, 64th Cong., 1st Sess., p. 40.)

conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that . . . by the law of war may be triable by such military commissions."

By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction, as we held in *Ex parte Quirin,* to any use of the military commission contemplated by the common law of war. But it did not thereby make subject to the Articles of War persons other than those defined by Article 2 as being subject to the Articles, nor did it confer the benefits of the Articles upon such persons. The Articles recognized but one kind of military commission, not two. But they sanctioned the use of that one for the trial of two classes of persons, to one of which the Articles do, and to the other of which they do not, apply in such trials. Being of this latter class, petitioner cannot claim the benefits of the Articles, which are applicable only to the members of the other class. Petitioner, an enemy combatant, is therefore not a person made subject to the Articles of War by Article 2, and the military commission before which he was tried, though sanctioned, and its jurisdiction saved, by Article 15, was not convened by virtue of the Articles of War, but pursuant to the common law of war. It follows that the Articles of War, including Articles 25 and 38, were not applicable to petitioner's trial and imposed no restrictions upon the procedure to be followed. The Articles left the control over the procedure in such a case where it had previously been, with the military command.

Petitioner further urges that by virtue of Article 63 of the Geneva Convention of 1929, 47 Stat. 2052, he is entitled to the benefits afforded by the 25th and 38th Articles of War to members of our own forces. Article 63 provides: "Sentence may be pronounced against a prisoner of war

only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power." Since petitioner is a prisoner of war, and as the 25th and 38th Articles of War apply to the trial of any person in our own armed forces, it is said that Article 63 requires them to be applied in the trial of petitioner. But we think examination of Article 63 in its setting in the Convention plainly shows that it refers to sentence "pronounced against a prisoner of war" for an offense committed while a prisoner of war, and not for a violation of the law of war committed while a combatant.

Article 63 of the Convention appears in part 3, entitled "Judicial Suits," of Chapter 3, "Penalties Applicable to Prisoners of War," of § V, "Prisoners' Relations with the Authorities," one of the sections of Title III, "Captivity." All taken together relate only to the conduct and control of prisoners of war while in captivity as such. Chapter 1 of § V, Article 42 deals with complaints of prisoners of war because of the conditions of captivity. Chapter 2, Articles 43 and 44, relates to those of their number chosen by prisoners of war to represent them.

Chapter 3 of § V, Articles 45 through 67, is entitled "Penalties Applicable to Prisoners of War." Part 1 of that chapter, Articles 45 through 53, indicate what acts of prisoners of war, committed while prisoners, shall be considered offenses, and defines to some extent the punishment which the detaining power may impose on account of such offenses.[8] Punishment is of two kinds—"disciplinary" and

[8] Part 1 of Chapter 3, "General Provisions," provides in Articles 45 and 46 that prisoners of war are subject to the regulations in force in the armies of the detaining power, that punishments other than those provided "for the same acts for soldiers of the national armies" may not be imposed on prisoners of war, and that "Collective punishment for individual acts" is forbidden. Article 47 provides that "Acts constituting an offense against discipline, and particularly attempted escape, shall be verified immediately; for all prisoners of war, commissioned

"judicial," the latter being the more severe. Article 52 requires that leniency be exercised in deciding whether an offense requires disciplinary or judicial punishment. Part 2 of Chapter 3 is entitled "Disciplinary Punishments," and further defines the extent of such punishment, and the mode in which it may be imposed. Part 3, entitled "Judicial Suits," in which Article 63 is found, describes the procedure by which "judicial" punishment may be imposed. The three parts of Chapter 3, taken together, are thus a comprehensive description of the substantive offenses which prisoners of war may commit during their imprisonment, of the penalties which may be imposed on account of such offenses, and of the procedure by which guilt may be adjudged and sentence pronounced.

We think it clear, from the context of these recited provisions, that part 3, and Article 63, which it contains, apply only to judicial proceedings directed against a prisoner of war for offenses committed while a prisoner of war. Sec-

---

or not, preventive arrest shall be reduced to the absolute minimum. Judicial proceedings against prisoners of war shall be conducted as rapidly as the circumstances permit . . . In all cases, the duration of preventive imprisonment shall be deducted from the disciplinary or judicial punishment inflicted . . ."

Article 48 provides that prisoners of war, after having suffered "the judicial or disciplinary punishment which has been imposed on them," are not to be treated differently from other prisoners, but provides that "prisoners punished as a result of attempted escape may be subjected to special surveillance." Article 49 recites that prisoners "given disciplinary punishment may not be deprived of the prerogatives attached to their rank." Articles 50 and 51 deal with escaped prisoners who have been retaken or prisoners who have attempted to escape. Article 52 provides: "Belligerents shall see that the competent authorities exercise the greatest leniency in deciding the question of whether an infraction committed by a prisoner of war should be punished by disciplinary or judicial measures. This shall be the case especially when it is a question of deciding on acts in connection with escape or attempted escape. . . . A prisoner may not be punished more than once because of the same act or the same count."

tion V gives no indication that this part was designed to deal with offenses other than those referred to in parts 1 and 2 of Chapter 3.

We cannot say that the commission, in admitting evidence to which objection is now made, violated any act of Congress, treaty or military command defining the commission's authority. For reasons already stated we hold that the commission's rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing military authorities. From this viewpoint it is unnecessary to consider what, in other situations, the Fifth Amendment might require, and as to that no intimation one way or the other is to be implied. Nothing we have said is to be taken as indicating any opinion on the question of the wisdom of considering such evidence, or whether the action of a military tribunal in admitting evidence, which Congress or controlling military command has directed to be excluded, may be drawn in question by petition for habeas corpus or prohibition.

Effect of failure to give notice of the trial to the protecting power. Article 60 of the Geneva Convention of July 27, 1929, 47 Stat. 2051, to which the United States and Japan were signatories, provides that "At the opening of a judicial proceeding directed against a prisoner of war, the detaining Power shall advise the representative of the protecting Power thereof as soon as possible, and always before the date set for the opening of the trial." Petitioner relies on the failure to give the prescribed notice to the protecting power [9] to establish want of authority in the commission to proceed with the trial.

[9] Switzerland, at the time of the trial, was the power designated by Japan for the protection of Japanese prisoners of war detained by the United States, except in Hawaii. U. S. Dept. of State Bull., Vol. XIII, No. 317, p. 125.

For reasons already stated we conclude that Article 60 of the Geneva Convention, which appears in part 3, Chapter 3, § V, Title III of the Geneva Convention, applies only to persons who are subjected to judicial proceedings for offenses committed while prisoners of war.[10]

---

[10] One of the items of the bill of particulars, in support of the charge against petitioner, specifies that he permitted members of the armed forces under his command to try and execute three named and other prisoners of war, "subjecting to trial without prior notice to a representative of the protecting power, without opportunity to defend, and without counsel; denying opportunity to appeal from the sentence rendered; failing to notify the protecting power of the sentence pronounced; and executing a death sentence without communicating to the representative of the protecting power the nature and circumstances of the offense charged." It might be suggested that if Article 60 is inapplicable to petitioner it is inapplicable in the cases specified, and that hence he could not be lawfully held or convicted on a charge of failing to require the notice, provided for in Article 60, to be given.

As the Government insists, it does not appear from the charge and specifications that the prisoners in question were not charged with offenses committed by them as prisoners rather than with offenses against the law of war committed by them as enemy combatants. But apart from this consideration, independently of the notice requirements of the Geneva Convention, it is a violation of the law of war, on which there could be a conviction if supported by evidence, to inflict capital punishment on prisoners of war without affording to them opportunity to make a defense. 2 Winthrop, *supra*, *434–435, 1241; Article 84, Oxford Manual, Laws and Customs of War on Land; U. S. War Dept., Basic Field Manual, Rules of Land Warfare (1940) par. 356; Lieber's Code, G. O. No. 100 (1863) Instructions for the Government of Armies of the United States in the Field, par. 12; Spaight, War Rights on Land, 462, n.

Further, the commission, in making its findings, summarized as follows the charges, on which it acted, in three classes, any one of which, independently of the others if supported by evidence, would be sufficient to support the conviction: (1) execution or massacre without trial and maladministration generally of civilian internees and prisoners of war; (2) brutalities committed upon the civilian population, and (3) burning and demolition, without adequate military necessity, of a

It thus appears that the order convening the commission was a lawful order, that the commission was lawfully constituted, that petitioner was charged with violation of the law of war, and that the commission had authority to proceed with the trial, and in doing so did not violate any military, statutory or constitutional command. We have considered, but find it unnecessary to discuss, other contentions which we find to be without merit. We therefore conclude that the detention of petitioner for trial and his detention upon his conviction, subject to the prescribed review by the military authorities, were lawful, and that the petition for certiorari, and leave to file in this Court

---

large number of homes, places of business, places of religious worship, hospitals, public buildings and educational institutions.

The commission concluded: "(1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces" under command of petitioner "against people of the United States, their allies and dependencies . . .; that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and noncommissioned officers"; (2) that during the period in question petitioner "failed to provide effective control of . . . [his] troops, as was required by the circumstances." The commission said: ". . . where murder and rape and vicious, revengeful actions are widespread offenses, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them."

The commission made no finding of non-compliance with the Geneva Convention. Nothing has been brought to our attention from which we could conclude that the alleged non-compliance with Article 60 of the Geneva Convention had any relation to the commission's finding of a series of atrocities committed by members of the forces under petitioner's command, and that he failed to provide effective control of his troops, as was required by the circumstances; or which could support the petitions for habeas corpus on the ground that petitioner had been charged with or convicted for failure to require the notice prescribed by Article 60 to be given.

petitions for writs of habeas corpus and prohibition should be, and they are

Denied.

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

MR. JUSTICE MURPHY, dissenting.

The significance of the issue facing the Court today cannot be overemphasized. An American military commission has been established to try a fallen military commander of a conquered nation for an alleged war crime. The authority for such action grows out of the exercise of the power conferred upon Congress by Article I, § 8, Cl. 10 of the Constitution to "define and punish . . . Offences against the Law of Nations . . ." The grave issue raised by this case is whether a military commission so established and so authorized may disregard the procedural rights of an accused person as guaranteed by the Constitution, especially by the due process clause of the Fifth Amendment.

The answer is plain. The Fifth Amendment guarantee of due process of law applies to "any person" who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest

army in the world, can ever destroy them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States.

The existence of these rights, unfortunately, is not always respected. They are often trampled under by those who are motivated by hatred, aggression or fear. But in this nation individual rights are recognized and protected, at least in regard to governmental action. They cannot be ignored by any branch of the Government, even the military, except under the most extreme and urgent circumstances.

The failure of the military commission to obey the dictates of the due process requirements of the Fifth Amendment is apparent in this case. The petitioner was the commander of an army totally destroyed by the superior power of this nation. While under heavy and destructive attack by our forces, his troops committed many brutal atrocities and other high crimes. Hostilities ceased and he voluntarily surrendered. At that point he was entitled, as an individual protected by the due process clause of the Fifth Amendment, to be treated fairly and justly according to the accepted rules of law and procedure. He was also entitled to a fair trial as to any alleged crimes and to be free from charges of legally unrecognized crimes that would serve only to permit his accusers to satisfy their desires for revenge.

A military commission was appointed to try the petitioner for an alleged war crime. The trial was ordered to be held in territory over which the United States has complete sovereignty. No military necessity or other emergency demanded the suspension of the safeguards of due process. Yet petitioner was rushed to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of some of the most

elementary rules of evidence and summarily sentenced to be hanged. In all this needless and unseemly haste there was no serious attempt to charge or to prove that he committed a recognized violation of the laws of war. He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit the acts of atrocity. The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge. This indictment in effect permitted the military commission to make the crime whatever it willed, dependent upon its biased view as to petitioner's duties and his disregard thereof, a practice reminiscent of that pursued in certain less respected nations in recent years.

In my opinion, such a procedure is unworthy of the traditions of our people or of the immense sacrifices that they have made to advance the common ideals of mankind. The high feelings of the moment doubtless will be satisfied. But in the sober afterglow will come the realization of the boundless and dangerous implications of the procedure sanctioned today. No one in a position of command in an army, from sergeant to general, can escape those implications. Indeed, the fate of some future President of the United States and his chiefs of staff and military advisers may well have been sealed by this decision. But even more significant will be the hatred and ill-will growing out of the application of this unprecedented procedure. That has been the inevitable effect of every method of punishment disregarding the element of personal culpability. The effect in this instance, unfortunately, will be magnified infinitely, for here we are dealing with the rights of man on an international level. To subject an enemy bel-

ligerent to an unfair trial, to charge him with an unrecognized crime, or to vent on him our retributive emotions only antagonizes the enemy nation and hinders the reconciliation necessary to a peaceful world.

That there were brutal atrocities inflicted upon the helpless Filipino people, to whom tyranny is no stranger, by Japanese armed forces under the petitioner's command is undeniable. Starvation, execution or massacre without trial, torture, rape, murder and wanton destruction of property were foremost among the outright violations of the laws of war and of the conscience of a civilized world. That just punishment should be meted out to all those responsible for criminal acts of this nature is also beyond dispute. But these factors do not answer the problem in this case. They do not justify the abandonment of our devotion to justice in dealing with a fallen enemy commander. To conclude otherwise is to admit that the enemy has lost the battle but has destroyed our ideals.

War breeds atrocities. From the earliest conflicts of recorded history to the global struggles of modern times inhumanities, lust and pillage have been the inevitable by-products of man's resort to force and arms. Unfortunately, such despicable acts have a dangerous tendency to call forth primitive impulses of vengeance and retaliation among the victimized peoples. The satisfaction of such impulses in turn breeds resentment and fresh tension. Thus does the spiral of cruelty and hatred grow.

If we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness. Justice must be tempered by compassion rather than by vengeance. In this, the first case involving this momentous problem ever to reach this Court, our responsibility is both lofty and difficult. We must insist, within the confines of our proper

jurisdiction, that the highest standards of justice be applied in this trial of an enemy commander conducted under the authority of the United States. Otherwise stark retribution will be free to masquerade in a cloak of false legalism. And the hatred and cynicism engendered by that retribution will supplant the great ideals to which this nation is dedicated.

This Court fortunately has taken the first and most important step toward insuring the supremacy of law and justice in the treatment of an enemy belligerent accused of violating the laws of war. Jurisdiction properly has been asserted to inquire "into the cause of restraint of liberty" of such a person. 28 U. S. C. § 452. Thus the obnoxious doctrine asserted by the Government in this case, to the effect that restraints of liberty resulting from military trials of war criminals are political matters completely outside the arena of judicial review, has been rejected fully and unquestionably. This does not mean, of course, that the foreign affairs and policies of the nation are proper subjects of judicial inquiry. But when the liberty of any person is restrained by reason of the authority of the United States the writ of habeas corpus is available to test the legality of that restraint, even though direct court review of the restraint is prohibited. The conclusive presumption must be made, in this country at least, that illegal restraints are unauthorized and unjustified by any foreign policy of the Government and that commonly accepted juridical standards are to be recognized and enforced. On that basis judicial inquiry into these matters may proceed within its proper sphere.

The determination of the extent of review of war trials calls for judicial statesmanship of the highest order. The ultimate nature and scope of the writ of habeas corpus are within the discretion of the judiciary unless validly circumscribed by Congress. Here we are confronted with a use of the writ under circumstances novel in the history of the

Court. For my own part, I do not feel that we should be confined by the traditional lines of review drawn in connection with the use of the writ by ordinary criminals who have direct access to the judiciary in the first instance. Those held by the military lack any such access; consequently the judicial review available by habeas corpus must be wider than usual in order that proper standards of justice may be enforceable.

But for the purposes of this case I accept the scope of review recognized by the Court at this time. As I understand it, the following issues in connection with war criminal trials are reviewable through the use of the writ of habeas corpus: (1) whether the military commission was lawfully created and had authority to try and to convict the accused of a war crime; (2) whether the charge against the accused stated a violation of the laws of war; (3) whether the commission, in admitting certain evidence, violated any law or military command defining the commission's authority in that respect; and (4) whether the commission lacked jurisdiction because of a failure to give advance notice to the protecting power as required by treaty or convention.

The Court, in my judgment, demonstrates conclusively that the military commission was lawfully created in this instance and that petitioner could not object to its power to try him for a recognized war crime. Without pausing here to discuss the third and fourth issues, however, I find it impossible to agree that the charge against the petitioner stated a recognized violation of the laws of war.

It is important, in the first place, to appreciate the background of events preceding this trial. From October 9, 1944, to September 2, 1945, the petitioner was the Commanding General of the 14th Army Group of the Imperial Japanese Army, with headquarters in the Philippines. The reconquest of the Philippines by the armed forces of the United States began approximately at the time when

the petitioner assumed this command. Combined with a great and decisive sea battle, an invasion was made on the island of Leyte on October 20, 1944. "In the six days of the great naval action the Japanese position in the Philippines had become extremely critical. Most of the serviceable elements of the Japanese Navy had been committed to the battle with disastrous results. The strike had miscarried, and General MacArthur's land wedge was firmly implanted in the vulnerable flank of the enemy . . . There were 260,000 Japanese troops scattered over the Philippines but most of them might as well have been on the other side of the world so far as the enemy's ability to shift them to meet the American thrusts was concerned. If General MacArthur succeeded in establishing himself in the Visayas where he could stage, exploit, and spread under cover of overwhelming naval and air superiority, nothing could prevent him from overrunning the Philippines." Biennial Report of the Chief of Staff of the United States Army, July 1, 1943, to June 30, 1945, to the Secretary of War, p. 74.

By the end of 1944 the island of Leyte was largely in American hands. And on January 9, 1945, the island of Luzon was invaded. "Yamashita's inability to cope with General MacArthur's swift moves, his desired reaction to the deception measures, the guerrillas, and General Kenney's aircraft combined to place the Japanese in an impossible situation. The enemy was forced into a piecemeal commitment of his troops." *Ibid.*, p. 78. It was at this time and place that most of the alleged atrocities took place. Organized resistance around Manila ceased on February 23. Repeated land and air assaults pulverized the enemy and within a few months there was little left of petitioner's command except a few remnants which had gathered for a last stand among the precipitous mountains.

As the military commission here noted, "The Defense established the difficulties faced by the Accused with re-

spect not only to the swift and overpowering advance of American forces, but also to the errors of his predecessors, weaknesses in organization, equipment, supply with especial reference to food and gasoline, training, communication, discipline and morale of his troops. It was alleged that the sudden assignment of Naval and Air Forces to his tactical command presented almost insurmountable difficulties. This situation was followed, the Defense contended, by failure to obey his orders to withdraw troops from Manila, and the subsequent massacre of unarmed civilians, particularly by Naval forces. Prior to the Luzon Campaign, Naval forces had reported to a separate ministry in the Japanese Government and Naval Commanders may not have been receptive or experienced in this instance with respect to a joint land operation under a single commander who was designated from the Army Service."

The day of final reckoning for the enemy arrived in August, 1945. On September 3, the petitioner surrendered to the United States Army at Baguio, Luzon. He immediately became a prisoner of war and was interned in prison in conformity with the rules of international law. On September 25, approximately three weeks after surrendering, he was served with the charge in issue in this case. Upon service of the charge he was removed from the status of a prisoner of war and placed in confinement as an accused war criminal. Arraignment followed on October 8 before a military commission specially appointed for the case. Petitioner pleaded not guilty. He was also served on that day with a bill of particulars alleging 64 crimes by troops under his command. A supplemental bill alleging 59 more crimes by his troops was filed on October 29, the same day that the trial began. No continuance was allowed for preparation of a defense as to the supplemental bill. The trial continued uninterrupted until December 5, 1945. On December 7 petitioner was found guilty as charged and was sentenced to be hanged.

The petitioner was accused of having "unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes." The bills of particulars further alleged that specific acts of atrocity were committed by "members of the armed forces of Japan under the command of the accused." Nowhere was it alleged that the petitioner personally committed any of the atrocities, or that he ordered their commission, or that he had any knowledge of the commission thereof by members of his command.

The findings of the military commission bear out this absence of any direct personal charge against the petitioner. The commission merely found that atrocities and other high crimes "have been committed by members of the Japanese armed forces under your command . . . that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and noncommissioned officers; . . . That during the period in question you failed to provide effective control of your troops as was required by the circumstances."

In other words, read against the background of military events in the Philippines subsequent to October 9, 1944, these charges amount to this: "We, the victorious American forces, have done everything possible to destroy and disorganize your lines of communication, your effective control of your personnel, your ability to wage war. In those respects we have succeeded. We have defeated and crushed your forces. And now we charge and condemn you for having been inefficient in maintaining control of your troops during the period when we were so effectively besieging and eliminating your forces and blocking your ability to maintain effective control. Many terrible atrocities were committed by your disorganized troops. Because these atrocities were so widespread we will not bother to charge or prove that you committed, ordered or

condoned any of them. We will assume that they must have resulted from your inefficiency and negligence as a commander. In short, we charge you with the crime of inefficiency in controlling your troops. We will judge the discharge of your duties by the disorganization which we ourselves created in large part. Our standards of judgment are whatever we wish to make them."

Nothing in all history or in international law, at least as far as I am aware, justifies such a charge against a fallen commander of a defeated force. To use the very inefficiency and disorganization created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice or to military reality.

International law makes no attempt to define the duties of a commander of an army under constant and overwhelming assault; nor does it impose liability under such circumstances for failure to meet the ordinary responsibilities of command. The omission is understandable. Duties, as well as ability to control troops, vary according to the nature and intensity of the particular battle. To find an unlawful deviation from duty under battle conditions requires difficult and speculative calculations. Such calculations become highly untrustworthy when they are made by the victor in relation to the actions of a vanquished commander. Objective and realistic norms of conduct are then extremely unlikely to be used in forming a judgment as to deviations from duty. The probability that vengeance will form the major part of the victor's judgment is an unfortunate but inescapable fact. So great is that probability that international law refuses to recognize such a judgment as a basis for a war crime, however fair the judgment may be in a particular instance. It is this consideration that undermines the charge against the petitioner in this case. The indictment permits, indeed compels, the military commission of a victorious nation to

sit in judgment upon the military strategy and actions of the defeated enemy and to use its conclusions to determine the criminal liability of an enemy commander. Life and liberty are made to depend upon the biased will of the victor rather than upon objective standards of conduct.

The Court's reliance upon vague and indefinite references in certain of the Hague Conventions and the Geneva Red Cross Convention is misplaced. Thus the statement in Article 1 of the Annex to Hague Convention No. IV of October 18, 1907, 36 Stat. 2277, 2295, to the effect that the laws, rights and duties of war apply to military and volunteer corps only if they are "commanded by a person responsible for his subordinates," has no bearing upon the problem in this case. Even if it has, the clause "responsible for his subordinates" fails to state to whom the responsibility is owed or to indicate the type of responsibility contemplated. The phrase has received differing interpretations by authorities on international law. In Oppenheim, International Law (6th ed., rev. by Lauterpacht, 1940, vol. 2, p. 204, fn. 3) it is stated that "The meaning of the word 'responsible' . . . is not clear. It probably means 'responsible to some higher authority,' whether the person is appointed from above or elected from below; . . ." Another authority has stated that the word "responsible" in this particular context means "presumably to a higher authority," or "Possibly it merely means one who controls his subordinates and who therefore can be called to account for their acts." Wheaton, International Law (7th ed., by Keith, London, 1944, p. 172, fn. 30). Still another authority, Westlake, International Law (1907, Part II, p. 61), states that "Probably the responsibility intended is nothing more than a capacity of exercising effective control." Finally, Edmonds and Oppenheim, Land Warfare (1912, p. 19, par. 22) state that it is enough "if the commander of the corps is regularly or temporarily commissioned as an officer or is a person of

position and authority . . ." It seems apparent beyond dispute that the word "responsible" was not used in this particular Hague Convention to hold the commander of a defeated army to any high standard of efficiency when he is under destructive attack; nor was it used to impute to him any criminal responsibility for war crimes committed by troops under his command under such circumstances.

The provisions of the other conventions referred to by the Court are on their face equally devoid of relevance or significance to the situation here in issue. Neither Article 19 of Hague Convention No. X, 36 Stat. 2371, 2389, nor Article 26 of the Geneva Red Cross Convention of 1929, 47 Stat. 2074, 2092, refers to circumstances where the troops of a commander commit atrocities while under heavily adverse battle conditions. Reference is also made to the requirement of Article 43 of the Annex to Hague Convention No. IV, 36 Stat. 2295, 2306, that the commander of a force occupying enemy territory "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." But the petitioner was more than a commander of a force occupying enemy territory. He was the leader of an army under constant and devastating attacks by a superior re-invading force. This provision is silent as to the responsibilities of a commander under such conditions as that.

Even the laws of war heretofore recognized by this nation fail to impute responsibility to a fallen commander for excesses committed by his disorganized troops while under attack. Paragraph 347 of the War Department publication, Basic Field Manual, Rules of Land Warfare, FM 27–10 (1940), states the principal offenses under the laws of war recognized by the United States. This includes all of the atrocities which the Japanese troops were alleged to have committed in this instance. Originally

this paragraph concluded with the statement that "The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall." The meaning of the phrase "under whose authority they are committed" was not clear. On November 15, 1944, however, this sentence was deleted and a new paragraph was added relating to the personal liability of those who violate the laws of war. Change 1, FM 27–10. The new paragraph 345.1 states that "Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment. The person giving such orders may also be punished." From this the conclusion seems inescapable that the United States recognizes individual criminal responsibility for violations of the laws of war only as to those who commit the offenses or who order or direct their commission. Such was not the allegation here. Cf. Article 67 of the Articles of War, 10 U. S. C. § 1539.

There are numerous instances, especially with reference to the Philippine Insurrection in 1900 and 1901, where commanding officers were found to have violated the laws of war by specifically ordering members of their command to commit atrocities and other war crimes. Francisco Frani, G. O. 143, Dec. 13, 1900, Hq. Div. Phil.; Eugenio Fernandez and Juan Soriano, G. O. 28, Feb. 6, 1901, Hq. Div. Phil.; Ciriaco Cabungal, G. O. 188, Jul. 22, 1901, Hq. Div. Phil.; Natalio Valencia, G. O. 221, Aug. 17, 1901, Hq. Div. Phil.; Aniceta Angeles, G. O. 246, Sept. 2, 1901, Hq. Div. Phil.; Francisco Braganza, G. O. 291, Sept. 26, 1901, Hq. Div. Phil.; Lorenzo Andaya, G. O. 328, Oct. 25, 1901, Hq. Div. Phil. And in other cases officers have been held

liable where they knew that a crime was to be committed, had the power to prevent it and failed to exercise that power. Pedro Abad Santos, G. O. 130, June 19, 1901, Hq. Div. Phil. Cf. Pedro A. Cruz, G. O. 264, Sept. 9, 1901, Hq. Div. Phil. In no recorded instance, however, has the mere inability to control troops under fire or attack by superior forces been made the basis of a charge of violating the laws of war.

The Government claims that the principle that commanders in the field are bound to control their troops has been applied so as to impose liability on the United States in international arbitrations. *Case of Jeannaud* (1880), 3 Moore, International Arbitrations (1898) 3000; *Case of The Zafiro* (1910), 5 Hackworth, Digest of International Law (1943) 707. The difference between arbitrating property rights and charging an individual with a crime against the laws of war is too obvious to require elaboration. But even more significant is the fact that even these arbitration cases fail to establish any principle of liability where troops are under constant assault and demoralizing influences by attacking forces. The same observation applies to the common law and statutory doctrine, referred to by the Government, that one who is under a legal duty to take protective or preventive action is guilty of criminal homicide if he willfully or negligently omits to act and death is proximately caused. *State* v. *Harrison,* 107 N. J. L. 213, 152 A. 867; *State* v. *Irvine,* 126 La. 434, 52 So. 567; Holmes, The Common Law, p. 278. No one denies that inaction or negligence may give rise to liability, civil or criminal. But it is quite another thing to say that the inability to control troops under highly competitive and disastrous battle conditions renders one guilty of a war crime in the absence of personal culpability. Had there been some element of knowledge or direct connection with the atrocities the problem would be entirely different. Moreover, it must be remembered that we are not dealing

here with an ordinary tort or criminal action; precedents in those fields are of little if any value. Rather we are concerned with a proceeding involving an international crime, the treatment of which may have untold effects upon the future peace of the world. That fact must be kept uppermost in our search for precedent.

The only conclusion I can draw is that the charge made against the petitioner is clearly without precedent in international law or in the annals of recorded military history. This is not to say that enemy commanders may escape punishment for clear and unlawful failures to prevent atrocities. But that punishment should be based upon charges fairly drawn in light of established rules of international law and recognized concepts of justice.

But the charge in this case, as previously noted, was speedily drawn and filed but three weeks after the petitioner surrendered. The trial proceeded with great dispatch without allowing the defense time to prepare an adequate case. Petitioner's rights under the due process clause of the Fifth Amendment were grossly and openly violated without any justification. All of this was done without any thorough investigation and prosecution of those immediately responsible for the atrocities, out of which might have come some proof or indication of personal culpability on petitioner's part. Instead the loose charge was made that great numbers of atrocities had been committed and that petitioner was the commanding officer; hence he must have been guilty of disregard of duty. Under that charge the commission was free to establish whatever standard of duty on petitioner's part that it desired. By this flexible method a victorious nation may convict and execute any or all leaders of a vanquished foe, depending upon the prevailing degree of vengeance and the absence of any objective judicial review.

At a time like this when emotions are understandably high it is difficult to adopt a dispassionate attitude toward

a case of this nature. Yet now is precisely the time when that attitude is most essential. While peoples in other lands may not share our beliefs as to due process and the dignity of the individual, we are not free to give effect to our emotions in reckless disregard of the rights of others. We live under the Constitution, which is the embodiment of all the high hopes and aspirations of the new world. And it is applicable in both war and peace. We must act accordingly. Indeed, an uncurbed spirit of revenge and retribution, masked in formal legal procedure for purposes of dealing with a fallen enemy commander, can do more lasting harm than all of the atrocities giving rise to that spirit. The people's faith in the fairness and objectiveness of the law can be seriously undercut by that spirit. The fires of nationalism can be further kindled. And the hearts of all mankind can be embittered and filled with hatred, leaving forlorn and impoverished the noble ideal of malice toward none and charity to all. These are the reasons that lead me to dissent in these terms.

MR. JUSTICE RUTLEDGE, dissenting.

Not with ease does one find his views at odds with the Court's in a matter of this character and gravity. Only the most deeply felt convictions could force one to differ. That reason alone leads me to do so now, against strong considerations for withholding dissent.

More is at stake than General Yamashita's fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his death is sought. But there can be and should be justice administered according to law. In this stage of war's aftermath it is too early for Lincoln's great spirit, best lighted in the Second Inaugural, to have wide hold for the treatment of foes. It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process

of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late.

This long-held attachment marks the great divide between our enemies and ourselves. Theirs was a philosophy of universal force. Ours is one of universal law, albeit imperfectly made flesh of our system and so dwelling among us. Every departure weakens the tradition, whether it touches the high or the low, the powerful or the weak, the triumphant or the conquered. If we need not or cannot be magnanimous, we can keep our own law on the plane from which it has not descended hitherto and to which the defeated foes' never rose.

With all deference to the opposing views of my brethren, whose attachment to that tradition needless to say is no less than my own, I cannot believe in the face of this record that the petitioner has had the fair trial our Constitution and laws command. Because I cannot reconcile what has occurred with their measure, I am forced to speak. At bottom my concern is that we shall not forsake in any case, whether Yamashita's or another's, the basic standards of trial which, among other guaranties, the nation fought to keep; that our system of military justice shall not alone among all our forms of judging be above or beyond the fundamental law or the control of Congress within its orbit of authority; and that this Court shall not fail in its part under the Constitution to see that these things do not happen.

This trial is unprecedented in our history. Never before have we tried and convicted an enemy general for action taken during hostilities or otherwise in the course of military operations or duty. Much less have we condemned one for failing to take action. The novelty is not lessened by the trial's having taken place after hostilities ended and the enemy, including the accused, had surrendered. Moreover, so far as the time permitted for our

consideration has given opportunity, I have not been able to find precedent for the proceeding in the system of any nation founded in the basic principles of our constitutional democracy, in the laws of war or in other internationally binding authority or usage.

The novelty is legal as well as historical. We are on strange ground. Precedent is not all-controlling in law. There must be room for growth, since every precedent has an origin. But it is the essence of our tradition for judges, when they stand at the end of the marked way, to go forward with caution keeping sight, so far as they are able, upon the great landmarks left behind and the direction they point ahead. If, as may be hoped, we are now to enter upon a new era of law in the world, it becomes more important than ever before for the nations creating that system to observe their greatest traditions of administering justice, including this one, both in their own judging and in their new creation. The proceedings in this case veer so far from some of our time-tested road signs that I cannot take the large strides validating them would demand.

I.

It is not in our tradition for anyone to be charged with crime which is defined after his conduct, alleged to be criminal, has taken place; [1] or in language not sufficient to inform him of the nature of the offense or to enable him to make defense.[2] Mass guilt we do not impute to individuals, perhaps in any case but certainly in none where the person is not charged or shown actively to have participated in or knowingly to have failed in taking action to

[1] *Cummings* v. *Missouri*, 4 Wall. 277; *Kring* v. *Missouri*, 107 U. S. 221.

[2] *Armour Packing Co.* v. *United States*, 209 U. S. 56, 83–84; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; cf. *Screws* v. *United States*, 325 U. S. 91. See note 17 and text.

prevent the wrongs done by others, having both the duty and the power to do so.

It is outside our basic scheme to condemn men without giving reasonable opportunity for preparing defense; [3] in capital or other serious crimes to convict on "official documents . . .; affidavits; . . . documents or translations thereof; diaries . . ., photographs, motion picture films, and . . . newspapers" [4] or on hearsay, once, twice or thrice removed,[5] more particularly when the documentary evidence or some of it is prepared *ex parte* by the prosecuting authority and includes not only opinion but conclusions of guilt. Nor in such cases do we deny the rights of confrontation of witnesses and cross-examination.[6]

Our tradition does not allow conviction by tribunals both authorized and bound [7] by the instrument of their creation to receive and consider evidence which is expressly excluded by Act of Congress or by treaty obligation; nor is it in accord with our basic concepts to make the tribunal, specially constituted for the particular trial, regardless of those prohibitions the sole and exclusive judge of the cred-

---

[3] *Hawk* v. *Olson*, 326 U. S. 271; *Snyder* v. *Massachusetts*, 291 U. S. 97, 105: "What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it." See Part III.

[4] The commission's findings state: "We have received for analysis and evaluation 423 exhibits consisting of official documents of the United States Army, The United States State Department, and the Commonwealth of the Philippines; affidavits; captured enemy documents or translations thereof; diaries taken from Japanese personnel, photographs, motion picture films, and Manila newspapers." See notes 19 and 20.

Concerning the specific nature of these elements in the proof, the issues to which they were directed, and their prejudicial effects, see text *infra* and notes in Part II.

[5] *Queen* v. *Hepburn*, 7 Cranch 290; *Donnelly* v. *United States*, 228 U. S. 243, 273. See Part II; note 21.

[6] *Motes* v. *United States*, 178 U. S. 458; *Paoni* v. *United States*, 281 F. 801. See Parts II and III.

[7] See Part II at notes 10, 19; Part III.

ibility, probative value and admissibility of whatever may be tendered as evidence.

The matter is not one merely of the character and admissibility of evidence. It goes to the very competency of the tribunal to try and punish consistently with the Constitution, the laws of the United States made in pursuance thereof, and treaties made under the nation's authority.

All these deviations from the fundamental law, and others, occurred in the course of constituting the commission, the preparation for trial and defense, the trial itself, and therefore, in effect, in the sentence imposed. Whether taken singly in some instances as departures from specific constitutional mandates or in totality as in violation of the Fifth Amendment's command that *no* person shall be deprived of life, liberty or property without due process of law, a trial so vitiated cannot withstand constitutional scrutiny.

One basic protection of our system and one only, petitioner has had. He has been represented by able counsel, officers of the army he fought. Their difficult assignment has been done with extraordinary fidelity, not only to the accused, but to their high conception of military justice, always to be administered in subordination to the Constitution and consistent Acts of Congress and treaties. But, as will appear, even this conceded shield was taken away in much of its value, by denial of reasonable opportunity for them to perform their function.

On this denial and the commission's invalid constitution specifically, but also more generally upon the totality of departures from constitutional norms inherent in the idea of a fair trial, I rest my judgment that the commission was without jurisdiction from the beginning to try or punish the petitioner and that, if it had acquired jurisdiction then, its power to proceed was lost in the course of what was done before and during trial.

Only on one view, in my opinion, could either of these conclusions be avoided. This would be that an enemy

belligerent in petitioner's position is altogether beyond the pale of constitutional protection, regardless of the fact that hostilities had ended and he had surrendered with his country. The Government has so argued, urging that we are still at war with Japan and all the power of the military effective during active hostilities in theatres of combat continues in full force unaffected by the events of August 14, 1945, and after.

In this view the action taken here is one of military necessity, exclusively within the authority of the President as Commander-in-Chief and his military subordinates to take in warding off military danger and subject to no judicial restraint on any account, although somewhat inconsistently it is said this Court may "examine" the proceedings generally.

As I understand the Court, this is in substance the effect of what has been done. For I cannot conceive any instance of departure from our basic concepts of fair trial, if the failures here are not sufficient to produce that effect.

We are technically still at war, because peace has not been negotiated finally or declared. But there is no longer the danger which always exists before surrender and armistice. Military necessity does not demand the same measures. The nation may be more secure now than at any time after peace is officially concluded. In these facts is one great difference from *Ex parte Quirin*, 317 U. S. 1. Punitive action taken now can be effective only for the next war, for purposes of military security. And enemy aliens, including belligerents, need the attenuated protections our system extends to them more now than before hostilities ceased or than they may after a treaty of peace is signed. Ample power there is to punish them or others for crimes, whether under the laws of war during its course or later during occupation. There can be no question of that. The only question is how it shall be done, consist-

ently with universal constitutional commands or outside their restricting effects. In this sense I think the Constitution follows the flag.

The other thing to be mentioned in order to be put aside is that we have no question here of what the military might have done in a field of combat. There the maxim about the law becoming silent in the noise of arms applies. The purpose of battle is to kill. But it does not follow that this would justify killing by trial after capture or surrender, without compliance with laws or treaties made to apply in such cases, whether trial is before or after hostilities end.

I turn now to discuss some of the details of what has taken place. My basic difference is with the Court's view that provisions of the Articles of War and of treaties are not made applicable to this proceeding and with its ruling that, absent such applicable provisions, none of the things done so vitiated the trial and sentence as to deprive the commission of jurisdiction.

My brother MURPHY has discussed the charge with respect to the substance of the crime. With his conclusions in this respect I agree. My own primary concern will be with the constitution of the commission and other matters taking place in the course of the proceedings, relating chiefly to the denial of reasonable opportunity to prepare petitioner's defense and the sufficiency of the evidence, together with serious questions of admissibility, to prove an offense, all going as I think to the commission's jurisdiction.

Necessarily only a short sketch can be given concerning each matter. And it may be stated at the start that, although it was ruled in *Ex parte Quirin, supra,* that this Court had no function to review the evidence, it was not there or elsewhere determined that it could not ascertain whether conviction is founded upon evidence expressly excluded by Congress or treaty; nor does the Court purport to do so now.

II.

Invalidity of the Commission's Constitution.

The fountainhead of the commission's authority was General MacArthur's directive by which General Styer was ordered to and pursuant to which he did proceed with constituting the commission.[8] The directive was accompanied by elaborate and detailed rules and regulations prescribing the procedure and rules of evidence to be followed, of which for present purposes § 16, set forth below,[9] is crucial.

---

[8] The line of authorization within the military hierarchy extended from the President, through the Joint Chiefs of Staff and General MacArthur, to General Styer, whose order of September 25th and others were made pursuant to and in conformity with General MacArthur's directive. The charge was prepared by the Judge Advocate General's Department of the Army. There is no dispute concerning these facts or that the directive was binding on General Styer and the commission, though it is argued his own authority as area commanding general was independently sufficient to sustain what was done.

[9] "16. Evidence.—a. The commission shall admit such evidence as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man. In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:

(1) Any document which appears to the commission to have been signed or issued officially by any officer, department, agency, or member of the armed forces of any government, without proof of the signature or of the issuance of the document.

(2) Any report which appears to the commission to have been signed or issued by the International Red Cross or a member thereof, or by a medical doctor or any medical service personnel, or by an investigator or intelligence officer, or by any other person whom the commission finds to have been acting in the course of his duty when making the report.

(3) Affidavits, depositions, or other statements taken by an officer detailed for that purpose by military authority.

(4) Any diary, letter or other document appearing to the commission to contain information relating to the charge.

(5) A copy of any document or other secondary evidence of its contents, if the commission believes that the original is not available or cannot be produced without undue delay. . . ."

Section 16, as will be noted, permits reception of documents, reports, affidavits, depositions, diaries, letters, copies of documents or other secondary evidence of their contents, hearsay, opinion evidence and conclusions, in fact of anything which in the commission's opinion "would be of assistance in proving or disproving the charge," without any of the usual modes of authentication.

A more complete abrogation of customary safeguards relating to the proof, whether in the usual rules of evidence or any reasonable substitute and whether for use in the trial of crime in the civil courts or military tribunals, hardly could have been made. So far as the admissibility and probative value of evidence was concerned, the directive made the commission a law unto itself.

It acted accordingly. As against insistent and persistent objection to the reception of all kinds of "evidence," oral, documentary and photographic, for nearly every kind of defect under any of the usual prevailing standards for admissibility and probative value, the commission not only consistently ruled against the defense, but repeatedly stated it was bound by the directive to receive the kinds of evidence it specified,[10] reprimanded counsel for continuing to make objection, declined to hear further objections, and in more than one instance during the course of the proceedings reversed its rulings favorable to the defense, where initially it had declined to receive what the prosecution offered. Every conceivable kind of statement, rumor, report, at first, second, third or further hand, written, printed or oral, and one "propaganda" film were allowed to come in, most of this relating to atrocities committed

[10] In one instance the president of the commission said: "The rules and regulations which guide this Commission are binding upon the Commission and agencies provided to assist the Commission. . . . We have been authorized to receive and weigh such evidence as we can consider to have probative value, and further comments by the Defense on the right which we have to accept this evidence is decidedly out of order." But see note 19.

by troops under petitioner's command throughout the several thousand islands of the Philippine Archipelago during the period of active hostilities covered by the American forces' return to and recapture of the Philippines.[11]

The findings reflect the character of the proof and the charge. The statement quoted above [12] gives only a numerical idea of the instances in which ordinary safeguards in reception of written evidence were ignored. In addition to these 423 "exhibits," the findings state the commission "has heard 286 persons during the course of this trial, most of whom have given eye-witness accounts of what they endured or what they saw."

But there is not a suggestion in the findings that petitioner personally participated in, was present at the occurrence of, or ordered any of these incidents, with the exception of the wholly inferential suggestion noted below. Nor is there any express finding that he knew of any one of the incidents in particular or of all taken together. The only inferential findings that he had knowledge, or that the commission so found, are in the statement that the "crimes *alleged to have been permitted* by the Accused in violation of the laws of war may be grouped into three categories" set out below,[13] in the further statement that "the Prose-

[11] Cf. text *infra* at note 19 concerning the prejudicial character of the evidence.

[12] Note 4.

[13] Namely, "(1) Starvation, execution or massacre without trial and maladministration generally of civilian internees and prisoners of war; (2) Torture, rape, murder and mass execution of very large numbers of residents of the Philippines, including women and children and members of religious orders, by starvation, beheading, bayoneting, clubbing, hanging, burning alive, and destruction by explosives; (3) Burning and demolition without adequate military necessity of large numbers of homes, places of business, places of religious worship, hospitals, public buildings, and educational institutions. In point of time, the offenses extended throughout the period the Accused was in command of Japanese troops in the Philippines. In point of area, the crimes extended throughout the Philippine Archipelago, although by far the most of the incredible acts occurred on Luzon."

cution presented evidence to show that the crimes were so extensive and widespread, both as to time and area,[14] that *they must* either have been *wilfully permitted* by the Accused, *or secretly ordered* by" him; and in the conclusion of guilt and the sentence.[15] (Emphasis added.) Indeed the commission's ultimate findings [16] draw no express conclusion of knowledge, but state only two things: (1) the fact of widespread atrocities and crimes; (2) that petitioner "failed to provide effective control . . . as was required by the circumstances."

This vagueness, if not vacuity, in the findings runs throughout the proceedings, from the charge itself through the proof and the findings, to the conclusion. It affects

---

[14] Cf. note 13.

[15] In addition the findings set forth that captured orders of subordinate officers gave proof that "they, at least," ordered acts "leading directly to" atrocities; that "the *proof offered* to the Commission *alleged* criminal *neglect* . . . as well as complete failure *by the higher echelons* of command *to detect* and prevent cruel and inhuman treatment accorded by local commanders and guards"; and that, although the "Defense established the difficulties faced by the Accused" with special reference among other things to the discipline and morale of his troops under the "swift and overpowering advance of American forces," and notwithstanding he had stoutly maintained his complete ignorance of the crimes, still he was an officer of long experience; his assignment was one of broad responsibility; it was his duty *"to discover* and control" crimes by his troops, if widespread, and therefore

"The Commission concludes: (1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command against people of the United States, their allies and dependencies throughout the Philippine Islands; that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and noncommissioned officers; (2) That during the period in question you failed to provide effective control of your troops as was required by the circumstances.

"Accordingly upon secret written ballot, two-thirds or more of the members concurring, the Commission finds you guilty as charged and sentences you to death by hanging." (Emphasis added.)

[16] See note 15.

the very gist of the offense, whether that was wilful, informed and intentional omission to restrain and control troops *known* by petitioner to be committing crimes or was only a negligent failure on his part *to discover* this and take whatever measures he then could to stop the conduct.

Although it is impossible to determine from what is before us whether petitioner in fact has been convicted of one or the other or of both these things,[17] the case has been

[17] The charge, set forth at the end of this note, is consistent with either theory—or both—and thus ambiguous, as were the findings. See note 15. The only word implying knowledge was "permitting." If "wilfully" is essential to constitute a crime or charge of one, otherwise subject to the objection of "vagueness," cf. *Screws* v. *United States*, 325 U. S. 91, it would seem that "permitting" alone would hardly be sufficient to charge "wilful and intentional" action or omission; and, if taken to be sufficient to charge knowledge, it would follow necessarily that the charge itself was not drawn to state and was insufficient to support a finding of mere failure to detect or discover the criminal conduct of others.

At the most, "permitting" could charge knowledge only by inference or implication. And reasonably the word could be taken in the context of the charge to mean "allowing" or "not preventing," a meaning consistent with absence of knowledge and mere failure to discover. In capital cases such ambiguity is wholly out of place. The proof was equally ambiguous in the same respect, so far as we have been informed, and so, to repeat, were the findings. The use of "wilfully," even qualified by a "must have," one time only in the findings hardly can supply the absence of that or an equivalent word or language in the charge or in the proof to support that essential element in the crime.

The charge was as follows: "Tomoyuki Yamashita, General Imperial Japanese Army, between 9 October 1944 and 2 September 1945, at Manila and at other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he, General Tomoyuki Yamashita, thereby violated the laws of war."

presented on the former basis and, unless as is noted below there is fatal duplicity, it must be taken that the crime charged and sought to be proved was only the failure, with knowledge, to perform the commander's function of control, although the Court's opinion nowhere expressly declares that knowledge was essential to guilt or necessary to be set forth in the charge.

It is in respect to this feature especially, quite apart from the reception of unverified rumor, report, etc., that perhaps the greatest prejudice arose from the admission of untrustworthy, unverified, unauthenticated evidence which could not be probed by cross-examination or other means of testing credibility, probative value or authenticity.

Counsel for the defense have informed us in the brief and at the argument that the sole proof of knowledge introduced at the trial was in the form of ex parte affidavits and depositions. Apart from what has been excerpted from the record in the applications and the briefs, and such portions of the record as I have been able to examine, it has been impossible for me fully to verify counsel's statement in this respect. But the Government has not disputed it; and it has maintained that we have no right to examine the record upon any question "of evidence." Accordingly, without concession to that view, the statement of counsel is taken for the fact. And in that state of things petitioner has been convicted of a crime in which knowledge is an essential element, with no proof of knowledge other than what would be inadmissible in any other capital case or proceeding under our system, civil or military, and which furthermore Congress has expressly commanded shall not be received in such cases tried by military commissions and other military tribunals.[18]

Moreover counsel assert in the brief, and this also is not denied, that the sole proof made of certain of the specifi-

[18] Cf. text *infra* Part IV.

cations in the bills of particulars was by ex parte affidavits. It was in relation to this also vital phase of the proof that there occurred one of the commission's reversals of its earlier rulings in favor of the defense,[19] a fact in itself conclusive demonstration of the necessity to the prosecution's case of the prohibited type of evidence and of its prejudicial effects upon the defense.

These two basic elements in the proof, namely, proof of knowledge of the crimes and proof of the specifications in the bills, that is, of the atrocities themselves, constitute the most important instances perhaps, if not the most fla-

[19] On November 1, early in the trial, the president of the commission stated: "I think the Prosecution should consider the desirability of striking certain items. The Commission feels that there must be witnesses introduced on each of the specifications or items. *It has no objection to considering affidavits, but it is unwilling to form an opinion of a particular item based solely on an affidavit.* Therefore, until evidence is introduced, these particular exhibits are rejected." (Emphasis added.)

Later evidence of the excluded type was offered, to introduction of which the defense objected on various grounds including the prior ruling. At the prosecution's urging the commission withdrew to deliberate. Later it announced that "after further consideration, the Commission reverses that ruling [of November 1] and affirms its prerogative of receiving and considering affidavits or depositions, if it chooses to do so, for whatever probative value the Commission believes they may have, without regard to the presentation of some partially corroborative oral testimony." It then added: "The Commission *directs* the Prosecution again to introduce the affidavits or depositions then in question, and other documents of a similar nature which the Prosecution stated had been prepared for introduction." (Emphasis added.)

Thereafter this type of evidence was consistently received and again, by the undisputed statement of counsel, as the sole proof of many of the specifications of the bills, a procedure which they characterize correctly in my view as having "in effect, stripped the proceeding of all semblance of a trial and converted it into an ex parte investigation."

grant,[20] of departure not only from the express command of Congress against receiving such proof but from the whole British-American tradition of the common law and the Constitution. Many others occurred, which there is neither time nor space to mention.[21]

Petitioner asserts, and there can be no reason to doubt, that by the use of all this forbidden evidence he was deprived of the right of cross-examination and other means to establish the credibility of the deponents or affiants, not to speak of the authors of reports, letters, documents and newspaper articles; of opportunity to determine whether the multitudinous crimes specified in the bills were committed in fact by troops under his command or by naval or air force troops not under his command at the time alleged; to ascertain whether the crimes attested were isolated acts of individual soldiers or were military acts committed by troop units acting under supervision of officers; and, finally, whether "in short, there was such a 'pattern' of" conduct as the prosecution alleged and its whole theory of the crime and the evidence required to be made out.

He points out in this connection that the commission based its decision on a finding as to the extent and number

[20] This perhaps consisted in the showing of the so-called "propaganda" film, "Orders from Tokyo," portraying scenes of battle destruction in Manila, which counsel say "was not in itself seriously objectionable." Highly objectionable, inflammatory and prejudicial, however, was the accompanying sound track with comment that the film was "evidence which will convict," mentioning petitioner specifically by name.

[21] Innumerable instances of hearsay, once or several times removed, relating to all manner of incidents, rumors, reports, etc., were among these. Many instances, too, are shown of the use of opinion evidence and conclusions of guilt, including reports made after ex parte investigations by the War Crimes Branch of the Judge Advocate General's Department, which it was and is urged had the effect of "putting the prosecution on the witness stand" and of usurping the commission's function as judge of the law and the facts. It is said also that some of the reports were received as the sole proof of some of the specifications.

of the atrocities and that this of itself establishes the prejudicial effect of the affidavits, etc., and of the denial resulting from their reception of any means of probing the evidence they contained, including all opportunity for cross-examination. Yet it is said there is no sufficient showing of prejudice. The effect could not have been other than highly prejudicial. The matter is not one merely of "rules of evidence." It goes, as will appear more fully later, to the basic right of defense, including some fair opportunity to test probative value.

Insufficient as this recital is to give a fair impression of what was done, it is enough to show that this was no trial in the traditions of the common law and the Constitution. If the tribunal itself was not strange to them otherwise, it was in its forms and modes of procedure, in the character and substance of the evidence it received, in the denial of all means to the accused and his counsel for testing the evidence, in the brevity and ambiguity of its findings made upon such a mass of material and, as will appear, in the denial of any reasonable opportunity for preparation of the defense. Because this last deprivation not only is important in itself, but is closely related to the departures from all limitations upon the character of and modes of making the proof, it will be considered before turning to the important legal questions relating to whether all these violations of our traditions can be brushed aside as not forbidden by the valid Acts of Congress, treaties and the Constitution, in that order. If all these traditions can be so put away, then indeed will we have entered upon a new but foreboding era of law.

III.

Denial of Opportunity to Prepare Defense.

Petitioner surrendered September 3, 1945, and was interned as a prisoner of war in conformity with Article 9

of the Geneva Convention of July 27, 1929.[22] He was served with the charge on September 25 and put in confinement as an accused war criminal. On October 8 he was arraigned and pleaded not guilty. On October 29 the trial began and it continued until December 7, when sentence was pronounced, exactly four years almost to the hour from the attack on Pearl Harbor.

On the day of arraignment, October 8, three weeks before the trial began, petitioner was served with a bill of particulars specifying 64 items setting forth a vast number of atrocities and crimes allegedly committed by troops under his command.[23] The six officers appointed as defense counsel thus had three weeks, it is true at the prosecution's suggestion a week longer than they sought at first, to investigate and prepare to meet all these items and the large number of incidents they embodied, many of which had occurred in distant islands of the archipelago. There is some question whether they then anticipated the full scope and character of the charge or the evidence they would have to meet. But, as will appear, they worked night and day at the task. Even so it would have been impossible to do thoroughly, had nothing more occurred.

But there was more. On the first day of the trial, October 29, the prosecution filed a supplemental bill of par-

[22] Also with Paragraph 82 of the Rules of Land Warfare.

[23] Typical of the items are allegations that members of the armed forces of Japan under the command of the accused committed the acts "During the months of October, November and December 1944 [of] brutally mistreating and torturing numerous unarmed noncombatant civilians at the Japanese Military Police Headquarters located at Cortabitarte and Mabini Streets, Manila" and "On about 19 February 1945, in the Town of Cuenca, Batangas Province, brutally mistreating, massacring and killing Jose M. Laguo, Esteban Magsamdol, Jose Lanbo, Felisa Apuntar, Elfidio Lunar, Victoriana Ramo, and 978 other persons, all unarmed noncombatant civilians, pillaging and unnecessary [sic], deliberately and wantonly devastating, burning and destroying large areas of that town."

ticulars, containing 59 more specifications of the same general character, involving perhaps as many incidents occurring over an equally wide area.[24] A copy had been given the defense three days earlier. One item, No. 89, charged that American soldiers, prisoners of war, had been tried and executed without notice having been given to the protecting power of the United States in accordance with the requirements of the Geneva Convention, which it is now argued, strangely, the United States was not required to observe as to petitioner's trial.[25]

But what is more important is that defense counsel, as they felt was their duty, at once moved for a continuance.[26] The application was denied. However the commission indicated that if, at the end of the prosecution's presenta-

---

[24] The supplemental bill contains allegations similar to those set out in the original bill. See note 23. For example, it charged that members of the armed forces of Japan under the command of the accused "during the period from 9 October 1944 to about 1 February 1945, at Cavite City, Imus, and elsewhere in Cavite Province," were permitted to commit the acts of "brutally mistreating, torturing, and killing or attempting to kill, without cause or trial, unarmed noncombatant civilians."

[25] See note 39 and text, Part V.

[26] In support of the motion counsel indicated surprise by saying that, though it was assumed two or three new specifications might be added, there had been no expectation of 59 "about entirely different persons and times." The statement continued:

> "We have worked earnestly seven days a week in order to prepare the defense on 64 specifications. And when I say 'prepare the defense,' sir, I do not mean merely an affirmative defense, but to acquaint ourselves with the facts so that we could properly cross examine the Prosecution's witnesses.
>
> ". . . 'In advance of trial' means: Sufficient time to allow the Defense a chance to prepare its defense.
>
> "We earnestly state that we must have this time in order to adequately prepare a defense. I might add, sir, we think that this is important to the Accused, but far more important than any rights of this Accused, we believe, is the proposition that this Commission should not deviate from a fundamental American concept of fairness . . ."

tion concerning the original bill, counsel should "believe they require additional time . . ., the Commission will consider such a motion at that time," before taking up the items of the supplemental bill. Counsel again indicated, without other result, that time was desired at once "as much, if not more" to prepare for cross-examination "as the Prosecution's case goes in" as to prepare affirmative defense.

On the next day, October 30, the commission interrupted the prosecutor to say it would not then listen to testimony or discussion upon the supplemental bill. After colloquy it adhered to its prior ruling and, in response to inquiry from the prosecution, the defense indicated it would require two weeks before it could proceed on the supplemental bill. On November 1 the commission ruled it would not receive affidavits without corroboration by witnesses on any specification, a ruling reversed four days later.

On November 2, after the commission had received an affirmative answer to its inquiry whether the defense was prepared to proceed with an item in the supplemental bill which the prosecution proposed to prove, it announced: "Hereafter, then, unless there is no [sic] objection by the Defense, the Commission will assume that you are prepared to proceed with any items in the Supplemental Bill." On November 8, the question arose again upon the prosecution's inquiry as to when the defense would be ready to proceed on the supplemental bill, the prosecutor adding: "Frankly, sir, it took the War Crimes Commission some three months to investigate these matters and I cannot conceive of the Defense undertaking a similar investigation with any less period of time." Stating it realized "the tremendous task which we placed upon the Defense" and its "determination to give them the time they require," the commission again adhered to its ruling of October 29.

Four days later the commission announced it would grant a continuance "only for the most urgent and unavoidable reasons." [27]

On November 20, when the prosecution rested, senior defense counsel moved for a reasonable continuance, recalling the commission's indication that it would then consider such a motion and stating that since October 29 the defense had been "working day and night," with "no time whatsoever to prepare any affirmative defense," since counsel had been fully occupied trying "to keep up with that new Bill of Particulars."

The commission thereupon retired for deliberation and, on resuming its sessions shortly, denied the motion. Counsel then asked for "a short recess of a day." The commission suggested a recess until 1: 30 in the afternoon. Counsel responded this would not suffice. The commission stated it felt "that the Defense should be prepared at least on its opening statement," to which senior counsel answered: "We haven't had time to do that, sir." The commission then recessed until 8: 30 the following morning.

Further comment is hardly required. Obviously the burden placed upon the defense, in the short time allowed for preparation on the original bill, was not only "tremendous." In view of all the facts, it was an impossible one, even though the time allowed was a week longer than asked. But the grosser vice was later when the burden was more than doubled by service of the supplemental bill on the eve of trial, a procedure which, taken in connection with the consistent denials of continuance and the commission's later reversal of its rulings favorable to the defense,

[27] The commission went on to question the need for all of the six officers representing the defense to be present during presentation of all the case, suggested one or two would be adequate and others "should be out of the courtroom" engaged in other matters and strongly suggested bringing in additional counsel in the midst of the trial, all to the end that "need to request a continuance may not arise."

was wholly arbitrary, cutting off the last vestige of adequate chance to prepare defense and imposing a burden the most able counsel could not bear. This sort of thing has no place in our system of justice, civil or military. Without more, this wide departure from the most elementary principles of fairness vitiated the proceeding. When added to the other denials of fundamental right sketched above, it deprived the proceeding of any semblance of trial as we know that institution.

IV.

Applicability of the Articles of War.

The Court's opinion puts the proceeding and the petitioner, in so far as any rights relating to his trial and conviction are concerned, wholly outside the Articles of War. In view of what has taken place, I think the decision's necessary effect is also to place them entirely beyond limitation and protection, respectively, by the Constitution. I disagree as to both conclusions or effects.

The Court rules that Congress has not made Articles 25 and 38 applicable to this proceeding. I think it has made them applicable to this and all other military commissions or tribunals. If so, the commission not only lost all power to punish petitioner by what occurred in the proceedings. It never acquired jurisdiction to try him. For the directive by which it was constituted, in the provisions of § 16,[28] was squarely in conflict with Articles 25 and 38 of the Articles of War [29] and therefore was void.

---

[28] See note 9.

[29] Article 25 is as follows: "A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before *any military court or commission in any case not capital, or* in any proceeding before a *court of inquiry or a military board, if* such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or district in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles

Article 25 allows reading of depositions in evidence, under prescribed conditions, in the plainest terms "before *any* military court or commission *in any case not capital*," providing, however, that "testimony by deposition may be adduced *for the defense in capital cases.*" (Emphasis added.) This language clearly and broadly covers every kind of military tribunal, whether "court" or "commission." It covers all capital cases. It makes no exception or distinction for any accused.

Article 38 authorizes the President by regulations to prescribe procedure, including modes of proof, even more all-inclusively if possible, "in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals." Language could not be more broadly inclusive. No exceptions are mentioned or suggested, whether of tribunals or of accused persons. Every kind of military body for performing the function of trial is covered. That is clear from the face of the Article.

Article 38 moreover limits the President's power. He is so far as practicable to prescribe "the rules of evidence generally recognized in the trial of criminal cases in the

---

from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to appear and testify in person at the place of trial or hearing: *Provided, That testimony by deposition may be adduced for the defense in capital cases.*" (Emphasis added.) 10 U. S. C. § 1496.

Article 38 reads: "The President may, by regulations, which he may modify from time to time, prescribe the procedure, *including modes of proof,* in cases before *courts-martial, courts of inquiry, military commissions, and other military tribunals,* which regulations shall insofar as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: *Provided, That nothing contrary to or inconsistent with these articles shall be so prescribed: Provided further, That all rules made in pursuance of this article shall be laid before the Congress annually.*" (Emphasis added.) 10 U. S. C. § 1509.

district courts of the United States," a clear mandate that Congress intended all military trials to conform as closely as possible to our customary procedural and evidentiary protections, constitutional and statutory, for accused persons. But there are also two unqualified limitations, one "that nothing contrary to or inconsistent with *these* articles [specifically here Article 25] shall be so prescribed"; the other "that all rules made in pursuance of this article shall be laid before the Congress annually."

Notwithstanding these broad terms the Court, resting chiefly on Article 2, concludes the petitioner was not among the persons there declared to be subject to the Articles of War and therefore the commission which tries him is not subject to them. That Article does not cover prisoners of war or war criminals. Neither does it cover civilians in occupied territories, theatres of military operations or other places under military jurisdiction within or without the United States or territory subject to its sovereignty, whether they be neutrals or enemy aliens, even citizens of the United States, unless they are connected in the manner Article 2 prescribes with our armed forces, exclusive of the Navy.

The logic which excludes petitioner on the basis that prisoners of war are not mentioned in Article 2 would exclude all these. I strongly doubt the Court would go so far, if presented with a trial like this in such instances. Nor does it follow necessarily that, because some persons may not be mentioned in Article 2, they can be tried without regard to any of the limitations placed by any of the other Articles upon military tribunals.

Article 2 in defining persons "subject to the articles of war" was, I think, specifying those to whom the Articles in general were applicable. And there is no dispute that most of the Articles are not applicable to the petitioner. It does not follow, however, and Article 2 does not provide, that there may not be in the Articles specific provisions

covering persons other than those specified in Article 2. Had it so provided, Article 2 would have been contradictory not only of Articles 25 and 38 but also of Article 15 among others.

In 1916, when the last general revision of the Articles of War took place,[30] for the first time certain of the Articles were specifically made applicable to military commissions. Until then they had applied only to courts-martial. There were two purposes, the first to give statutory recognition to the military commission without loss of prior jurisdiction and the second to give those tried before military commissions some of the more important protections afforded persons tried by courts-martial.

In order to effectuate the first purpose, the Army proposed Article 15.[31] To effectuate the second purpose, Arti-

---

[30] Another revision of the Articles of War took place in 1920. At this time Article 15 was slightly amended.

In 1916 Article 15 was enacted to read: "The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals *of concurrent jurisdiction* in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions, provost courts, or other military tribunals." (Emphasis added.)

The 1920 amendment put in the words "by statute or" before the words "by the law of war" and omitted the word "lawfully."

[31] Speaking at the Hearings before the Committee on Military Affairs, House of Representatives, 62d Cong., 2d Sess., printed as an Appendix to S. Rep. 229, 63d Cong., 2d Sess., General Crowder said:

> "The next article, No. 15, is entirely new, and the reasons for its insertion in the code are these: In our War with Mexico two war courts were brought into existence by orders of Gen. Scott, viz, the military commission and the council of war. By the military commission Gen. Scott tried cases cognizable in time of peace by civil courts, and by the council of war he tried offenses against the laws of war. *The council of war did not survive the Mexican War period, and in our subsequent wars its jurisdiction has been taken over by the military commission,* which during the Civil War period tried more than 2,000 cases. While the military commission has not been formally authorized by statute, its jurisdiction as a war court has been upheld by the Supreme

Footnote 31—Continued.

Court of the United States. It is an institution of the greatest importance in a period of war and should be preserved. In the new code *the jurisdiction of courts-martial has been somewhat amplified by the introduction of the phrase 'Persons subject to military law.' There will be more instances in the future than in the past when the jurisdiction of courts-martial will overlap that of the war courts,* and the question would arise whether Congress having vested jurisdiction by statute the common law of war *jurisdiction* was not ousted. I wish to make it *perfectly plain by the new article that in such cases the jurisdiction of the war court is concurrent.*" S. Rep. No. 229, 63d Cong., 2d Sess., p. 53. (Emphasis added.)

And later, in 1916, speaking before the Subcommittee on Military Affairs of the Senate at their Hearings on S. 3191, a project for the revision of the Articles of War, 64th Cong., 1st Sess., printed as an Appendix to S. Rep. 130, 64th Cong., 1st Sess., General Crowder explained at greater length:

"Article 15 is new. We have included in article 2 as subject to military law a number of persons who are also subject to trial by military commission. A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law. As long as the articles embraced them in the designation 'persons subject to military law,' and provided that they might be tried by court-martial, *I was afraid that, having made a special provision for their trial by court-martial, it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced . . .*

"*It just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field* in time of war *will be at liberty to employ either form of court* that happens to be convenient. *Both classes of courts have the same procedure.* For the information of the committee and in explanation of these war courts to which I have referred I insert here an explanation from Winthrop's Military Law and Precedents—

" 'The military commission—a war court—had its origin in G. O. 20, Headquarters of the Army at Tampico, February 19, 1847 (Gen. Scott). Its jurisdiction was confined mainly to criminal offenses of the class cognizable by civil courts in time of peace committed by inhabitants of the theater of hostilities. A further war court was originated by Gen. Scott at the same time, called "council of war," with jurisdiction to try the same classes of persons for violations of the laws of war, mainly guerrillas. These two jurisdictions were united in the later war court of the Civil War and Spanish War periods, for which the general designation of "military commission" was retained. The military commission was given statutory recognition in section 30, act of

cles 25 and 38 and several others were proposed.[32] But as the Court now construes the Articles of War, they have no application to military commissions before which alleged offenders against the laws of war are tried. What the Court holds in effect is that there are two types of military commission, one to try offenses which might be cognizable by a court-martial, the other to try war crimes, and that Congress intended the Articles of War referring in terms to military commissions without exception to be applicable only to the first type.

March 3, 1863, and in various other statutes of that period. The United States Supreme Court has acknowledged the validity of its judgments (Ex parte Vallandigham, 1 Wall., 243, and Coleman *v.* Tennessee, 97 U. S., 509). It tried more than 2,000 cases during the Civil War and reconstruction period. *Its composition, constitution, and procedure follows the analogy of courts-martial.* Another war court is the provost court, an inferior court with jurisdiction assimilated to that of justices of the peace and police courts; and other war courts variously designated "courts of conciliation," "arbitrators," "military tribunals," have been convened by military commanders in the exercise of the war power as occasion and necessity dictated.'

"Yet, as I have said, these war courts never have been formally authorized by statute.

"Senator COLT. They grew out of usage and necessity?

"Gen. CROWDER. Out of usage and necessity. I thought it was just as well, as inquiries would arise, to put this information in the record." S. Rep. No. 130, 64th Cong., 1st Sess. (1916) p. 40. (Emphasis added.)

Article 15 was also explained in the "Report of a committee on the proposed revision of the articles of war, pursuant to instructions of the Chief of Staff, March 10, 1915," included in Revision of the Articles of War, Comparative Prints, etc., 1904–1920, J. A. G. O., as follows:

> "A number of articles . . . of the revision have the effect of giving courts-martial jurisdiction over certain offenders and offenses which, under the law of war or by statute, are also triable by military commissions, provost courts, etc. Article 15 is introduced for the purpose of making clear that in such cases a court-martial has only a concurrent jurisdiction with such war tribunals."

[32] Of course, Articles 25 and 38, at the same time that they gave protection to defendants before military commissions, also provided for the application by such tribunals of modern rules of procedure and evidence.

This misconceives both the history of military commissions and the legislative history of the Articles of War. There is only one kind of military commission. It is true, as the history noted shows, that what is now called "the military commission" arose from two separate military courts instituted during the Mexican War. The first military court, called by General Scott a "military commission," was given jurisdiction in Mexico over criminal offenses of the class cognizable by civil courts in time of peace. The other military court, called a "council of war," was given jurisdiction over offenses against the laws of war. Winthrop, Military Law and Precedents (2d ed., reprinted 1920) *1298–1299. During the Civil War "the two jurisdictions of the earlier commission and council respectively . . . [were] *united* in the . . . war-court, for which the general designation of 'military commission' was retained as the preferable one." Winthrop, *supra*, at *1299. Since that time there has been only one type of military tribunal called the military commission, though it may exercise different kinds of jurisdiction,[33] according to the circumstances under which and purposes for which it is convened.

The testimony of General Crowder is perhaps the most authoritative evidence of what was intended by the legis-

[33] Winthrop, speaking of military commissions at the time he was writing, 1896, says: "The offences cognizable by military commissions may thus be classed as follows: (1) Crimes and statutory offences cognizable by State or U. S. courts, and which would properly be tried by such courts if open and acting; (2) *Violations of the laws and usages of war* cognizable by military tribunals only; (3) Breaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war." (Emphasis added.) Winthrop, at *1309. And cf. Fairman, The Law of Martial Rule (2d ed. 1943): "Military commissions take cognizance of three categories of criminal cases: *offenses against the laws of war,* breaches of military regulations, and civil crimes which, where the ordinary courts have ceased to function, cannot be tried normally." (Emphasis added.) Fairman, 265–266. See also Davis, A Treatise on the Military Law of the United States (1915) 309–310.

lation, for he was its most active official sponsor, spending years in securing its adoption and revision. Articles 15, 25 and 38 particularly are traceable to his efforts. His concern to secure statutory recognition for military commissions was equalled by his concern that the statutory provisions giving this should not restrict their preexisting jurisdiction. He did not wish by securing additional jurisdiction, overlapping partially that of the court-martial, to surrender other. Hence Article 15. That Article had one purpose and one only. It was to make sure that the acquisition of partially concurrent jurisdiction with courts-martial should not cause loss of any other. And it was jurisdiction, not procedure, which was covered by other Articles, with which he and Congress were concerned in that Article. It discloses no purpose to deal in any way with procedure or to qualify Articles 25 and 38. And it is clear that General Crowder at all times regarded all military commissions as being governed by the identical procedure. In fact, so far as Articles 25 and 38 are concerned, this seems obvious for all types of military tribunals. The same would appear to be true of other Articles also, e. g., 24 (prohibiting compulsory self-incrimination), 26, 27, 32 (contempts), all except the last dealing with procedural matters.

Article 12 is especially significant. It empowers general courts-martial to try two classes of offenders: (1) "any person *subject to military law*," under the definition of Article 2, for any offense "made punishable by these articles"; (2) "and any other person who *by the law of war* is subject to trial *by military tribunals*," not covered by the terms of Article 2. (Emphasis added.)

Article 12 thus, in conformity with Article 15, gives the general court-martial concurrent jurisdiction of war crimes and war criminals with military commissions. Neither it nor any other Article states or indicates there are to be *two* kinds of general courts-martial for trying war crimes; yet

this is the necessary result of the Court's decision, unless in the alternative that would be to imply that in exercising such jurisdiction there is only one kind of general court-martial, but there are two or more kinds of military commission, with wholly different procedures and with the result that "the commander in the field" will not be free to determine whether general court-martial or military commission shall be used as the circumstances may dictate, but must govern his choice by the kind of procedure he wishes to have employed.

The only reasonable and, I think, possible conclusion to draw from the Articles is that the Articles which are in terms applicable to military commissions are so uniformly and those applicable to both such commissions and to courts-martial when exercising jurisdiction over offenders against the laws of war likewise are uniformly applicable, and not diversely according to the person or offense being tried.

Not only the face of the Articles, but specific statements in General Crowder's testimony support this view. Thus in the portion quoted above [34] from his 1916 statement, after stating expressly the purpose of Article 15 to preserve unimpaired the military commission's jurisdiction, and to make it concurrent with that of courts-martial in so far as the two would overlap, "so that the *military commander in the field* in time of war will be at liberty to employ either form of court that happens to be convenient," he went on to say: "Both classes of courts have the same procedure," a statement so unequivocal as to leave no room for question. And his quotation from Winthrop supports his statement, namely: "Its [i. e., the military commission's] composition, constitution and procedure follow the analogy of courts-martial."

At no point in the testimony is there suggestion that there are two types of military commission, one bound by

[34] Note 31.

the procedural provisions of the Articles, the other wholly free from their restraints or, as the Court strangely puts the matter, that there is only one kind of commission, but that it is bound or not bound by the Articles applicable in terms, depending upon who is being tried and for what offense; for that very difference makes the difference between one and two. The history and the discussion show conclusively that General Crowder wished to secure and Congress intended to give statutory recognition to all forms of military tribunals; to enable commanding officers in the field to use either court-martial or military commission as convenience might dictate, thus broadening to this extent the latter's jurisdiction and utility; but at the same time to preserve its full preexisting jurisdiction; and also to lay down identical provisions for governing or providing for the government of the procedure and rules of evidence of every type of military tribunal, wherever and however constituted.[35]

---

[35] In addition to the statements of General Crowder with relation to Article 15, set out in note 31 *supra*, see the following statements made with reference to Article 25, in 1912 at a hearing before the Committee on Military Affairs of the House: "We come now to article 25, which relates to the admissibility of depositions. . . . It will be noted further that *the application of the old article has been broadened to include military commissions, courts of inquiry, and military boards.*

"Mr. SWEET. Please explain what you mean by military commission.

"Gen. CROWDER. That is our common law of war court, and was referred to by me in a prior hearing. [The reference is to the discussion of Article 15.] This war court came into existence during the Mexican War, and was created by orders of Gen. Scott. It had jurisdiction to try all cases usually cognizable in time of peace by civil courts. Gen. Scott created another war court, called the 'council of war,' with jurisdiction to try offenses against the laws of war. The constitution, composition, and jurisdiction of these courts *have never been regulated by statute.* The council of war did not survive the Mexican War period, since which its jurisdiction has been taken over by the military commission. The military commission received express recognition in the reconstruction acts, and its *jurisdiction* has been affirmed and supported by all our courts. It was extensively employed during the

Finally, unless Congress was legislating with regard to all military commissions, Article 38, which gives the President the power to "prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals," takes on a rather senseless meaning; for the President would have such power only with respect to those military commissions exercising concurrent jurisdiction with courts-martial.

All this seems so obvious, upon a mere reading of the Articles themselves and the legislative history, as not to require demonstration. And all this Congress knew, as that history shows. In the face of that showing I cannot accept the Court's highly strained construction, first, because I think it is in plain contradiction of the facts disclosed by the history of Articles 15, 25 and 38 as well as their language; and also because that construction defeats at least two of the ends General Crowder had in mind, namely, to secure statutory recognition for every form of military tribunal and to provide for them a basic uni-

Civil War period and also during the Spanish-American War. It is highly desirable that this important war court should be continued to be governed as heretofore, by the laws of war rather than by statute." S. Rep. No. 229, 63d Cong., 2d Sess., 59; cf. S. Rep. 130, 64th Cong., 1st Sess., 54–55. (Emphasis added.) See also Hearings before the Subcommittee of the Committee on Military Affairs of the Senate on Establishment of Military Justice, 66th Cong., 1st Sess., 1182–1183.

Further evidence that procedural provisions of the Articles were intended to apply to all forms of military tribunal is given by Article 24, 10 U. S. C. § 1495, which provides against compulsory self-incrimination "before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation." This article was drafted so that "The prohibition should reach all witnesses, *irrespective of the class of military tribunal* before which they appear . . ." (Emphasis added.) Comparative Print showing S. 3191 with the Present Articles of War and other Related Statutes, and Explanatory Notes, Printed for use of the Senate Committee on Military Affairs, 64th Cong., 1st Sess., 17, included in Revision of the Articles of War, Comparative Prints, Etc., 1904–1920, J. A. G. O.

form mode of procedure or method of providing for their procedure.

Accordingly, I think Articles 25 and 38 are applicable to this proceeding; that the provisions of the governing directive in § 16 are in direct conflict with those Articles; and for that reason the commission was invalidly constituted, was without jurisdiction, and its sentence is therefore void.

V.

The Geneva Convention of 1929.

If the provisions of Articles 25 and 38 were not applicable to the proceeding by their own force as Acts of Congress, I think they would still be made applicable by virtue of the terms of the Geneva Convention of 1929, in particular Article 63. And in other respects, in my opinion, the petitioner's trial was not in accord with that treaty, namely, with Article 60.

The Court does not hold that the Geneva Convention is not binding upon the United States and no such contention has been made in this case.[36] It relies on other

[36] We are informed that Japan has not ratified the Geneva Convention. See discussion of Article 82 in the paragraphs below. We are also informed, however—and the record shows this at least as to Japan—that at the beginning of the war both the United States and Japan announced their intention to adhere to the provisions of that treaty. The force of that understanding continues, perhaps with greater reason if not effect, despite the end of hostilities. See note 40 and text.

Article 82 provides:

> "The provisions of the present Convention must be respected by the High Contracting Parties under all circumstances.
>
> "In case, in time of war, one of the belligerents is not a party to the Convention, its provisions shall nevertheless remain in force as between the belligerents who are parties thereto."

It is not clear whether the Article means that during a war, when one of the belligerents is not a party to the Convention, the provisions must nevertheless be applied by all the other belligerents to the prisoners of war not only of one another but also of the power that was

arguments to show that Article 60, which provides that the protecting power shall be notified in advance of a judicial proceeding directed against a prisoner of war, and Article 63, which provides that a prisoner of war may be tried only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power, are not properly invoked by the petitioner. Before considering the Court's view that these Articles are not applicable to this proceeding by their terms, it may be noted that on his surrender petitioner was interned in conformity with Article 9 of this Convention.

---

not a party thereto or whether it means that they need not be applied to soldiers of the nonparticipating party who have been captured. If the latter meaning is accepted, the first paragraph would seem to contradict the second.

"Legislative history" here is of some, if little, aid. A suggested draft of a convention on war prisoners drawn up in advance of the Geneva meeting by the International Committee of the Red Cross (Actes de la Conférence Diplomatique de Genève, edited by Des Gouttes, pp. 21–34) provided in Article 92 that the provisions of the Convention "ne cesseront d'être obligatories qu'au cas où l'un des Etats belligérents participant à la Convention se trouve avoir à combattre les forces armées d'un autre Etat que n'y serait par partie et à l'égard de cet Etat seulement." See Rasmussen, Code des Prisonniers de Guerre (1931) 70. The fact that this suggested article was not included in the Geneva Convention would indicate that the nations in attendance were avoiding a decision on this problem. But I think it shows more, that is, it manifests an intention not to foreclose a future holding that under the terms of the Convention a state is bound to apply the provisions to prisoners of war of nonparticipating states. And not to foreclose such a holding is to invite one. We should, in my opinion, so hold, for reasons of security to members of our own armed forces taken prisoner, if for no others.

Moreover, if this view is wrong and the Geneva Convention is not strictly binding upon the United States as a treaty, it is strong evidence of and should be held binding as representing what have become the civilized rules of international warfare. Yamashita is as much entitled to the benefit of such rules as to the benefit of a binding treaty which codifies them. See U. S. War Dept., Basic Field Manual, Rules of Land Warfare (1940), par. 5–*b*.

The chief argument is that Articles 60 and 63 have reference only to offenses committed by a prisoner of war while a prisoner of war and not to violations of the laws of war committed while a combatant. This conclusion is derived from the setting in which these Articles are placed. I do not agree that the context gives any support to this argument. The argument is in essence of the same type as the argument the Court employs to nullify the application of Articles 25 and 38 of the Articles of War by restricting their own broader coverage by reference to Article 2. For reasons set forth in the margin,[37] I think it equally invalid here.

---

[37] Title III of the Convention, which comprises Articles 7 to 67, is called "Captivity." It contains § I, "Evacuation of Prisoners of War" (Articles 7–8); § II, "Prisoners-of-War Camps" (Articles 9–26); § III, "Labor of Prisoners of War" (Articles 27–34); § IV, "External Relations of Prisoners of War" (Articles 35–41); and § V, "Prisoners' Relations with the Authorities" (Articles 42–67). Thus Title III regulates all the various incidents of a prisoner of war's life while in captivity.

Section V, with which we are immediately concerned, is divided into three chapters. Chapter 1 (Article 42) gives a prisoner of war the right to complain of his condition of captivity. Chapter 2 (Articles 43–44) gives prisoners of war the right to appoint agents to represent them. Chapter 3 is divided into three subsections and is termed "Penalties Applicable to Prisoners of War." Subsection 1 (Articles 45–53) contains various miscellaneous articles to be considered in detail later. Subsection 2 (Articles 54–59) contains provisions with respect to disciplinary punishments. And subsection 3 (Articles 60–67), which is termed "Judicial Suits," contains various provisions for protection of a prisoner's rights in judicial proceedings instituted against him.

Thus, subsection 3, which contains Articles 60 and 63, as opposed to subsection 2, of Chapter 3, is concerned not with mere problems of discipline, as is the latter, but with the more serious matters of trial leading to imprisonment or possible sentence of death; cf. Brereton, The Administration of Justice Among Prisoners of War by Military Courts (1935) 1 Proc. Australian & New Zealand Society of International Law 143, 153. The Court, however, would have the distinction

1 RUTLEDGE, J., dissenting.

Footnote 37—Continued.

between subsection 2 and subsection 3 one between minor disciplinary action against a prisoner of war for acts committed while a prisoner and major judicial action against a prisoner of war for acts committed while a prisoner. This narrow view not only is highly strained, confusing the different situations and problems treated by the two subdivisions. It defeats the most important protections subsection 3 was intended to secure, for our own as well as for enemy captive military personnel.

At the most, there would be logic in the Court's construction if it could be said that all of Chapter 3 deals with acts committed while a prisoner of war. Of course, subsection 2 does, because of the very nature of its subject-matter. Disciplinary action will be taken by a captor power against prisoners of war only for acts committed by prisoners after capture.

But it is said that subsection 1 deals exclusively with acts committed by a prisoner of war after having become a prisoner, and this indicates subsection 3 is limited similarly. This ignores the fact that some of the articles in subsection 1 appear, on their face, to apply to all judicial proceedings for whatever purpose instituted. Article 46, for example, provides in part:

> "Punishments other than those provided for the same acts for soldiers of the national armies may not be imposed upon prisoners of war by the military authorities and courts of the detaining Power."

This seems to refer to war crimes as well as to other offenses; for surely a country cannot punish soldiers of another army for offenses against the laws of war, when it would not punish its own soldiers for the same offenses. Similarly, Article 47 in subsection 1 appears to refer to war crimes as well as to crimes committed by a prisoner after his capture. It reads in part:

> "Judicial proceedings against prisoners of war shall be conducted as rapidly as the circumstances permit; preventive imprisonment shall be limited as much as possible."

Thus, at the most, subsection 1 contains, in some of its articles, the same ambiguities and is open to the same problem that we are faced with in construing Articles 60 and 63. It cannot be said, therefore, that all of Chapter 3, and especially subsection 3, relate only to acts committed by prisoners of war after capture, for the meaning of subsection 3, in this argument, is related to the meaning of subsection 1; and subsection 1 is no more clearly restricted to punishments and proceedings in disciplinary matters than is subsection 3.

Neither Article 60 nor Article 63 contains such a restriction of meaning as the Court reads into them.[38] In the absence of any such limitation, it would seem that they were intended to cover all judicial proceedings, whether instituted for crimes allegedly committed before capture or later. Policy supports this view. For such a construction is required for the security of our own soldiers, taken prisoner, as much as for that of prisoners we take. And the opposite one leaves prisoners of war open to any form of trial and punishment for offenses against the laws of war their captors may wish to use, while safeguarding them, to the extent of the treaty limitations, in cases of disciplinary offense. This, in many instances, would be to make the treaty strain at a gnat and swallow the camel.

The United States has complied with neither of these Articles. It did not notify the protecting power of Japan in advance of trial as Article 60 requires it to do, although the supplemental bill charges the same failure to peti-

---

[38] Article 60 pertinently is as follows: "At the opening of a judicial proceeding directed against a prisoner of war, the detaining Power shall advise the representative of the protecting Power thereof as soon as possible, and always before the date set for the opening of the trial.

"This advice shall contain the following information:

"a) Civil state and rank of prisoner;

"b) Place of sojourn or imprisonment;

"c) Specification of the [count] or counts of the indictment, giving the legal provisions applicable.

"If it is not possible to mention in that advice the court which will pass upon the matter, the date of opening the trial and the place where it will take place, this information must be furnished to the representative of the protecting Power later, as soon as possible, and at all events, at least three weeks before the opening of the trial."

Article 63 reads: "Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power."

tioner in Item 89.[39] It is said that, although this may be true, the proceeding is not thereby invalidated. The argument is that our noncompliance merely gives Japan a right of indemnity against us and that Article 60 was not intended to give Yamashita any personal rights. I cannot agree. The treaties made by the United States are by the Constitution made the supreme law of the land. In the absence of something in the treaty indicating that its provisions were not intended to be enforced, upon breach, by more than subsequent indemnification, it is, as I conceive it, the duty of the courts of this country to insure the nation's compliance with such treaties, except in the case of political questions. This is especially true where the treaty has provisions—such as Article 60—for the protection of a man being tried for an offense the punishment for which is death; for to say that it was intended to provide for enforcement of such provisions solely by claim, after breach, of indemnity would be in many instances, especially those involving trial of nationals of a defeated nation by a conquering one, to deprive the Articles of all force. Executed men are not much aided by post-war claims for indemnity. I do not think the adhering powers' purpose was to provide only for such ineffective relief.

Finally, the Government has argued that Article 60 has no application after the actual cessation of hostilities, as there is no longer any need for an intervening power between the two belligerents. The premise is that Japan no longer needs Switzerland to intervene with the United

[39] Item 89 charged the armed forces of Japan with subjecting to trial certain named and other prisoners of war "without prior notice to a representative of the protecting power, without opportunity to defend, and without counsel; denying opportunity to appeal from the sentence rendered; failing to notify the protecting power of the sentence pronounced; and executing a death sentence without communicating to the representative of the protecting power the nature and circumstances of the offense charged."

States to protect the rights of Japanese nationals, since Japan is now in direct communication with this Government. This of course is in contradiction of the Government's theory, in other connections, that the war is not over and military necessity still requires use of all the power necessary for actual combat.

Furthermore the premise overlooks all the realities of the situation. Japan is a defeated power, having surrendered, if not unconditionally then under the most severe conditions. Her territory is occupied by American military forces. She is scarcely in a position to bargain with us or to assert her rights. Nor can her nationals. She no longer holds American prisoners of war.[40] Certainly, if there was the need of an independent neutral to protect her nationals during the war, there is more now. In my opinion the failure to give the notice required by Article 60 is only another instance of the commission's failure to observe the obligations of our law.

What is more important, there was no compliance with Article 63 of the same Convention. Yamashita was not tried "according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power." Had one of our soldiers or officers been tried for alleged war crimes, he would have been entitled to the benefits of the Articles of War. I think that Yamashita was equally entitled to the same protection. In any event, he was entitled to their benefits under the provisions of Article 63 of the Geneva Convention. Those benefits he did not receive. Accordingly, his trial was in violation of the Convention.

VI.

The Fifth Amendment.

Wholly apart from the violation of the Articles of War and of the Geneva Convention, I am completely unable to

[40] Nations adhere to international treaties regulating the conduct of war at least in part because of the fear of retaliation. Japan no longer has the means of retaliating.

accept or to understand the Court's ruling concerning the applicability of the due process clause of the Fifth Amendment to this case. Not heretofore has it been held that any human being is beyond its universally protecting spread in the guaranty of a fair trial in the most fundamental sense. That door is dangerous to open. I will have no part in opening it. For once it is ajar, even for enemy belligerents, it can be pushed back wider for others, perhaps ultimately for all.

The Court does not declare expressly that petitioner as an enemy belligerent has no constitutional rights, a ruling I could understand but not accept. Neither does it affirm that he has some, if but little, constitutional protection. Nor does the Court defend what was done. I think the effect of what it does is in substance to deny him all such safeguards. And this is the great issue in the cause.

For it is exactly here we enter wholly untrodden ground. The safe signposts to the rear are not in the sum of protections surrounding jury trials or any other proceeding known to our law. Nor is the essence of the Fifth Amendment's elementary protection comprehended in any single one of our time-honored specific constitutional safeguards in trial, though there are some without which the words "fair trial" and all they connote become a mockery.

Apart from a tribunal concerned that the law as applied shall be an instrument of justice, albeit stern in measure to the guilt established, the heart of the security lies in two things. One is that conviction shall not rest in any essential part upon unchecked rumor, report, or the results of the prosecution's ex parte investigations, but shall stand on proven fact; the other, correlative, lies in a fair chance to defend. This embraces at the least the rights to know with reasonable clarity in advance of the trial the exact nature of the offense with which one is to be charged; to have reasonable time for preparing to meet the charge and to have the aid of counsel in doing so, as also in the

trial itself; and if, during its course, one is taken by surprise, through the injection of new charges or reversal of rulings which brings forth new masses of evidence, then to have further reasonable time for meeting the unexpected shift.

So far as I know, it has not yet been held that any tribunal in our system, of whatever character, is free to receive such evidence "as *in its opinion* would be *of assistance* in proving or disproving the charge," or, again as in its opinion, "would have probative value in the mind of a reasonable man"; and, having received what in its unlimited discretion it regards as sufficient, is also free to determine what weight may be given to the evidence received without restraint.[41]

When to this fatal defect in the directive, however innocently made, are added the broad departures from the fundamentals of fair play in the proof and in the right to defend which occurred throughout the proceeding, there can be no accommodation with the due process of law which the Fifth Amendment demands.

All this the Court puts to one side with the short assertion that no question of due process under the Fifth Amendment or jurisdiction reviewable here is presented. I do not think this meets the issue, standing alone or in conjunction with the suggestion which follows that the Court gives no intimation one way or the other concerning

---

[41] There can be no limit either to the admissibility or the use of evidence if the only test to be applied concerns probative value and the only test of probative value, as the directive commanded and the commission followed out, lies "in the Commission's opinion," whether that be concerning the assistance the "evidence" tendered would give in proving or disproving the charge or as it might think would "have value in the mind of a reasonable man." Nor is it enough to establish the semblance of a constitutional right that the commission declares, in receiving the evidence, that it comes in as having only such probative value, if any, as the commission decides to award it and this is accepted as conclusive.

what Fifth Amendment due process might require in other situations.

It may be appropriate to add here that, although without doubt the directive was drawn in good faith in the belief that it would expedite the trial and that enemy belligerents in petitioner's position were not entitled to more, that state of mind and purpose cannot cure the nullification of basic constitutional standards which has taken place.

It is not necessary to recapitulate. The difference between the Court's view of this proceeding and my own comes down in the end to the view, on the one hand, that there is no law restrictive upon these proceedings other than whatever rules and regulations may be prescribed for their government by the executive authority or the military and, on the other hand, that the provisions of the Articles of War, of the Geneva Convention and the Fifth Amendment apply.

I cannot accept the view that anywhere in our system resides or lurks a power so unrestrained to deal with any human being through any process of trial. What military agencies or authorities may do with our enemies in battle or invasion, apart from proceedings in the nature of trial and some semblance of judicial action, is beside the point. Nor has any human being heretofore been held to be wholly beyond elementary procedural protection by the Fifth Amendment. I cannot consent to even implied departure from that great absolute.

It was a great patriot who said:

> "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself." [42]

MR. JUSTICE MURPHY joins in this opinion.

[42] 2 The Complete Writings of Thomas Paine (edited by Foner, 1945) 588.

CANIZIO *v.* NEW YORK.

CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY, NEW YORK.

No. 152. Argued January 4, 1946.—Decided February 4, 1946.

Petitioner, being under a state court sentence of imprisonment for 15 to 30 years on a plea of guilty to a charge of robbery and having served almost 14 years, instituted proceedings in a county court by a motion *coram nobis* praying that the sentence be vacated and set aside. He alleged under oath that, at the time of his arraignment, guilty plea and sentence, he was 19 years old and unfamiliar with legal proceedings, that he was not represented by counsel, that the court neither asked him if he desired counsel nor advised him of his right to counsel, and that the acceptance of his guilty plea and the sentencing under these circumstances deprived him of liberty without due process of law in violation of the Fourteenth Amendment. In opposition to the motion, the district attorney filed an affidavit admitting that the court records failed to show that petitioner had been represented by counsel when he was arraigned and when he pleaded guilty, but denying that he was not represented by counsel when sentenced and alleging that notice of appearance of counsel on behalf of petitioner was filed two days before sentence was imposed. Petitioner filed no denial. The record of the original proceedings in which petitioner was sentenced showed that he was actively represented by counsel in long hearings during the day of sentence. The court denied petitioner's motion on the basis of the aforementioned papers, including the record of the original proceedings, without permitting petitioner to introduce any evidence. *Held:*

1. The motion *coram nobis* being a proper procedure to raise the federal question under the state practice and the county court's denial of the motion not being appealable to any higher state court, this Court has jurisdiction to consider the case. P. 85.

2. Had there been nothing to contradict petitioner's allegation that he was not represented by counsel in the interim between his plea of guilty and the time he was sentenced, his charges would have been such as to have required the court to hold a hearing on his motion. P. 85.

3. The new facts disclosed by the district attorney's affidavit being undenied and the record of the original proceedings showing

that petitioner was actively represented by counsel in long hearings during the day of sentence, so far refuted petitioner's entire constitutional claim as to justify the county court's holding that a hearing on his motion was unnecessary. P. 85.

4. Since counsel who represented petitioner on the day of sentence could have moved to withdraw the plea of guilty and let him stand trial and petitioner had counsel in ample time to take advantage of every defense which would have been available to him originally, it can not be said that the court denied petitioner the right to have a trial with the benefit of counsel. P. 85.

Affirmed.

Petitioner instituted a *coram nobis* proceeding in the County Court of Kings County, New York, praying that a sentence which had been imposed on him on a plea of guilty be vacated on the ground, *inter alia,* that he had been deprived of his liberty without due process of law in violation of the Fourteenth Amendment. The motion having been denied and there being no appeal to a higher state court, this Court granted certiorari. 326 U. S. 705. *Affirmed,* p. 87.

Maurice Edelbaum argued the cause and filed a brief for petitioner.

William I. Siegel argued the cause for respondent. With him on the brief was *Henry J. Walsh.*

MR. JUSTICE BLACK delivered the opinion of the Court.

On June 1, 1931 in the County Court of Kings County, New York, the petitioner pleaded guilty to the crime of robbery in the first degree. On June 19, 1931 that court sentenced him to serve a term of from 15 to 30 years in state prison. After the petitioner had served almost 14 years of this sentence he instituted this proceeding by a motion, *coram nobis,* in the Kings County court, praying that the June 19, 1931 sentence be vacated and set aside. His motion, verified by oath, alleged that at the time of his arraignment, guilty plea, and sentence, petitioner was

19 years old and unfamiliar with legal proceedings; that he was not represented by counsel; and that the court neither asked him whether he desired counsel to be assigned, nor advised him of his right to counsel. Petitioner's motion charged that the acceptance of his guilty plea and the sentencing under these circumstances violated Article 1, § 6 of the New York State Constitution and § 308 of the New York Code of Criminal Procedure, and deprived him of his liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

The District Attorney filed an affidavit opposing the motion. This affidavit, based on information obtained from court records, admitted that these failed to show that petitioner had been represented by counsel when he was arraigned and when he pleaded guilty on June 1, 1931. To overcome this apparent defect of the record the affidavit urged the presumption of regularity of judicial proceedings to support the conclusion, in the absence of a clear showing to the contrary, that the judge must have performed his duty under New York's laws to advise petitioner of his right to counsel. The District Attorney contended that petitioner's motion though verified was not sufficient to overcome this presumption, especially since petitioner's conviction occurred 14 years ago. Moreover, the affidavit denied that petitioner was not represented by counsel at the time of sentencing, and alleged that on June 17, 1931, two days before the sentence was imposed, there was filed a notice of appearance of counsel on behalf of the petitioner. Thus, according to the affidavit petitioner was represented by counsel from June 17th to June 19th, 1931. Petitioner filed no denial to this affidavit.

The court denied petitioner's motion on the basis of the aforementioned papers including the record of the original proceeding, and without permitting petitioner to introduce any evidence. Under New York practice petitioner's mo-

tion was the proper procedure to raise the federal question. *Lyons* v. *Goldstein,* 290 N. Y. 19, 47 N. E. 2d 425. Since the court's denial of the motion cannot be appealed to any higher New York court, *People* v. *Gersewitz,* 294 N. Y. 163, 61 N. E. 2d 427, we have jurisdiction to consider the case. *Betts* v. *Brady,* 316 U. S. 455, 461. We granted certiorari because the case presents an important question involving the right to counsel under the Constitution of the United States.

Before we consider this question we shall assume that petitioner was without counsel when arraigned and when he pleaded guilty and that although he was unfamiliar with his legal rights the court failed to inform him of his right to counsel. Consequently, had there been nothing to contradict petitioner's general allegation that he was not represented by counsel in the interim between his plea of guilty and the time he was sentenced, his charges would have been such as to have required the court to hold a hearing on his motion. *Rice* v. *Olson,* 324 U. S. 786. But the District Attorney's affidavit and the record and stenographic transcripts of the original proceedings in which petitioner was sentenced show that petitioner was actively represented by counsel in long hearings during the day of sentence. In our opinion, these new facts, undenied, so far refuted petitioner's entire constitutional claim as to justify the court's holding that a hearing on petitioner's motion was unnecessary.

These papers before the trial court showed that petitioner along with two others were originally charged under three counts. Petitioner pleaded guilty on one charge on condition that he would not be prosecuted on the other two. Thereafter, as we have indicated, an attorney appeared on his behalf in an effort to secure a low sentence. The attorney could have moved to withdraw the plea of guilty and the County Court of Kings County would have had the power to set aside the plea and let the petitioner

691100°—47——10

stand trial. New York Code of Criminal Procedure, § 337; *People* v. *Gowasky,* 244 N. Y. 451, 155 N. E. 737. Petitioner's counsel probably thought it undesirable to do so, because this move might have jeopardized his chances for securing a low sentence. The plea was to robbery in the first degree, unarmed. The record clearly shows that petitioner was heavily armed. Had he been convicted of first degree robbery while armed he would in all likelihood have gotten a higher sentence. Cf. *People ex rel. O'Berst* v. *Murphy,* 256 App. Div. 58, 8 N. Y. S. 2d 965; *People ex rel. Pilo* v. *Martin,* 262 App. Div. 1056, 30 N. Y. S. 2d 290. At any rate, whatever the reason, petitioner's counsel did not move to withdraw the guilty plea.[1] All of this demonstrated to the satisfaction of the court below that even though petitioner may not have had counsel at the beginning, he had counsel in ample time to take advantage of every defense which would have been available to him originally. We think the record shows that petitioner actually had the benefit of counsel. When that counsel took over petitioner's defense he could have raised the question of a defect in the earlier part of the proceedings.[2]

[1] The assumption cannot be made that had petitioner's counsel done so it would not have been granted. If the motion had in fact been denied, petitioner's counsel could have appealed and thus have brought up the denial of the motion. Code of Crim. Proc. § 517; *People* v. *Joyce,* 41 Hun 641. If the case had then eventually reached us our previous decisions would have compelled us to hold the denial of the motion improper. See e. g. *Rice* v. *Olson, supra.* But the question is not before us in this proceeding.

[2] It is suggested that the New York case of *People* v. *Steinmetz,* 240 N. Y. 411, 148 N. E. 597, which allows a withdrawn guilty plea under some circumstances to be admitted at trial as evidence in the nature of a confession, might have compelled counsel to refrain from making a motion to withdraw the plea because in view of the *Steinmetz* rule little would thereby be accomplished in a practical way. In the *Steinmetz* case defendant had been represented by counsel at the time of the guilty plea. The opinion, read as a whole, seems to indicate that a guilty plea would be inadmissible as evidence at a trial, where it was

Failing to do so when the statute afforded him the opportunity, we cannot say that the court denied petitioner the right to have a trial with the benefit of counsel.

Petitioner's motion was, therefore, properly denied.

Affirmed.

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

MR. JUSTICE MURPHY, dissenting.

The complete travesty of justice revealed by the record in this case forces me to dissent.

The constitutional right to assistance of counsel is a very necessary and practical one. The ordinary person accused of crime has little if any knowledge of law or experience in its application. He is ill-prepared to combat the arsenal of statutes, decisions, rules of procedure, technicalities of pleading and other legal weapons at the ready disposal of the prosecutor. Without counsel, many of his elementary procedural and substantive rights may be lost irretrievably in the intricate legal maze of a criminal proceeding. Especially is this true of the ignorant, the indigent, the illiterate and the immature defendant. *Powell* v. *Alabama,* 287 U. S. 45, 69; *Williams* v. *Kaiser,* 323 U. S. 471, 474–476. Courts must therefore be unyielding in their insistence that this basic canon of justice, this right to counsel, be respected at all times.

later withdrawn because defendant, ignorant of his right to counsel, had at the time of pleading guilty not been informed of his right. We have held that in a federal court a withdrawn guilty plea is not admissible in evidence. *Kercheval* v. *United States,* 274 U. S. 220, 223, 225. See also *People* v. *Ariano,* 264 App. Div. 426, 35 N. Y. S. 2d 818. If a guilty plea without counsel should be held admissible in New York, the proper case in which to raise the issue of the propriety of its admission is on appeal to this Court on conviction after trial. Otherwise, if such an admission is proper at all it would also be proper if a trial is had after we reversed this case. Consequently nothing would be gained by a reversal on that ground.

Today, however, a serious qualification is added to this constitutional right to which I am unable to assent. Petitioner and two others were indicted on May 25, 1931, for three offenses: (1) robbery in the first degree; (2) grand larceny in the second degree; and (3) assault in the second degree. They were arraigned on the same day and pleaded not guilty. Petitioner at this time was but 19 years old, indigent, poorly educated, orphaned and ignorant of his right to counsel. The court did not inform him of his right to counsel at this time and it does not appear that he competently and intelligently waived his constitutional right. Several days later, on June 1, petitioner again appeared without counsel and without being informed of his right in that respect. This time he withdrew his plea of not guilty and entered a plea of guilty to the crime of first degree robbery. The prosecutor agreed to withdraw the other charges. On June 17, a notice of appearance of counsel on behalf of petitioner was filed. And on June 19, in the presence of this counsel, petitioner was sentenced to serve from 15 to 30 years in prison. On the basis of these facts, the Court now holds that petitioner was adequately represented by counsel. The error manifest in the denial of the right of counsel during the arraignment and the plea of guilty is held cured by the mere presence of counsel on the day of the imposition of the sentence.

It is said that, at least under New York practice, the attorney on the day of the sentencing could have moved to withdraw petitioner's plea of guilty; the judge would then have had power to set aside the plea and let the petitioner stand trial. On the assumption that the judge would have granted such a motion had it been made, the argument is advanced that petitioner had counsel in ample time to take advantage of every defense originally avail-

able. Thus the conclusion is reached that this denial of the right to counsel prior to the imposition of sentence is in compliance with the Constitution.

In my opinion, however, the right to counsel means nothing unless it means the right to counsel at each and every step in a criminal proceeding. The failure at any particular point to have representation or to be aware of one's right to counsel may have an indelible and imponderable effect upon the entire proceeding, an effect which may not be erasable on the day of imposing the sentence. As was said in *Glasser* v. *United States,* 315 U. S. 60, 76, "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." So here we cannot assume or determine that the denial of counsel at the time of the arraignment and plea was harmless. Nor can we say with certainty that the presence of counsel at the final stage of the proceeding was sufficient to counteract the prejudice inherent in the prior denial of counsel. Unless all the effects of such a constitutional infirmity are completely and unquestionably eliminated, a conviction cannot stand. An elimination of that nature ordinarily, and particularly in this case, means a new proceeding in which the right to counsel is fully protected at all times.

It is further significant that the failure of the trial court to inform the petitioner of his right to counsel was in violation not only of the due process clause of the Fourteenth Amendment but also of Article 1, § 6, of the New York Constitution and of §§ 8, 188, 308 and 309 of the New York Code of Criminal Procedure. The arraignment and the plea of guilty were thereby vitiated, from which it follows that the conviction was inconsistent with due process of law. See *Johnson* v. *Zerbst,* 304 U. S. 458, 468; *Waley* v. *Johnston,* 316 U. S. 101, 104.

The lack of due process in the conviction was unaffected by the possibility that the counsel which petitioner eventually obtained might have successfully moved to vacate the void plea of guilty. Constitutional rights as well as due process requirements rest upon something more substantial than what might have been but was not done. The inescapable facts confronting us are that petitioner was denied the right to counsel and that the court's judgment was based upon an illegal arraignment and plea. Counsel's negligence in failing to move to set aside that plea should not blind us to those facts; nor can it invest the proceeding with the due process which it otherwise lacked.

Moreover, even had petitioner's counsel been successful in making such a motion, the effect of the illegal plea might not have been dissipated. Under New York law, a plea of guilty which is withdrawn may subsequently be admitted in evidence at the trial. *People* v. *Steinmetz,* 240 N. Y. 411, 148 N. E. 597. And even though such a practice might be of doubtful constitutionality under these circumstances, the possibility of its occurrence may have effectively and understandably deterred counsel from seeking to set aside the plea and subjecting petitioner to the risk of a greater sentence.

The denial of the petitioner's constitutional rights was a serious matter. Unaided by counsel, he was faced with charges of three crimes. Each of these crimes involved different degrees. Petitioner was not competent to decide whether he was properly charged with the correct degree of each crime. Nor was he competent to determine whether to plead guilty to any or all of the offenses. Those were complex legal problems as to which petitioner deserved legal aid. Yet that necessary aid was denied him. Nothing happened on the day of sentencing, moreover, to negative that fact. To sustain his conviction there-

fore fails to give petitioner the high degree of protection which his constitutional right to counsel deserves.

MR. JUSTICE RUTLEDGE, dissenting.

I agree with my brother MURPHY that the judgment should be reversed and join substantially in his opinion.

My conclusion rests squarely upon the fact, as I understand the record and the law of New York, that under that law a withdrawn plea of guilty is admissible in evidence against the accused at his later trial. *People* v. *Steinmetz,* 240 N. Y. 411, 148 N. E. 597. I have heretofore expressed my reasons for thinking that such a procedure involves a species of self-incrimination. *Wood* v. *United States,* 75 U. S. App. D. C. 274, 128 F. 2d 265. That question however has not been determined here, although it has been held on nonconstitutional grounds that in a federal court a withdrawn plea of guilty is not admissible. *Kercheval* v. *United States,* 274 U. S. 220. Nor has this Court decided whether such a procedure followed in a state court would be in violation of any constitutional provision.

In the setting of the facts in this case the significance of the New York rule is that the rule itself made it impossible for the full effects of petitioner's invalid plea of guilty to be wiped out even through a successful motion for withdrawal, had one been made by petitioner's attorney after his appearance in the cause following the plea and shortly before sentence.

It is not at all certain that the motion would have been successful. Had it been made and granted, petitioner by the State's law would have been confronted with the necessity of overcoming by proof the incriminating effect of his prior plea. His burden of defense thus increased not only would have been greater than if the invalid plea had not been made. It would have gone far to destroy the presumption of innocence to which he was entitled until otherwise and lawfully proved guilty. Finally his lawyer

presumably would have been cognizant of these facts. Imagination need not be stretched to believe that even the most competent attorney, confronted with such a situation, might have chosen to advise against moving to withdraw the plea rather than undertaking the heavy burden of meeting it by proof at the trial.

In my opinion the damage done by the original invalid plea was not removed by the attorney's eleventh-hour entry nor could it have been at that time, fully and effectively, in view of the existing state of the law and the facts. Accordingly, I think there was no effective waiver through the late entrance of counsel and his hampered advice, which as I understand is the only basis for the Court's decision. There was no choice but Hobson's.

CASE, COMMISSIONER OF PUBLIC LANDS OF THE STATE OF WASHINGTON, *v.* BOWLES, PRICE ADMINISTRATOR, ET AL.

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

No. 261. Argued January 10, 1946.—Decided February 4, 1946.

1. The Emergency Price Control Act applies to the sale by the State of Washington of timber growing on lands granted by Congress to the State "for the support of common schools," notwithstanding a provision in the Enabling Act providing that these lands shall "be disposed of only at public sale, and at a price not less than" $10 per acre and a provision of the state constitution that these lands shall not be sold except "at public auction to the highest bidder" at a price not less than the full market value found after appraisal or "the price prescribed in the grant" of these lands. P. 98.
2. The Emergency Price Control Act applies generally to sales of commodities by the States. P. 98.

   (a) The definition in § 302 (h) making the Act applicable to the United States "or any other government, or any of its political subdivisions, or any agency of the foregoing," clearly is broad enough to include the States. P. 98.

(b) It would frustrate the purposes of the Act for the courts to read exemptions into it which Congress did not see fit to put in the language, since excessive prices for rents or commodities charged by a State would produce exactly the same conditions as would be produced were these prices charged by others. P. 99.

3. A special exemption can not be read into the Act in order to permit States holding land granted for school purposes to charge more than the ceiling price set for timber. P. 100.

While congressional grants of land to the States for school purposes transferred exclusive ownership and control over those lands to the States, no part of all the history concerning these grants indicates a purpose on the part of Congress to enter into a permanent agreement with the States under which they would be free to use the lands in a manner which would conflict with valid legislation enacted by Congress in the national interest. P. 100.

4. As thus construed, the Act is constitutional. P. 100.

(a) While the State does have power to own and control the school lands here involved and to sell the lands or the timber growing on them, this power is subordinate to the power of Congress to fix maximum prices in order to carry on war. P. 101.

(b) To hold otherwise would impair the constitutional grant of power to make war, which was a prime purpose of the Federal Government's establishment. P. 102.

(c) The Tenth Amendment does not operate as a limitation upon the powers, express or implied, delegated to the National Government. P. 102.

5. Section 201 (a) of the Emergency Price Control Act specifically empowers the Price Administrator to commence suits to enjoin violations of that Act and authorizes attorneys employed by him to represent him in such suits. Therefore, 28 U. S. C. § 485, making it the duty of district attorneys to prosecute most civil actions to which the United States is a party, is not applicable to such proceedings. P. 96.

6. Where the complaint in a suit against a state officer to enjoin violations of the Emergency Price Control Act does not challenge the constitutionality of the state statute but merely alleges that its enforcement would violate the Emergency Price Control Act, § 266 of the Judicial Code does not require that the case be tried by a three-judge court. P. 97.

7. Neither Art. III, § 2, cl. 2, of the Constitution, giving this Court original jurisdiction of all cases in which a State is a party, nor

§ 233 of the Judicial Code, giving this Court exclusive jurisdiction to try cases between a State and the United States, prevents a district court from having jurisdiction to try suits to enjoin state officers from violating the Emergency Price Control Act. P. 97.

(a) Consistently with Art. III of the Constitution, Congress can give the district courts jurisdiction to try controversies between a State and the United States. P. 97.

(b) Section 205 (c) of the Emergency Price Control Act specifically gives the district courts jurisdiction over all enforcement suits and supersedes § 233 of the Judicial Code to that extent. P. 97.

8. While the Emergency Price Control Act denies a defendant in an enforcement proceeding the right to challenge the validity of the regulation sought to be enforced (since exclusive initial jurisdiction to determine this question is vested in the Emergency Court of Appeals), it does not deny him the right to attack the Act itself on constitutional grounds. P. 98.
9. In reviewing a judgment in an enforcement proceeding, this Court ordinarily would not pass on the statutory authority of the Price Administrator to promulgate a regulation, since Congress has granted exclusive initial jurisdiction to determine that question to the Emergency Court of Appeals. P. 98.
10. It will do so, however, where the right of Congress to regulate certain prices is challenged on constitutional grounds, if it is not a device to attack the regulations indirectly. P. 98.

149 F. 2d 777, affirmed.

After litigation instituted in a state court by the bidders for certain timber on school lands of the State of Washington had resulted in a holding by the state supreme court that the Emergency Price Control Act did not bar the sale of school-land timber at a price above the ceiling fixed pursuant to that Act, *Soundview Pulp Co.* v. *Taylor*, 21 Wash. 2d 261, the Price Administrator instituted suit in a federal district court to enjoin the State Commissioner of Public Lands and the successful bidder at a public auction from completing a sale of school-land timber at a price above the ceiling fixed by Maximum Price Regulation No. 460, 8 Fed. Reg. 11850, as amended, 8 Fed. Reg. 13023. The district court denied the injunction and dismissed the complaint. The circuit court of

appeals reversed. 149 F. 2d 777. This Court granted certiorari. 326 U. S. 706. *Affirmed,* p. 103.

R. A. Moen, Assistant Attorney General of Washington, argued the cause for petitioner. With him on the brief were *Smith Troy,* Attorney General, and *Edwin C. Ewing,* Assistant Attorney General.

Robert L. Stern and *Abraham Glasser* argued the cause for the Price Administrator, respondent. With them on the brief were *Solicitor General McGrath* and *Milton Klein.*

Submitted on brief for the Soundview Pulp Company, respondent, by *W. Z. Kerr* and *E. S. McCord.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The Congressional Enabling Act providing for the State of Washington's admission to the Union granted certain lands to that State "for the support of common schools." 25 Stat. 676, 679. Section 11 of the Enabling Act provided that these lands should "be disposed of only at public sale, and at a price not less than ten dollars per acre . . ." The State Constitution provides that these lands shall not be sold except "at public auction to the highest bidder" at a price which may not be below both the full market value found after appraisal and "the price prescribed in the grant" of these lands. In 1943 the State Commissioner of Public Lands held a public auction for the sale of timber on school lands. At that auction the Soundview Pulp Company, one of the respondents, bid $86,335.39 for some of the timber. This amount exceeded by approximately $9,000.00 the ceiling price fixed by Maximum Price Regulation No. 460.[1] The Price Administrator advised Soundview that consummation of the sale at the bid price would constitute a violation of the regula-

[1] 8 Fed. Reg. 11850, as amended, 8 Fed. Reg. 13023.

tion and of the Emergency Price Control Act.[2] Thereafter Soundview and the unsuccessful bidder, Coos Bay Pulp Corporation, commenced actions in the state courts, seeking an adjudication as to the legality of Soundview's bid and of the proposed transfer of timber to Soundview. This resulted in a holding by the state supreme court that the Emergency Price Control Act did not bar the sale of school-land timber at prices above the ceiling. *Soundview Pulp Co.* v. *Taylor,* 21 Wash. 2d 261, 150 P. 2d 839. When, after this judgment was rendered, the parties were about to complete the sale, the Price Administrator commenced this action in the federal district court to enjoin the State Commissioner of Public Lands and Soundview from completing the timber transaction at a price above the ceiling fixed by the regulation. The district court held that the Emergency Price Control Act did not grant the Price Administrator authority to set maximum prices for school-land timber sold by the State. The circuit court of appeals reversed. 149 F. 2d 777. Because the circuit court's decision conflicted with that of the Supreme Court of Idaho in *Twin Falls County* v. *Hulbert,* 66 Idaho —, 156 P. 2d 319, we granted certiorari in both cases.

Before considering the principal questions raised by the State, we shall at the outset briefly dispose of certain procedural contentions. The State urges that the complaint should have been dismissed because it was signed by attorneys employed by the Price Administrator and not by the District Attorney or members of the Department of Justice. True, 28 U. S. C. 485 makes it the duty of every district attorney to prosecute most civil actions to which the United States is a party. But this section does not prescribe the procedure under the Emergency Price Control Act, for that Act specifically empowers the Administrator to commence actions such as this one and authorizes

[2] 56 Stat. 23, 58 Stat. 640; c. 214, 59 Stat. 306.

attorneys employed by him to represent him in such actions. § 201 (a). The State contends further that this case should have been tried by a district court composed of three judges because § 266 of the Judicial Code requires such a proceeding whenever enforcement of a state statute is sought to be enjoined on the ground that the statute is unconstitutional. But here the complaint did not challenge the constitutionality of the state statute but alleged merely that its enforcement would violate the Emergency Price Control Act. Consequently a three-judge court is not required. *Ex parte Bransford,* 310 U. S. 354, 358–359; *Query* v. *United States,* 316 U. S. 486, 488–489. Another procedural point urged by the State is that since this is in effect a controversy between the United States and the State of Washington, the United States Supreme Court has exclusive jurisdiction under Article III, § 2, Clause 2, of the United States Constitution and the district court lacked power to try the case. But it is well settled that despite Article III, Congress can give the district courts jurisdiction to try controversies between a State and the United States.[3] Congress has given the district court power to try cases such as this one. While § 233 of the Judicial Code does give this Court exclusive jurisdiction to try cases between a State and the United States, § 205 (c) of the Emergency Price Control Act specifically provides that the district court shall have jurisdiction over all enforcement suits. To that extent § 205 (c) of the Price Control Act supersedes § 233 of the Judicial Code. *United States* v. *California,* 297 U. S. 175, 186.

The State's principal contention is that sales by a State, such as the one here involved, are not and cannot be made subject to price control. Maximum Price Regulation No. 460, which the State's sale of timber allegedly violated,

[3] *Ames* v. *Kansas,* 111 U. S. 449; *United States* v. *Louisiana,* 123 U. S. 32; *United States* v. *California,* 297 U. S. 175.

specifically provides that it is applicable to sales by States. The State makes the following contentions: (1) Insofar as the regulation applies to state sales it is unauthorized by the Emergency Price Control Act, since Congress did not intend that Act to apply to States. (2) Even if the Act was intended to apply to state sales, the Act should not be construed as authorizing the Price Administrator to fix a maximum price at which timber on school-land grants can be sold by States. (3) If the Act is so construed, it violates the Fifth and Tenth Amendments to the Constitution.

We ordinarily would not pass on the statutory authority of the Administrator to promulgate the regulation in a proceeding such as this one. For Congress has granted exclusive initial jurisdiction to determine this question to the Emergency Court of Appeals. *Lockerty* v. *Phillips*, 319 U. S. 182. But while the Act thus denies a defendant in an enforcement proceeding the right to challenge the validity of the regulation, it does not deny him the right to attack the Emergency Price Control Act itself on constitutional grounds. *Yakus* v. *United States*, 321 U. S. 414, 430. Of course, this right may not be utilized as a means of indirectly attacking the regulations themselves instead of the statute. But here petitioner's third contention that Congress lacks authority to regulate the prices of state school-land timber extends beyond the implementing regulation and strikes at the Act itself. In order to reach this constitutional question, we first have to decide whether the Act, properly interpreted, is applicable to sales by States, including sales of timber on school-grant lands.

The Emergency Price Control Act grants to the Price Administrator broad powers to set maximum prices for commodities and rents and makes it unlawful for "any person" to violate these maximum price regulations. Section 302 (h) defines a "person" as including "an individ-

ual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing." This language on its face, and given its ordinary meaning, would appear to be broad enough to include any person, natural or artificial, or any group or agency, public or private, which sells commodities [4] or charges rents. The argument that the Act should not be construed so as to include a State within the enumerated list made subject to price regulation, rests largely on the premise that Congress does not ordinarily attempt to regulate state activities and that we should not infer such an intention in the absence of plain and unequivocal language. Petitioner presses this contention so far as to urge us to accept as a general principle that unless Congress actually uses the word "state," courts should not construe regulatory enactments as applicable to the States. This Court has previously rejected similar arguments,[5] and we cannot accept such an argument now.

We think it too plain, to call for extended discussion, that Congress meant to include States and their political subdivisions when it expressly made the Act applicable to the United States "or any other government, or any of its political subdivisions, or any agency of any of the foregoing . . ." Congress clearly intended to control all commodity prices and all rents with certain specific exceptions which it declared. It would frustrate this purpose for

[4] Section 302 of the Act defines "commodity" as including "services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity."

[5] *Ohio* v. *Helvering*, 292 U. S. 360, 370; *United States* v. *California*, 297 U. S. 175, 186; *California* v. *United States*, 320 U. S. 577, 585.

courts to read exemptions into the Act which Congress did not see fit to put in the language. Excessive prices for rents or commodities charged by a State or its agencies would produce exactly the same conditions as would be produced were these prices charged by other persons. We, therefore, have no doubt that Congress intended the Act to apply generally to sales of commodities by States.[6]

Nor can we accept the contention that a special exemption could be read into the Act in order to permit States holding land granted for school purposes to charge more than the ceiling price set for timber. In reaching this conclusion we are not unaware of the difficulties which confronted the Commissioner of Public Lands of the State of Washington, nor of the importance of protecting the public interest in those school lands. Both the Act of Congress, which granted the land to Washington, and the Constitution of the State, had provided for safeguards in connection with the disposition of school lands. We do not question the wisdom of these precautions. We are mindful also of the fact that this Court has declared that grants of land to the State, like those here involved, transferred exclusive ownership and control over those lands to the State. *Cooper* v. *Roberts,* 18 How. 173. No part of all the history concerning these grants, however, indicates a purpose on the part of Congress to enter into a permanent agreement with the States under which States would be free to use the lands in a manner which would conflict with valid legislation enacted by Congress in the national interest. Here again, the sale of school-land timber at above-ceiling prices could be just as disturbing to the national inflation-control program as the charging of excess prices for timber located on any other lands.

---

[6] The Emergency Court of Appeals recently considered the same question and reached the same conclusion. *Dallas* v. *Bowles,* 152 F. 2d 464.

We now turn to petitioner's constitutional contention. Though as we have pointed out petitioners have alleged that the Act applied to setting a maximum price for school-land timber violates the Fifth and Tenth Amendments, the argument here seems to spring from implications of the Tenth Amendment only. The contention rests on the premise that there is a doctrine implied in the Federal Constitution that "the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other." It is not contended, and could not be under our prior decisions, that the ceiling price fixed by the Administrator is constitutionally invalid as applied to privately owned timber. *Yakus* v. *United States,* 321 U. S. 414; *Bowles* v. *Willingham,* 321 U. S. 503. Nor is it denied that the Administrator could have fixed ceiling prices if the State had engaged in a sales business "having the incidents of similar enterprises usually prosecuted for private gain." *Allen* v. *Regents,* 304 U. S. 439, 452. But it is argued that the Act cannot be applied to this sale because it was "for the purpose of gaining revenue to carry out an essential governmental function—the education of its citizens." Since the Emergency Price Control Act has been sustained as a congressional exercise of the war power, the petitioner's argument is that the extent of that power as applied to state functions depends on whether these are "essential" to the state government. The use of the same criterion in measuring the constitutional power of Congress to tax has proved to be unworkable,[7] and we reject it as a guide in the field here involved. Cf. *United States* v. *California, supra,* 297 U. S. at 183–185.

The State of Washington does have power to own and control the school lands here involved and to sell the lands

[7] See the several opinions in *New York* v. *United States,* 326 U. S. 572.

or the timber growing on them, subject to the limitations set out in the Enabling Act. And our only question is whether the State's power to make the sales must be in subordination to the power of Congress to fix maximum prices in order to carry on war. For reasons to which we have already adverted, an absence of federal power to fix maximum prices for state sales or to control rents charged by a State might result in depriving Congress of ability effectively to prevent the evil of inflation at which the Act was aimed. The result would be that the constitutional grant of the power to make war would be inadequate to accomplish its full purpose. And this result would impair a prime purpose of the Federal Government's establishment.

To construe the Constitution as preventing this would be to read it as a self-defeating charter. It has never been so interpreted. Since the decision in *McCulloch* v. *Maryland*, 4 Wheat. 316, 420, it has seldom if ever been doubted that Congress has power in order to attain a legitimate end—that is, to accomplish the full purpose of a granted authority—to use all appropriate means plainly adapted to that end, unless inconsistent with other parts of the Constitution. And we have said, that the Tenth Amendment "does not operate as a limitation upon the powers, express or implied, delegated to the national government." [8]

Where, as here, Congress has enacted legislation authorized by its granted powers, and where at the same time, a State has a conflicting law which but for the congressional Act would be valid, the Constitution marks the course for courts to follow. Article VI provides that "The Constitution and the Laws of the United States . . .

[8] *Fernandez* v. *Wiener*, 326 U. S. 340, 362. *United States* v. *Darby*, 312 U. S. 100, 124; *California* v. *United States*, *supra*; *United States* v. *California*, *supra*; *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 534–535.

made in Pursuance thereof . . . shall be the supreme Law of the Land . . ." [9]

Affirmed.

MR. JUSTICE DOUGLAS would reverse the judgment for the reasons set forth in his dissenting opinion in *Hulbert* v. *Twin Falls County*, 327 U. S. 105.

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

HULBERT ET AL. *v.* TWIN FALLS COUNTY.

CERTIORARI TO THE SUPREME COURT OF IDAHO.

No. 238. Argued January 10, 1946.—Decided February 4, 1946.

Maximum Price Regulation No. 133, promulgated by the Office of Price Administration pursuant to the Emergency Price Control Act, applies to a sale of a tractor by a county. *Case* v. *Bowles*, *ante*, p. 92. P. 104.

66 Idaho —, 156 P. 2d 319, reversed.

An Idaho district court held the sale of a farm tractor by a county to be subject to the Emergency Price Control Act and Maximum Price Regulation No. 133 promulgated pursuant thereto. The Supreme Court of Idaho reversed. 66 Idaho —, 156 P. 2d 319. This Court granted certiorari. 326 U. S. 707. *Reversed*, p. 105.

Robert L. Stern argued the cause for petitioner. With him on the brief were *Solicitor General McGrath* and *Milton Klein*.

Submitted on brief for respondent by *Frank Langley*, Attorney General of Idaho, and *Everett M. Sweeley*.

[9] For application of this principle see *Hines* v. *Davidovitz*, 312 U. S. 52, 68; *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 104.

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner Hulbert bid $1,050 for a used farm-type gasoline tractor which Twin Falls County, Idaho, offered for sale at an auction. His was the highest bid. Upon being informed by the Office of Price Administration that the amount bid was above the ceiling price of $723.56, petitioner refused to pay the full amount. He tendered $723.56 which the County refused to accept. Thereupon the County sued the petitioner in the state district court for $1,050. Petitioner tendered $1,050 to be disposed of according to the outcome of the case. He defended on the ground that he had been advised by the Office of Price Administration that the regulation setting a ceiling price was applicable and stated that he was willing to pay any sum up to $1,050 which was not prohibited by this regulation. The Administrator intervened, alleging that the bid price exceeded the ceiling price fixed by Maximum Price Regulation 133 [1] and that the regulation was applicable to the sale of a tractor by the County. The County stated that prior to the sale it had been advised by the County Prosecuting Attorney that the sale would be controlled by § 30–708 of the Idaho Code, Ann., and that the Office of Price Administration regulations were inapplicable. The Idaho district court held the sale subject to the Emergency Price Control Act and to Regulation No. 133. The court gave judgment for the County for the ceiling price of $723.56, holding that the sale as to the amount above that ceiling price was void. The Supreme Court of Idaho reversed. 66 Idaho ——, 156 P. 2d 319. We granted certiorari because the supreme court's decision conflicted with that of the Circuit Court of Appeals for the Ninth Circuit in *Bowles* v. *Case*, 149 F. 2d 777.

The only question properly before us is whether Maximum Price Regulation No. 133 applies to sales of tractors

[1] 7 F. R. 3185, 6936, 7599; 8 F. R. 234.

by a county. In defining the term "person" the regulation uses the same language as § 302 (h) of the Emergency Price Control Act. In *Case* v. *Bowles,* 327 U. S. 92, we held that that language makes the Act applicable to sales by States and their subdivisions such as this one. For the reasons set out in that opinion, this language as employed in Regulation No. 133 makes that regulation applicable to the sale of the tractor by the County.

Reversed.

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

MR. JUSTICE DOUGLAS, dissenting.

I think Judge Givens, writing for the Supreme Court of Idaho (66 Idaho ——, 156 P. 2d 319), has shown that it is at least doubtful if Congress meant to include the States as sellers under this Act.[1] I think there is little to add to his analysis except to say that the doubt for me is increased when the whole scheme of regulation is considered. While § 302 (h) would relieve the States from the criminal sanctions of the Act,[2] they would be subject to the treble damage provisions of § 205 (e), which are remedial, not punitive, in nature. *Bowles* v. *American Stores,* 139 F. 2d 377, 379. And the Administrator would have the power under § 205 (f) (1) to require a State to get a license from him in order to sell its commodities—a license which would be subject to suspension. § 205 (f) (2). These are sub-

[1] Sec. 302 (h) defines the term "person" as including "an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing: *Provided,* That no punishment provided by this Act shall apply to the United States, or to any such government, political subdivision, or agency."

[2] See note 1, *supra.*

stantial intrusions on the sovereignty of the States, involving matters of great delicacy. And they raise for me serious constitutional questions. Cf. *New York* v. *United States,* 326 U. S. 572, 590, dissenting opinion. Since the Act is at best ambiguous, I would choose the construction [3] which avoided the constitutional issue. Only in the event that the language of the Act was explicit would I assume that Congress intended even in days of war to interfere with the traditional sovereignty of the States to the extent indicated.

UNITED STATES *v.* JOHNSON.

NO. 115. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.*

Argued January 2, 1946.—Decided February 4, 1946.

1. Where, on an appeal from a denial of a motion for a new trial on the ground of newly discovered evidence under Rule II (3) of the Criminal Appeals Rules, it appears that the only objection is to the trial court's findings on conflicting evidence and that there was evidence to support its findings, the appeal does not present a reviewable issue of law; and the circuit court of appeals should, on its own motion, dismiss the appeal as frivolous under Rule IV, which gives the circuit courts of appeals power to supervise and control all proceedings on appeal. P. 113.
2. It is important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remain undisturbed, except in most extraordinary circumstances. P. 111.
3. It is not the province of this Court or the circuit courts of appeals to review orders granting or denying motions for a new trial when such review is sought on the ground that the trial court made erroneous findings of fact and it does not clearly appear that the findings are not supported by any evidence. P. 111.

---

[3] A permissible construction is that the phrase "the United States . . . or any other government" means the United States or other comparable national sovereignties, i. e., foreign governments.

*Together with No. 116, *United States* v. *Sommers et al.,* on certiorari to the same court. Argued and decided on the same dates.

4. While a defendant should be afforded the full benefit of a motion for a new trial on the ground of newly discovered evidence under Rule II (3) of the Criminal Appeals Rules, courts should be on the alert to see that the privilege is not abused; and one of the most effective methods of preventing abuse is to refrain from reviewing findings of fact which have evidence to support them. P. 113.

149 F. 2d 31, reversed.

Respondents in both cases were convicted of violations of penal provisions of the Revenue Acts and for conspiracy. The circuit court of appeals reversed. 123 F. 2d 111, 142. After granting certiorari, 315 U. S. 790, this Court reversed and remanded the case to the circuit court of appeals. 319 U. S. 503. That court remanded the case to the district court to permit a motion for a new trial on the ground of newly discovered evidence. That motion was made and denied. The circuit court of appeals affirmed. 142 F. 2d 588. Respondents petitioned this Court for certiorari, but the petition was dismissed on motion of their counsel. 323 U. S. 806. After obtaining a second remand from the circuit court of appeals on the ground of still further newly discovered evidence, respondents filed in the district court an amended motion for a new trial. That motion was denied. The circuit court of appeals reversed. 149 F. 2d 31. This Court granted certiorari. 326 U. S. 702. *Reversed and remanded* to the district court to enforce the judgment. P. 113.

Arnold Raum argued the cause for the United States. With him on the brief were *Solicitor General McGrath, Assistant Attorney General Samuel O. Clark, Jr., Joseph S. Platt* and *Melva M. Graney.*

Homer Cummings argued the cause for respondents. With him on the brief were *William J. Dempsey* and *Harold R. Schradzke.*

MR. JUSTICE BLACK delivered the opinion of the Court.

On October 12, 1940, after a federal district court trial lasting more than six weeks, a jury found respondent Johnson guilty of wilfully attempting to defeat and evade a large part of his income taxes for the calendar years 1936–1939 and of conspiring to do so; the other respondents were convicted and sentenced for conspiring with and aiding and abetting him.[1] From the time of these convictions until now, enforcement of the sentences was delayed by persistent efforts to obtain a new trial. Though there has been no second trial the case is here for the third time.

September 21, 1941, was the date when the circuit court of appeals first reversed the conviction, one judge dissenting. 123 F. 2d 111. June 7, 1943, we reversed and remanded the case to the circuit court of appeals, 319 U. S. 503. Respondents then asked that court to remand the case to the trial court to permit a motion for a new trial on the ground of newly discovered evidence.[2] The circuit court acting pursuant to Rule II (3) of the Criminal Appeals Rules[3] remanded the case and on Oc-

[1] The respondent Brown was found guilty only on the conspiracy count and counts 3 and 4, the substantive counts for 1938–1939.

[2] Previously respondents had applied to Mr. Justice Frankfurter for a stay of mandate pending petition for rehearing. Mr. Justice Frankfurter's denial of the motion specifically stated that it was to be "without prejudice, however, to the consideration and disposition by the United States Circuit Court of Appeals for the Seventh Circuit of any motion filed under Rule 2 (3) of the Criminal Appeals Rules . . ."

[3] "II. *Motions.*

. . . . . .

"(3) Except in capital cases a motion for a new trial solely upon the ground of newly-discovered evidence may be made within sixty (60) days after final judgment, without regard to the expiration of the term at which judgment was rendered, unless an appeal has been taken and in that event the trial court may entertain the motion only on remand of the case by the appellate court for that purpose, and such remand may be made at any time before final judgment. . . ."

tober 29, 1943, respondents, with leave of the trial court, filed a motion for a new trial. The respondents alleged that the newly discovered evidence proved that Goldstein, a government witness at the trial, was unworthy of belief and had committed perjury in testifying that certain properties were purchased by him on behalf of Johnson and with money supplied by Johnson. To support their charges against Goldstein respondents offered numerous affidavits. The Government filed an answer to the motion and a number of counter-affidavits. And among the papers before the court were affidavits by Goldstein reaffirming his testimony at the trial. The trial judge, in a carefully prepared opinion covering fifty-six pages of the record, gave thoughtful consideration to each affidavit, reached the conclusion that none of them showed that Goldstein had perjured himself, and found both from the new affidavits and his own knowledge of the original six-weeks trial, that Goldstein's testimony was true. The motion for a new trial was consequently denied.

The circuit court of appeals affirmed. 142 F. 2d 588. It unanimously held that it could not substitute its judgment on the facts for that of the trial judge; that it did not have power to try these facts de novo; that it could review the record for errors of law, to determine, among other things, whether the trial judge had abused his discretion; that a review of the new evidence in the record did not inevitably lead to the conclusion that Goldstein had testified falsely; that the trial judge had not reached his conclusion "arbitrarily, capriciously, or in the misapplication of any rule of law" and hence had not abused his discretion. The respondents thereupon filed a second petition for certiorari in this Court. While this petition was pending, respondents presented papers informing us that they had discovered still more new evidence tending to discredit Goldstein's original testimony. We deferred consideration of their case, which we later dismissed, 323 U. S.

806, and they, after obtaining a second remand from the circuit court of appeals, filed an amended motion for new trial in the district court. The trial court again wrote an opinion analyzing each new affidavit in detail. These additional affidavits contained statements which, had they been offered as testimony at the original trial, would have been admissible and relevant to discredit Goldstein's and buttress Johnson's testimony. At least some of the facts set out in the affidavits had not been discovered until shortly before the amended motion was made. But the trial court concluded that the new affidavits failed to prove that Goldstein had committed perjury, and that consequently the basic ground for the motion—that there was new evidence showing that Goldstein had perjured himself—was without foundation.[4] That court found again that the new and old evidence taken together affirmatively showed that Goldstein had been a truthful witness. This time, however, the circuit court of appeals reversed with one judge dissenting. 149 F. 2d 31. The reversal rested basically on the court's belief that the trial judge had erroneously found that Goldstein did not commit perjury. The majority of the court reviewed parts of the affidavits and concluded from them that the trial judge's finding that Goldstein did not commit perjury was illogical and unreasonable. The majority substituted its own finding that Goldstein's original testimony was "unerringly false" and held that the trial judge's contrary

[4] An alternative ground for the court's denial of the motion need not be considered here. For as will be seen we think that the trial court's findings that the so-called new evidence failed to show Goldstein's perjury should not have been upset. The alternative ground was that all the so-called newly discovered evidence was either not newly discovered, or merely cumulative or impeaching, and in any event would probably not produce a different result. In this aspect of the case, the trial court, as did the circuit court of appeals in its first opinion, relied on the frequently quoted and followed rule announced in *Berry* v. *Georgia,* 10 Ga. 511.

conclusion amounted to an abuse of discretion. Since we think it important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances, we granted certiorari.

In our opinion the circuit court of appeals erred. The appeal to that court was so devoid of merit that it should have been dismissed. The crucial question before the trial court was one of fact: Did the new evidence show that Goldstein's original testimony was false? [5] The trial judge, after carefully studying all the evidence, found that there was nothing to show perjury on the part of Goldstein, that Goldstein had in fact told the truth, and concluded that a new trial was not warranted. The trial court thus answered the above question in the negative. Two judges of the circuit court of appeals thought that the evidence compelled an affirmative answer. But it is not the province of this Court or the circuit court of appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact. *Holmgren* v. *United States,* 217 U. S. 509; *Holt* v. *United States,* 218 U. S. 245; *Fairmount Glass Works* v. *Cub Fork Coal Co.,* 287 U. S. 474, 481. While the appellate court might intervene when the findings of fact are wholly unsupported by evidence, cf. *United States* v. *Socony-Vacuum Oil Co.,*

[5] In addition to questions involving the merely impeaching or cumulative effect of the evidence, which we have already indicated need not be considered here, see note 2, *supra,* we also need not consider what criteria should have guided the court in passing on the motion, had respondents actually shown that Goldstein recanted his testimony or that he committed perjury. Compare *Larrison* v. *United States,* 24 F. 2d 82, with *Berry* v. *Georgia, supra,* note 2. For as later appears we consider the district court's finding, that Goldstein's testimony was not shown to have been false, not reviewable. That was sufficient to warrant a denial of the motion.

310 U. S. 150, 247; *Glasser* v. *United States*, 315 U. S. 60, 87, it should never do so where it does not clearly appear that the findings are not supported by any evidence.

The trial judge's findings were supported by evidence. He had conducted the original trial and had watched the case against Johnson and the other respondents unfold from day to day. Consequently the trial judge was exceptionally qualified to pass on the affidavits. The record of both the original trial and the proceedings on the motions for a new trial shows clearly that the trial judge gave the numerous elements of the controversy careful and honest consideration. We think that even a casual perusal of this record should have revealed to the circuit court of appeals that here nothing more was involved than an effort to upset a trial court's findings of fact.

Determination of guilt or innocence as a result of a fair trial, and prompt enforcement of sentences in the event of conviction, are objectives of criminal law. In the interest of promptness, Rule II (2) of the Criminal Appeals Rules requires that motions for new trial generally must be made within three days after verdict or finding of guilt, and Rule III requires appeals to be taken within five days. But motions for new trial on the ground of newly discovered evidence have been more liberally treated. They can, under Rule II (3), be made at any time within sixty days after judgment, and in the event of an appeal, at any time before final disposition by the appellate court. This extraordinary length of time within which this type of motion can be made is designed to afford relief where, despite the fair conduct of the trial, it later clearly appears to the trial judge that, because of facts unknown at the time of trial, substantial justice was not done. It is obvious, however, that this privilege might lend itself for use as a method of delaying enforcement of just sentences. Especially is this true where delay is extended by appeals lacking in merit. This case well illustrates this possibil-

ity. While a defendant should be afforded the full benefit of this type of rectifying motion, courts should be on the alert to see that the privilege of its use is not abused. One of the most effective methods of preventing this abuse is for appellate courts to refrain from reviewing findings of fact which have evidence to support them. The circuit court of appeals was right in the first instance, when it declared that it did not sit to try de novo motions for a new trial. It was wrong in the second instance when it did review the facts de novo and order the judgment set aside.

The appeal to the circuit court of appeals was instituted by notice of appeal under Rule III of the Criminal Appeals Rules. Rule IV gives the circuit court of appeals power to supervise and control all proceedings on the appeal and to expedite such proceedings by, among other things, entertaining motions to dismiss. *Ray* v. *United States,* 301 U. S. 158, 164; *Mortensen* v. *United States,* 322 U. S. 369. Under that rule the circuit court of appeals here, after studying the issues raised, and upon determining that the only objection was to the trial court's findings on conflicting evidence, should have decided that this does not present a reviewable issue of law and on its own motion have dismissed the appeal as frivolous.[6]

The judgment of the circuit court of appeals is reversed, and the cause is remanded to the district court to enforce the judgments against the petitioners.

It is so ordered.

MR. JUSTICE JACKSON and MR. JUSTICE MURPHY took no part in the consideration or decision of this case.

[6] *Alberts* v. *United States,* 21 F. 2d 968; *Corrigan* v. *Buckley,* 271 U. S. 323, 329; *Avent* v. *United States,* 266 U. S. 127, 131; *Sugarman* v. *United States,* 249 U. S. 182, 184; *Zucht* v. *King,* 260 U. S. 174, 176; *Campbell* v. *Olney,* 262 U. S. 352; *Seaboard Air Line R. Co.* v. *Watson,* 287 U. S. 86, 90, 92; *Salinger* v. *United States,* 272 U. S. 542, 544; *Kryder* v. *Indiana,* 305 U. S. 570; *Cady* v. *Georgia,* 323 U. S. 676.

ESTEP *v.* UNITED STATES.

NO. 292. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.*

Argued November 7, 1945.—Decided February 4, 1946.

1. In a criminal prosecution under the Selective Training and Service Act of 1940 for wilfully failing and refusing to submit to induction, a registrant who appeared at the induction center and was finally accepted, but who refused to submit to induction—having pursued his administrative remedy to the end—may interpose the defense that the action of his local board in rejecting his claim of exemption as a minister of religion and classifying him as available for military service was beyond its jurisdiction. *Falbo* v. *United States,* 320 U. S. 549, distinguished. P. 121.
2. Action of a local board which is contrary to the Act or the regulations prescribed pursuant thereto is beyond the jurisdiction of the board. Pp. 120, 121.
3. The fact that the Selective Training and Service Act makes no provision for judicial review of the action of local boards or the appeal agencies is not necessarily to be construed as a denial of the power of the federal courts to grant relief in the exercise of the general jurisdiction which Congress has conferred upon them. P. 119.
4. Apart from constitutional requirements, the question whether judicial review will be provided where Congress is silent depends on the whole setting of the particular statute and the scheme of regulation which is adopted. P. 120.
5. Except when the Constitution requires it, judicial review of administrative action may be granted or withheld as Congress chooses. P. 120.
6. Section 11 of the Selective Training and Service Act is not to be read as requiring courts to sanction orders which flagrantly violate the rules and regulations defining the jurisdiction of the local boards. P. 121.
7. The provision of the Act making decisions of the local boards "final" means that Congress chose not to give administrative action under the Act the customary scope of judicial review which obtains under other statutes; that the courts are not to weigh the evidence to determine whether the classification made by the local board was

*Together with No. 66, *Smith* v. *United States,* on certiorari to the Circuit Court of Appeals for the Fourth Circuit. Argued and decided on the same dates.

justified; and that decisions of the local boards made in conformity with the regulations are conclusive even though they may be erroneous. P. 122.

8. On judicial review the question of the jurisdiction of the local board is reached only if there is no basis in fact for the classification given the registrant. P. 122.

150 F. 2d 768, 148 F. 2d 288, reversed.

No. 292. Petitioner was convicted of a violation of the Selective Training and Service Act of 1940. The circuit court of appeals affirmed. 150 F. 2d 768. This Court granted certiorari. 326 U. S. 703. *Reversed,* p. 125.

No. 66. Petitioner was convicted of a violation of the Selective Training and Service Act of 1940. The circuit court of appeals affirmed. 148 F. 2d 288. This Court granted certiorari. 325 U. S. 846. *Reversed,* p. 125.

Hayden C. Covington argued the cause for petitioners. With him on the brief were *Grover C. Powell* and *Curran E. Cooley.*

Irving S. Shapiro argued the cause for the United States. With him on the briefs were *Solicitor General McGrath* and *Robert S. Erdahl. Walter J. Cummings, Jr.,* also was on the brief in No. 292.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In *Falbo* v. *United States,* 320 U. S. 549, we held that in a criminal prosecution under § 11 of the Selective Training and Service Act of 1940 (54 Stat. 894, 50 U. S. C. App. § 311) a registrant could not defend on the ground that he was wrongfully classified and was entitled to a statutory exemption, where the offense was a failure to report for induction into the armed forces or for work of national importance.[1] We found no provision for judicial

[1] Sec. 5 (g) of the Act provides that a registrant shall "be assigned to work of national importance under civilian direction" if he is conscientiously opposed to induction into the armed services even for noncombatant service. See Selective Service Regulations, 652.1–652.14, 653.1–653.16.

review of a registrant's classification prior to the time when he had taken all the steps in the selective process and had been finally accepted by the armed services. The question in these cases is whether there may be judicial review of his classification in a prosecution under § 11 where he reported for induction, was finally accepted, but refused to submit to induction.

Estep's local board classified him as I–A, i. e., as available for military service.[2] Sec. 5 (d) of the Act exempts from training and service (but not from registration) "Regular or duly ordained ministers of religion . . ." Under the regulations those in that category are classified as IV–D.[3] Estep, a member of Jehovah's Witnesses, claimed that he was entitled to that classification. The local board ruled against him. He took his case to the appeal board which classified him as I–A.[4] He then asked the State and National Directors of Selective Service to appeal to the President for him.[5] His request was refused. The local board thereupon ordered him to report for induction. He reported at the time and place indicated. He was accepted by the Navy. But he refused to be inducted, claiming that he was exempt from service because he was an ordained minister of the gospel.

[2] Selective Service Regulations, 622.11.

[3] *Id.*, 622.44.

[4] By § 10 (a) (2) of the Act the President was authorized to establish "civilian local boards and such other civilian agencies, including appeal boards and agencies of appeal, as may be necessary to carry out the provisions of this Act." The provisions governing appeals to the boards of appeal are contained in 627.1–627.61 of the regulations. The Act provides a special appeal procedure for conscientious objectors. See § 5 (g).

[5] Either of them may take such an appeal at any time when he "deems it to be in the national interest or necessary to avoid an injustice . . ." Selective Service Regulations, 628.1. A registrant may appeal to the President when he is classified as I–A provided one or more of the board of appeal dissented from such classification. *Id.*, 628.2. In Estep's case the board of appeal was unanimous in classifying him in I–A.

He was indicted under § 11 of the Act for wilfully failing and refusing to submit to induction.[6] He sought to defend on the ground that as a Jehovah's Witness he was a minister of religion and that he had been improperly denied exemption from service, because the classifying agencies acted arbitrarily and capriciously in refusing to classify him as IV–D. He also claimed that his right to an effective appeal had been denied because the local board unlawfully withheld certain relevant documents from the appeal board and included improper material in the record on appeal. The district court rejected these defenses and did not permit the introduction of evidence to sustain Estep's contention. The jury found him guilty and he was sentenced to imprisonment for a term of five years. On appeal the circuit court of appeals affirmed, on a divided vote. 150 F. 2d 768.

Smith, like Estep, is a member of Jehovah's Witnesses. He claimed exemption from all service on the ground that he was a minister of religion. His local board placed him in Class I–A, as available for military service. His classification was affirmed by the appeal board. On appeal to the President his classification was again affirmed. The local board then ordered him to report for induction. He reported to the induction station, was accepted by the military, but refused to be inducted, claiming he was exempt from service because he was a minister. He was inducted against his will and later was held for trial by a general court-martial for disobedience of military orders. He filed a petition for a writ of *habeas corpus* which was denied. *Smith* v. *Richart,* 53 F. Supp. 582. While his

[6] Sec. 11 so far as material here provides: "any person who . . . shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, . . . shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

691100°—47——12

appeal was pending, we decided *Billings* v. *Truesdell,* 321 U. S. 542. He was thereupon released from military custody and indicted for violation of § 11 of the Act. At the trial he sought to attack the classification given him by his local board, claiming, among other things, that it acted without any foundation of fact, discriminated against him because he was a Jehovah's Witness, and denied him the right to make full proof of his claim that he was a minister of religion. The court ruled that no such defense could be tendered. Smith was found guilty by the jury and a sentence of three and one-half years was imposed. The judgment of conviction was affirmed on appeal. 148 F. 2d 288.

The cases are here on petitions for writs of certiorari which we granted because of the importance of the question presented.

Congress entrusted the administration of the Selective Service System to civilian agencies, not to the military. It authorized the President to create and establish a Selective Service System and to establish civilian local boards and appeal boards to administer it. § 10 (a) (2). The Selective Service System was designed to "provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service . . ." *Id.* Congress specified certain restricted classes for deferment [7] or exemption from service, including in the latter, as we have said, "Regular or duly ordained ministers of religion . . ." § 5. The President was authorized to provide for the deferment of other classes by rules and regulations.[8] § 5

[7] Thus by § 5 (c) (1) specified classes of public officials were deferred from training and service while holding their offices.

[8] The regulations placed in deferred classifications those whose employment in industry, agriculture, or other occupations or whose activity was found to be necessary to the maintenance of the national health, safety, or interest; those who had persons dependent on them for support; those found to be physically, mentally, or morally deficient or defective. See Selective Service Regulations 622.21, 622.25–1, 622.32, 622.61, 622.62.

(e). And the local boards "under rules and regulations prescribed by the President" were granted the "power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards." § 10 (a) (2). The Act makes no provision in terms for judicial review of the actions of the local boards or the appeal boards. For § 10 (a) (2) states that the "decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe." [9]

By the terms of the Act Congress enlisted the aid of the federal courts only for enforcement purposes. Sec. 11 makes criminal a wilful failure to perform any duty required of a registrant by the Act or the rules or regulations made under it. An order to report for induction is such a duty; and it includes the duty to submit to induction. *Billings* v. *Truesdell, supra,* p. 557. Sec. 11 confers jurisdiction on the district courts to try one charged with such offense. But § 11 is silent when it comes to the defenses, if any, which may be interposed.

Thus we start with a statute which makes no provision for judicial review of the actions of the local boards or the appeal agencies. That alone, of course, is not decisive.

[9] The part of § 10 (a) (2) relevant here provides: "Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe."

For the silence of Congress as to judicial review is not necessarily to be construed as a denial of the power of the federal courts to grant relief in the exercise of the general jurisdiction which Congress has conferred upon them. *American School of Healing* v. *McAnnulty,* 187 U. S. 94; *Gegiow* v. *Uhl,* 239 U. S. 3; *Stark* v. *Wickard,* 321 U. S. 288. Judicial review may indeed be required by the Constitution. *Ng Fung Ho* v. *White,* 259 U. S. 276. Apart from constitutional requirements, the question whether judicial review will be provided where Congress is silent depends on the whole setting of the particular statute and the scheme of regulation which is adopted. *Switchmen's Union* v. *Mediation Board,* 320 U. S. 297, 301. And except when the Constitution requires it, judicial review of administrative action may be granted or withheld as Congress chooses.

The authority of the local boards whose orders are the basis of these criminal prosecutions is circumscribed both by the Act and by the regulations. Their authority to hear and determine all questions of deferment or exemption is, as stated in § 10 (a) (2), limited to action "within their respective jurisdictions." It is only orders "within their respective jurisdictions" that are made final. It would seem, therefore, that if a Pennsylvania board ordered a citizen and resident of Oregon to report for induction, the defense that it acted beyond its jurisdiction could be interposed in a prosecution under § 11. That case would be comparable to *Tung* v. *United States,* 142 F. 2d 919, where the local board ordered a registrant to report for induction without allowing him the appeal to which he was entitled under the regulations. Since § 10 (a) (2) makes the decisions of the local boards final "except where an appeal is authorized" under the regulations, the defense was allowed in the criminal trial.

Any other case where a local board acts so contrary to its granted authority as to exceed its jurisdiction [10] does

[10] See cases cited in note 14, *infra.*

not stand on a different footing. By § 10 (a) (2) the local boards, in hearing and determining claims for deferment or exemption, must act "under rules and regulations prescribed by the President . . ." Those rules limit, as well as define, their jurisdiction. One of those regulations forbids the local boards from basing their classification of a registrant on a discrimination "for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization." 623.1. Another provides, in accordance with the mandate contained in § 5 (c) (1) of the Act, for the deferment of governors of States and members of Congress while they hold their offices.[11] 622.42. Another provides that the local board "shall reopen and consider anew the classification of a registrant" on the written request of the State Director or the Director and upon receipt of the request "shall immediately cancel" any order to report for induction or for work of national importance. 626.2–1. If a local board ordered a member of Congress to report for induction, or if it classified a registrant as available for military service because he was a Jew, or a German, or a Negro, it would act in defiance of the law. If a local board refused to reopen on the written request of the State Director a registrant's classification and refused to cancel its order to report for induction, it would be acting in the teeth of the regulations. In all such cases its action would be lawless and beyond its jurisdiction.

We cannot read § 11 as requiring the courts to inflict punishment on registrants for violating whatever orders the local boards might issue. We cannot believe that Congress intended that criminal sanctions were to be applied to orders issued by local boards no matter how flagrantly they violated the rules and regulations which define their jurisdiction. We are dealing here with a

[11] 622.42 provides, "In Class IV–B *shall be placed* any registrant" who holds specified offices. (Italics added.)

question of personal liberty. A registrant who violates the Act commits a felony.[12] A felon customarily suffers the loss of substantial rights.[13] Sec. 11, being silent on the matter, leaves the question of available defenses in doubt. But we are loath to resolve those doubts against the accused. We cannot readily infer that Congress departed so far from the traditional concepts of a fair trial when it made the actions of the local boards "final" as to provide that a citizen of this country should go to jail for not obeying an unlawful order of an administrative agency. We are loath to believe that Congress reduced criminal trials under the Act to proceedings so barren of the customary safeguards which the law has designed for the protection of the accused. 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

---

[12] "All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies." Criminal Code § 335, 18 U. S. C. § 541.

[13] *California:* § 2600 of the Penal Code provides that a sentence of imprisonment for less than life suspends all civil rights and forfeits all public offices and private trusts, authority, or power during the imprisonment.

New York: For a similar provision see § 510 of the Penal Law.

Missouri: § 4561 Rev. Stat. Ann. renders any person sentenced to a penitentiary or convicted of a felony for any crime incompetent to serve as a juror, and forever disqualifies him from voting or holding office, unless pardoned.

the registrant.[14] See *Goff* v. *United States,* 135 F. 2d 610, 612.

Falbo v. *United States, supra,* does not preclude such a defense in the present cases. In the *Falbo* case the defendant challenged the order of his local board before he had exhausted his administrative remedies. Here these registrants had pursued their administrative remedies to the end. All had been done which could be done. Submission to induction would be satisfaction of the orders of the local boards, not a further step to obtain relief from them.[15]

If § 11 were not construed to permit the accused to defend on the ground that his local board acted beyond its jurisdiction, a curious result would follow. The remedy of *habeas corpus* extends to a case where a person "is in custody in violation of the Constitution or of a law . . . of the United States . . ." R. S. § 753, 28 U. S. C. § 453. It has been assumed that *habeas corpus* is available only

---

[14] That is the scope of judicial inquiry in deportation cases where Congress has made the orders of deportation "final." *Chin Yow* v. *United States,* 208 U. S. 8; *Ng Fung Ho* v. *White, supra; Mahler* v. *Eby,* 264 U. S. 32; *U. S. ex rel. Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103; *Bridges* v. *Wixon,* 326 U. S. 135. That is also the scope of judicial inquiry when a registrant after induction seeks release from the military by *habeas corpus.* See *United States* v. *Cain,* 144 F. 2d 944.

[15] It is said that our conclusion runs counter to an unbroken line of cases holding that a registrant may not challenge his classification in a prosecution under § 11. But most of those cases on their facts involved only the issue presented by the *Falbo* case. In only a few of them was the issue presented here necessary for decision. The question was reserved in *United States* v. *Pitt,* 144 F. 2d 169, 173 (C. C. A. 3d, 1944). In the following cases, the question was necessary for decision, and it was held that the defense was not available: *Fletcher* v. *United States,* 129 F. 2d 262 (C. C. A. 5th, 1942); *United States* v. *Rinko,* 147 F. 2d 1 (C. C. A. 7th, 1945); *Gibson* v. *United States,* 149 F. 2d 751 (C. C. A. 8th, 1945); *Koch* v. *United States,* 150 F. 2d 762 (C. C. A. 4th, 1945).

after a registrant has been inducted into the armed services.[16] But if we now hold that a registrant could not defend at his trial on the ground that the local board had no jurisdiction in the premises, it would seem that the way would then be open to him to challenge the jurisdiction of the local board after conviction by *habeas corpus*.[17] The

[16] See *United States* v. *Grieme*, 128 F. 2d 811; *United States* v. *Kauten*, 133 F. 2d 703; *United States* v. *Mroz*, 136 F. 2d 221; *Biron* v. *Collins*, 145 F. 2d 758; *Fujii* v. *United States*, 148 F. 2d 298; *Gibson* v. *United States*, 149 F. 2d 751. See Connor and Clarke, Judicial Investigation of Selective Service Action, 19 Tulane L. Rev. 344; Elliff, Jehovah's Witnesses and the Selective Service Act, 31 Va. L. Rev. 811.

[17] The courts which have said that *habeas corpus* was available only after induction (see note 16, *supra*) appear to have been influenced by the decisions arising under the 1917 Act, 40 Stat. 76, 50 U. S. C. App. § 201. Thus in *United States* v. *Grieme, supra*, note 16, p. 814, the court in ruling that the findings of the local boards were not reviewable by the courts said, "Here again the rule is similar to the construction placed upon the Selective Draft Act of 1917. See *Ex parte Hutflis*, 245 F. 798, 799." The latter case involved a petition for a writ of *habeas corpus* after induction, which was the accepted way of challenging the jurisdiction of the draft boards under the 1917 Act. But as we pointed out in *Billings* v. *Truesdell, supra*, p. 546, a registrant under the 1917 Act was subject to military law from the time he was ordered to present himself for induction. Defiance of the order was held to constitute desertion even though the draftee had not been afforded a fair hearing by the board. *Ex parte Romano*, 251 F. 762; *Ex parte Tinkoff*, 254 F. 912. It was said in *Ex parte Romano, supra*, p. 764: "Although based on irregular proceedings, it was not void. Until vacated, it was binding on the petitioner."

But as *Billings* v. *Truesdell, supra*, makes plain, the present Act and the regulations promulgated under it are different. A registrant is not subject to military law from the time he is ordered to report for induction, but only after he has submitted to induction. Thus the decisions under the 1917 Act, holding that his remedy against unlawful action of the local board is by way of *habeas corpus* after induction, are no guide to decision under the present Act.

It is true that after the conviction of the defendant in the *Falbo* case, his petition for a writ of *habeas corpus* was denied. 141 F. 2d 689. And in a like situation *habeas corpus* was denied in advance of the trial. *Albert* v. *Goguen*, 141 F. 2d 302. But in those cases addi-

court would then be sending men to jail today when it was apparent that they would have to be released tomorrow.

We do not suggest that because Congress has provided one judicial remedy another should be implied. We may assume that where only one judicial remedy is provided, it normally would be deemed exclusive. But the fact that *habeas corpus* after conviction is available in these cases gives added support to our reading of § 11. It supports a rejection of a construction of the Act that requires the courts to march up the hill when it is apparent from the beginning that they will have to march down again.

We express no opinion on the merits of the defenses which were tendered. Since the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case.

Reversed.

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

MR. JUSTICE MURPHY, concurring.

To sustain the convictions of the two petitioners in these cases would require adherence to the proposition that a person may be criminally punished without ever being accorded the opportunity to prove that the prosecution is based upon an invalid administrative order. That is a proposition to which I cannot subscribe. It violates the most elementary and fundamental concepts of due process of law. It condemns a man without a full hearing and a consideration of all of his alleged defenses. To sanc-

---

tional steps in the selective service procedure remained to be taken. Denial of *habeas corpus* followed by analogy to the familiar situations where other corrective procedures had been available which might have afforded relief from the orders complained of. See *Bowen* v. *Johnston*, 306 U. S. 19; *Ex parte Williams*, 317 U. S. 604; *Ex parte Hawk*, 321 U. S. 114. But in the present cases the registrants, as we have said, had pursued their administrative remedies to the end.

tion such a proposition is to place an indelible "blot upon our jurisprudence and civilization," *McVeigh* v. *United States,* 11 Wall. 259, 267, which cannot be justified by any appeal to patriotism or wartime exigencies.

The two courts below condemned the petitioners to prison for failing to obey orders to report for induction into the armed services, which had previously found them physically fit. Petitioners do not deny that they disobeyed these orders. They do claim, however, that there was a singular lack of procedural due process in the issuance of the induction orders and that the orders were therefore invalid—claims that must be assumed to be true for purposes of the cases before us. But the courts below, relying upon *Falbo* v. *United States,* 320 U. S. 549, forbade them from raising such claims. Under that view, it is irrelevant that the petitioners had never had a prior opportunity and will never have a future chance to test these claims; it is likewise immaterial that the claims, if proved, might completely absolve them from liability. Thus the stigma and penalties of criminality attach to one who wilfully disobeys an induction order which may be constitutionally invalid, or unauthorized by statute or regulation, or issued by mistake, or issued solely as the result of bias and prejudice. The mere statement of such a result is enough to condemn it.

The reasons advanced for thus depriving the petitioners of their liberty without due process of law are unmeritorious.

First. It is said that Congress so designed the Selective Training and Service Act of 1940 as to preclude courts from inquiring into the validity of an induction order during the course of a prosecution under § 11 for a wilful failure to obey such an order. But if that is true, the Act is unconstitutional in this respect. Before a person may be punished for violating an administrative order due process of law requires that the order be within the authority of

the administrative agency and that it not be issued in such a way as to deprive the person of his constitutional rights. A court having jurisdiction to try such a case has a clear, inherent duty to inquire into these matters so that constitutional rights are not impaired or destroyed. Congress lacks any authority to negative this duty or to command a court to exercise criminal jurisdiction without regard to due process of law or other individual rights. To hold otherwise is to substitute illegal administrative discretion for constitutional safeguards. As this Court has previously said, "Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority." *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 52. This principle has been applied many times in the past for the benefit of corporations. *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287, 289; *Dayton-Goose Creek R. Co.* v. *United States,* 263 U. S. 456, 486; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 432; *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210. I assume that an individual is entitled to no less respect.

But the Act need not be construed so as to reach this unconstitutional result. Nothing in the statute commands courts to shut their eyes to the Constitution or to deny a full and fair hearing when performing their functions under § 11, and we should be unwilling to imply such a prohibition. Once the judicial power is properly invoked under § 11, a court has unquestioned authority under the Constitution and the Judicial Code to accord a defendant due process of law and to inquire into alleged deprivations of constitutional rights despite the absence of any specific authority under the Act to that effect. A contrary result certainly is not dictated by the fact that the Act makes local board decisions "final," subject to the

administrative appeal provisions. This merely determines the point of administrative finality, leaving to the courts the ultimate and historical duty of judging the validity of the "final" administrative orders which they are called upon to enforce with criminal sanctions, at least where no other method of judicial review is previously available.

A construction of the Act so as to insure due process of law and the protection of constitutional liberties is not an amendment to the Act. It is simply a recognized use of the interpretative process to achieve a just and constitutional result, coupled with a refusal to ascribe to Congress an unstated intention to cause deprivations of due process.

Second. It is urged that the purpose and scheme of the legislative program necessitate the foreclosure of a full hearing in a criminal proceeding under § 11. The urgent need of mobilizing the manpower of the nation for emergency purposes and the dire consequences of delay in that process are emphasized. From this premise it is argued that no "litigious interruption" in the selective process can be tolerated and that judicial inquiry into the validity of an induction order during the course of a criminal proceeding is a prime example of a "litigious interruption."

This argument, which was pressed so urgently and successfully in the *Falbo* case, conveniently ignores the realities of the situation. The selective process, in relation to the petitioners, was finally and completely interrupted at the time when they disobeyed the induction orders and subjected themselves to possible criminal liability. Any subsequent judicial review of the induction orders could have no possible effect upon the continuance of the selective process and could bear no earmarks of a "litigious interruption." Thus at the time of petitioners' trials the courts were confronted with accomplished interruptions rather than with a theory. A decision at that point to

grant petitioners full hearings and to protect their constitutional rights would simply be a recognition of the fact that the Constitution protects the petitioners whenever their liberty is at stake, whatever may have been their motives in disobeying the orders.

It is alleged, of course, that to allow a full hearing in a criminal proceeding under this Act would be to extend an open invitation to all inductees to disobey their induction orders and litigate the validity of the orders in the subsequent trials. This is at best a poor excuse for stripping petitioners of their rights to due process of law. Moreover, the degree to which judicial review at this stage would encourage disobedience of induction orders lies in the realm of conjecture and cannot be demonstrated one way or the other by proof. But common sense would indicate that the number of those willing to undergo the risk of criminal punishment in order to test the validity of their induction orders, with the attendant difficulties of proof, would be extremely small. Adherence to due process of law in criminal trials is unlikely to impede the war effort unduly. And should perchance the opposite be true there are undoubtedly legislative means of combating the problem.

Third. The further suggestion is made that the only judicial review of induction orders available is by means of habeas corpus proceedings brought subsequent to induction and that this remedy satisfies whatever judicial review may be required by the Constitution. I fully concur in the desirability and necessity of such a proceeding for those who have been inducted and who wish to test the validity of their induction orders.

It should be noted in passing, however, that this remedy may be quite illusory in many instances. It requires one first to enter the armed forces and drop every vestige of civil rights. Military orders become the law of life and violations are met with summary court-martial procedure.

No more drastic condition precedent to judicial review has ever been framed. Many persons with religious or conscientious scruples are unable to meet such a condition. But even if a person is inducted and a quest is made for a writ of habeas corpus, the outlook is often bleak. The proceeding must be brought in the jurisdiction in which the person is then detained by the military, which may be thousands of miles removed from his home, his friends, his counsel, his local board and the witnesses who can testify in his behalf. Should he overcome all these obstacles and possess enough money to proceed further, he still faces the possibility of being shifted by the military at a moment's notice into another jurisdiction, thus making the proceeding moot. There is little assurance, moreover, that the military will treat his efforts to obtain the writ with sympathetic understanding. These practical difficulties may thus destroy whatever efficacy the remedy might otherwise have and cast considerable doubt on the assumption that habeas corpus proceedings necessarily guarantee due process of law to inductees.

But the availability of judicial review through habeas corpus proceedings misses the issue in this case. Such a proceeding may or may not provide an adequate remedy for the person who has been inducted. We are dealing here, however, with two persons who have not been inducted and who never will be inducted by force of the orders under attack. The writ of habeas corpus following induction is thus a completely non-existent remedy so far as these petitioners are concerned. It neither adds to nor detracts from the reasons for granting judicial review in these criminal proceedings.

If, as I believe, judicial review of some sort and at some time is required by the Constitution, then when and where can these petitioners secure that review? They have not had a prior chance to obtain review of the induction orders; nor will they subsequently be accorded the oppor-

tunity to test their contentions in court. It is no answer that they should have pursued different courses of action and secured writs of habeas corpus after induction. Due process of law is not dispensed on the basis of what people might have or should have done. The sole issue here is whether due process of law is to be granted now or never. The choice seems obvious.

By denying judicial review in this criminal proceeding, the courts below in effect said to each petitioner: You have disobeyed an allegedly illegal order for which you must be punished without the benefit of the judicial review required by the Constitution, although if you had obeyed the order you would have had all the judicial review necessary. I am at a loss to appreciate the logic or justice of that position. It denies due process of law to one who is charged with a crime and grants it to one who is obedient. It closes the door of the Constitution to a person whose liberty is at stake and whose need for due process of law is most acute. In short, it condemns a man without a fair hearing.

There is something basically wrong and unjust about a juridical system that sanctions the imprisonment of a man without ever according him the opportunity to claim that the charge made against him is illegal. I am not yet willing to conclude that we have such a system in this nation. Every fiber of the Constitution and every legal principle of justice and fairness indicate otherwise. The reports are filled with decisions affirming the right to a fair and full hearing, the opportunity to present every possible defense to a criminal charge and the chance at some point to challenge an administrative order before punishment. Those rudimentary concepts are ingrained in our legal framework and stand ready for use whenever life or liberty is in peril. The need for their application in this instance seems beyond dispute.

We must be cognizant of the fact that we are dealing here with a legislative measure born of the cataclysm of war, which necessitates many temporary restrictions on personal liberty and freedom. But the war power is not a blank check to be used in blind disregard of all the individual rights which we have struggled so long to recognize and preserve. It must be used with discretion and with a sense of proportionate values. In this instance it seems highly improbable that the war effort necessitates the destruction of the right of a person charged with a crime to obtain a complete review and consideration of his defense. As long as courts are open and functioning, judicial review is not expendable.

All of the mobilization and all of the war effort will have been in vain if, when all is finished, we discover that in the process we have destroyed the very freedoms for which we fought. These cases represent a small but significant reflection of that fact. The reversal of the judgments below is therefore in line with the highest traditions of the Court.

MR. JUSTICE RUTLEDGE, concurring.

I join in the result in each case and in the Court's opinion for the reasons it sets forth. A further reason would force me to this result. In my judgment a contrary construction would invalidate the statute. I have no doubt that Congress could make administrative or executive action final in such matters as these in the sense of excluding all judicial review, excepting only what may be required by the Constitution in the absence of suspension of the writ of habeas corpus.[1] Cf. *Ex parte McCardle,* 6

[1] Under the Selective Draft Act of 1917, the civil courts were not called upon to enforce induction orders by criminal proceedings; for the receipt of such an order automatically subjected a draftee to military law and for disobedience thereof he was triable by a court-martial for desertion. See *United States* v. *McIntyre,* 4 F. 2d 823; *Billings* v. *Truesdell,* 321 U. S. 542, 545–546; cf. the *Selective Draft Law Cases,* 245 U. S. 366.

Wall. 318; *Lockerty* v. *Phillips*, 319 U. S. 182; *Ng Fung Ho* v. *White*, 259 U. S. 276.

But as I do not think Congress can make it a crime punishable by the federal judicial power to violate an administrative order without affording an adequate opportunity to show its constitutional invalidity, cf. *Yakus* v. *United States*, 321 U. S. 414, 460, dissenting opinion,[2] so even more do I not think Congress can make criminal the disobedience to such an order allowing no opportunity whatever for showing its unconstitutionality. It is one thing to deny jurisdiction of the courts altogether, save in so far as the Constitution of its own force may preserve the jurisdiction. It is altogether different to confer jurisdiction for enforcement purposes, but in doing so to cut off all right of defense on constitutional grounds.

To sustain such a view not only would have the courts marching up the hill in the criminal case and down again in habeas corpus.[3] It would make the judicial function a rubber stamp in criminal cases for administrative or ex-

---

[2] And see the authorities cited in the Court's opinion, 321 U. S. at 433, 435. Apart from the question of the validity of splitting a criminal trial into civil and highly attenuated criminal parts, the issue in the *Yakus* case related to the adequacy of the opportunity allowed for challenging the order's validity in the Emergency Court of Appeals. The ruling did not comprehend a situation where no opportunity is afforded prior to or during the trial.

[3] It is not necessary in these cases to determine whether Congress could confine the scope of review in the criminal cause, on constitutional grounds, to those which might be asserted in habeas corpus after conviction. The very fact that ordinarily the permissible scope of such objections in the latter type of proceeding is considerably more restricted than in the former is additional reason for not accepting the Government's view that Congress intended to allow review by habeas corpus but not by defense in the criminal trial.

That view, of course, rejects the idea that "final" in the statute "means final," that is, beyond judicial reach in any manner, as it likewise implicitly but necessarily denies that "within the jurisdiction"—of the local boards—is wholly geographical.

ecutive action. And it would close the trap which, in *Billings* v. *Truesdell,* 321 U. S. 542, 558, we said would be set if *Falbo* v. *United States,* 320 U. S. 549, were construed to permit what it is now sought to have done to the petitioners.

MR. JUSTICE FRANKFURTER, concurring in result.

Although Congress, in 1940, and by reenactment since, provided that when a draft board determines whether a registrant is entitled to exemption or deferment the board's decision is "final," the Court now concludes that such a decision is not final but may be reviewed when the registrant is tried before a jury for wilful disobedience of a board's order. Not only is such a result opposed to the expressed will of Congress. It runs counter to the achievement of the great object avowed by Congress in enacting this legislation; it contradicts the settled practice under the Selective Service Act throughout the war years, recognized as such by authoritative Congressional opinion; it reverses all the circuit courts of appeals before whom the matter has come, constituting an impressive body of decisions and expressing the views of more than forty judges.

The case is this. Estep was a Jehovah's Witness. By virtue of that fact he claimed the protection of § 5 (d) of the Selective Training and Service Act of 1940 (54 Stat. 885, 888; 50 U. S. C. App. § 305 (d)), which exempts from service "Regular or duly ordained ministers of religion . . ." His local board ruled against this claim and classified Estep as I–A, that is, available for military service, and ordered him to report for induction. He reported and was accepted by the Navy but refused to submit to induction. See *Billings* v. *Truesdell,* 321 U. S. 542. This prosecution was then commenced under § 11 of the Act (54 Stat. 885, 894; 50 U. S. C. App. § 311). That section makes it an offense for any person wilfully to disobey

"any of the provisions of this Act, or the rules or regulations made or directions given thereunder . . ." Concededly Estep failed to carry out the order of the board to submit to induction. Estep sought to defend disobedience on the ground that the local board had improperly denied his claim of exemption from service in that they refused to classify him as a "regular or duly ordained minister of religion . . ." He also offered in defense proof of alleged misconduct by the board bearing on his right of appeal from the board's decision. Disallowance of these defenses by the district court, which after conviction were sustained by the Circuit Court of Appeals, presents two issues for our consideration: I. Is the decision of a local board denying a claim of exemption subject to reconsideration in a criminal prosecution for knowingly failing to discharge the duties required by the Act as a result of such classification? II. Is action by the local board whereby a registrant is cut off from the opportunities of a review within the Selective Service process as authorized by the Act available as a defense in such prosecution for disobedience of the local board's order? These are questions of such moment in the enforcement of the Selective Service Act as to call for an adequate statement of the reasons that impel disagreement with the major conclusion of the Court.

I.

Did Congress place within the Selective Service System the authority for determining who shall and who shall not serve in the armed services, who shall and who shall not enjoy the exemptions and deferments by which Congress has qualified the duty of all to serve? Or, did it leave such determination for reconsideration in trials before juries of persons charged with wilful disobedience of duties defined by the Act? This is the crucial issue in the case and touches the very nerve-center of the Selective Service Act.

One would suppose that Congress expressed its will with the utmost clarity, precluding the need of labored argumentation as to its purpose. Section 10 (a) (2) gives the answer.

> "Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe." 54 Stat. 885, 893; 50 U. S. C. App. § 310 (a) (2).

These words can only mean what they appear to mean if they are read as ordinary words should be read. Ordinary words should be read with their common, everyday meaning when they serve as directions for ordinary people. If legislation was ever designed to define the rights and duties of the vast body of ordinary people, it is the Selective Service Act. One need not italicize "final" to make final mean final, when nowhere in the Act is there any derogation of this Congressional command of finality to "the decisions of such local boards," subject only to reviewability within the Selective Service System.

But if one goes beyond the meaning that the text spontaneously yields, all other relevant considerations only confirm what the text expresses. To allow judicial review of a board's decision on classification is not to respect the context of purpose into which a specific provision of a law is properly placed. To do so disregards that purpose. And Congress did not rely on the public understanding of the purpose that moved it in passing the Selective Service Act, as well it might have, considering that the Act was passed in September, 1940. It was explicit: "the Con-

gress hereby declares that it is imperative to increase and train the personnel of the armed forces of the United States." § 1 (a), 54 Stat. 885; 50 U. S. C. App. § 301 (a).

There cannot have been many instances in our national life when Congress stamped its legislation as "imperative." And history has amply underscored the desperate urgency. Congress deemed it imperative to secure a vast citizen army with the utmost expedition. It did so with due regard for the individual interests by giving ample opportunities, within the elaborate system which it established, for supervision of the decisions of the multitudinous draft boards on the selection of individuals for service. As to such legislation, even were the language not explicit, every provision of the Act should be construed to promote fulfillment of the imperative need which inspired it. Surely it would hamper the aim of Congress to subject the decisions of the selective process in determining who is amenable to service to reconsideration by the cumbersome process of trial by jury, admirably suited as that is for the familiar controversies when the nation's life is not at stake. To avoid such a palpable inroad upon Congressional purpose, we need not draw on implications. We must merely resist unwarranted implications that sterilize what Congress has expressly required.

In construing the Act, this Court has heretofore applied the reasons which led Congress to rely wholly on the Selective Service System in determining the rights of individuals. This is what we said two years ago:

> "To meet the need which it felt for mobilizing national manpower in the shortest practicable period, Congress established a machinery which it deemed efficient for inducting great numbers of men into the armed forces. Careful provision was made for fair administration of the Act's policies within the framework of the selective service process."

We so ruled in *Falbo* v. *United States,* 320 U. S. 549, 554. That was a case in which we held that a challenge to a

local board's classification cannot be raised upon a trial like the present for violation of the Court's order, where the registrant disobeys the order before he is accepted for national service. But the Congress made the decisions of the board "final" without regard to the stage at which the registrant disobeys it. The command of Congress makes the decision of the board no less final after the registrant has submitted to the pre-induction examination than before such submission. The finality of the board is neither diminished, nor the authority of the courts to review such decision enlarged, because a registrant flouts the Selective Service process at an early or at a late stage. The language of the statute is unqualified and all-inclusive: "The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe."

Such has been the construction of more than forty judges in the circuit courts of appeals.[1] The question raised by the facts of this case has come before the Circuit Courts of Appeals for the First, the Second, the Third, the Fourth, the Fifth, the Sixth, the Seventh and the Eighth

---

[1] This is a list of the judges:

First Circuit: Mahoney, Woodbury, Peters.

Second Circuit: Learned Hand, Swan, Augustus N. Hand, Chase, Clark, Frank, Simons, Hutcheson (the last two sitting as designated judges).

Third Circuit: Jones, Maris, Goodrich, McLaughlin, Parker (the last sitting as a designated judge).

Fourth Circuit: Parker, Soper, Dobie, Northcott.

Fifth Circuit: Sibley, Hutcheson, Holmes, McCord, Waller, Lee, Strum.

Sixth Circuit: Hicks, Simons, Hamilton, Martin.

Seventh Circuit: Evans, Sparks, Major, Kerner, Minton, Lindley, Briggle.

Eighth Circuit: Sanborn, Woodrough, Thomas, Johnsen, Riddick.

Since *Falbo*, the only contrary views have been expressed by Judges Biggs and Leahy in the court below in No. 292.

Circuits. All, eight of them, have ruled that judicial review of a draft board classification is not available, in a criminal prosecution, even though the registrant has submitted to the pre-induction physical examination. *Sirski* v. *United States,* 145 F. 2d 749 (C. C. A. 1st, 1944); *United States* v. *Flakowicz,* 146 F. 2d 874 (C. C. A. 2d, 1945); *United States* v. *Estep,* 150 F. 2d 768 (C. C. A. 3d, 1945); *Smith* v. *United States,* 148 F. 2d 288 (C. C. A. 4th, 1945); *Koch* v. *United States,* 150 F. 2d 762 (C. C. A. 4th, 1945); *Fletcher* v. *United States,* 129 F. 2d 262 (C. C. A. 5th, 1942); *Klopp* v. *United States,* 148 F. 2d 659 (C. C. A. 6th, 1945); *United States* v. *Rinko,* 147 F. 2d 1 (C. C. A. 7th, 1945); *Gibson* v. *United States,* 149 F. 2d 751 (C. C. A. 8th, 1945).[2] Such was the impact of this Court's reasoning in the *Falbo* case that it greatly influenced the ruling of the Circuit Courts of Appeals as to the finality of local board orders and practically silenced whatever doubts may theretofore have been held by a few of the judges.

That it was during the crucial war years that the Act was thus interpreted and enforced, whereby the raising of the armed forces was saved from obstruction by not subjecting the Selective Process to judicial review when Congress forbade it, is of course no reason for misconstru-

[2] See, also, *United States* v. *Kauten,* 133 F. 2d 703 (C. C. A. 2d, 1943); *United States* v. *Nelson,* 143 F. 2d 584 (C. C. A. 2d, 1944); *United States* v. *Grieme,* 128 F. 2d 811 (C. C. A. 3d, 1942); *United States* v. *Bowles,* 131 F. 2d 818 (C. C. A. 3d, 1942), *aff'd on other grounds,* 319 U. S. 33; *Goodrich* v. *United States,* 146 F. 2d 265 (C. C. A. 5th, 1944); *United States* v. *Mroz,* 136 F. 2d 221 (C. C. A. 7th, 1943); *United States* v. *Messersmith,* 138 F. 2d 599 (C. C. A. 7th, 1943); *United States* v. *Daily,* 139 F. 2d 7 (C. C. A. 7th, 1943); *United States* v. *Sauler,* 139 F. 2d 173 (C. C. A. 7th, 1944); *United States* v. *Van Den Berg,* 139 F. 2d 654 (C. C. A. 7th, 1944); *United States* v. *Fratrick,* 140 F. 2d 5 (C. C. A. 7th, 1944); *United States* v. *Baxter,* 141 F. 2d 359 (C. C. A. 7th, 1944); *United States* v. *Domres,* 142 F. 2d 477 (C. C. A. 7th, 1944); *Bronemann* v. *United States,* 138 F. 2d 333 (C. C. A. 8th, 1943); *Van Bibber* v. *United States,* 151 F. 2d 444 (C. C. A. 8th, 1945).

ing it now and relaxing the mode of administration which Congress deemed necessary for its effectiveness.

Congress not only so willed but those especially entrusted with formulating this legislation were fully aware of the judicial consequences of what it prescribed. This is shown by an authoritative report of the House Committee on Military Affairs when that Committee, the originator of the Act, was considering amendments on renewal of the Act. In its report in January, 1945, more than four years after the Act had been in operation, the Committee thus stated with accuracy and acquiescence the unanimity of judicial decisions in support of the respect by the judiciary of finality of the decisions of the draft board:

> "Under the act as it is now written, registrants who are ordered to submit to induction into the armed forces may not refuse and defend such refusals in a criminal prosecution on the ground that their classifications were not given fair consideration by their boards. In order to obtain a judicial determination of such issues such registrants must first submit to induction and raise the issue by habeas corpus." H. R. Rep. No. 36, 79th Cong., 1st Sess. (1945) 4–5.

Congress wanted men to get into the army, not to litigate about getting in. And so it legislated on the assumption that its carefully devised scheme for determining within the Selective Service System, who was under duty to serve in the army would go awry too seldom to justify allowance of review by the courts. If challenges to such determination by the Selective Service System were found baseless, as they were so found as a matter of experience in all but a negligible number of instances, the men having submitted to induction would be in the army, available as such, and not in prison for disobedience. Accordingly, Congress legislated to discourage obstruction and delay through dilatory court proceedings that would

have been inevitable if judicial review of classification had been afforded during the war years.

The Court finds support for its reading that "final" does not mean final in the fact that not even at a time of our greatest national emergency was the writ of *habeas corpus* withdrawn as the ultimate safeguard of personal liberty. See U. S. Constitution, Art. I, § 9, cl. 2; 1 Stat. 81, as amended, 28 U. S. C. § 451. But this general right to question the entire want of a legal foundation for a restraint is no measure of the issues that Congress left open for determination in a jury trial for disobedience of orders of the local draft boards made "final" by § 10 (a) (2). Still less can it justify nullification of an explicit direction by Congress that such orders shall finally be determined within the framework of the Selective Service System. The issues in a *habeas corpus* proceeding are quickly joined, strictly limited and swiftly disposed of by a single judge. See 14 Stat. 385; 28 U. S. C. § 465. *Habeas corpus* proceedings are freed from the cumbersomeness which is a proper price to pay for the countervailing advantages of jury trials in appropriate situations. *Habeas corpus* "comes in from the outside," after regular proceedings formally defined by law have ended, "not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell." Holmes, J., dissenting in *Frank* v. *Mangum*, 237 U. S. 309, 346. *Habeas corpus*, after conviction, could not, of course, serve as a revisory process of the determination of classification which Congress lodged with finality in the draft boards. It could only be used in those hardly conceivable situations in which the proceedings before the draft board were a mere sham, "nothing but an empty form." *Ibid.* The availability in such a remote contingency of *habeas corpus* even after conviction is certainly no reason for deflecting and confusing a trial for the simple issue defined by § 11,

namely, whether there was a wilful disregard of an order made by the Selective Service System, a system ranging from the local board to the President. It is one thing for the writ of *habeas corpus* to be available even though an administrative action may otherwise be "final." See *e. g.*, *Ng Fung Ho* v. *White*, 259 U. S. 276. It is quite another to interpolate judicial review and thereby to disrupt a whole scheme of legislation under which millions of orders need promptly to be made and promptly to be respected and were therefore endowed with finality when sanctions for disobedience are sought.

Another ground for denying the evident purpose of Congress and disregarding the terms in which it expressed that purpose, is the suggestion that the validity of a classification goes to the "jurisdiction of the board" to issue an order to report for induction. But Congress did not say that "the decision of such local boards *when properly acting under their authority* shall be final." It said simply and unqualifiedly "The decisions of such local boards shall be final . . ." To be sure local boards are given power to act "within their respective jurisdictions." But all agencies upon which Congress confers authority have such authority impliedly only "within their respective jurisdictions." If that inherent limitation opened the door to review of their action in every enforcement proceeding despite provisions for finality, a provision of finality is meaningless.

This argument revives, if indeed it does not multiply, all the casuistic difficulties spawned by the doctrine of "jurisdictional fact." In view of the criticism which that doctrine, as sponsored by *Crowell* v. *Benson*, 285 U. S. 22, brought forth and of the attritions of that case through later decisions, one had supposed that the doctrine had earned a deserved repose. In withholding judicial review in the situations with which we are concerned, Congress was acting upon the conviction that it was dealing with

matters which were more fittingly lodged in the exclusive discretion of the Selective Service System. Even in cases of far less exigency, Congress has chosen to act on such a view. See, *e. g., Gray* v. *Powell,* 314 U. S. 402; *Final Report of the Attorney General's Committee on Administrative Procedure* (1941) 86. But the short answer to any claim of reviewability drawn from the confinement of the local boards to action "within their respective jurisdictions" is that Congress was concerned with geography and not with law. Throughout this Act, the term "jurisdiction" has this geographic connotation. Is it reasonable to believe that Congress, bent on creating a vast armed force as quickly as possible, would in effect authorize every order of the Selective Service System to be reconsidered upon trials for disregard of such orders? The Act does not differentiate between the power of the board to allow exemptions and its power to grant deferments. The boards were invested with final authority to determine such matters subject only to such review as the Act authorizes. When Congress talked about a board acting within its jurisdiction it meant that a registrant had submitted his papers to a board either because he resided within its area or for some other relevant reason had registered with it.

For five years the circuit courts of appeals have construed § 10 (a) (2) to mean that Congress established a system for organizing a vast citizen's army, the selection of which shall be in civilian boards with such control over them as the President may formulate. Designed obstruction of this means of meeting the great emergency was made an offense. That the Congress had the Constitutional power to do so needs no argument at this late date. See *Selective Draft Law Cases,* 245 U. S. 366; *Hirabayashi* v. *United States,* 320 U. S. 81, 93. And yet the Court today holds that eight circuit courts of appeals were wrong in reading the language of Congress as Congress wrote it,

even though in doing so these courts were respectful of the considerations that moved Congress to write the Act as it did in order to raise that army. If this be so, not only were they wrong, but probably hundreds of convictions for disobedience of local board orders based on such regard for what Congress had written, were invalid.

II.

Since Congress has made final the decision of a local board on a claim of exemption, its decision as to exemption cannot be reopened upon a trial for disobedience of the board's order. But Congress also authorized an appeal from the local board to an appeal board and ultimately to the President. Congress has not given to the local board authority to decide when such statutory rights of appeal may be availed of, nor to make "final" unwarranted action by a board whereby such appeal is frustrated. Cf. *Tung* v. *United States*, 142 F. 2d 919 (C. C. A. 1st, 1944). Accordingly, if a registrant does not obey an order of induction because the board has cut off the opportunity which the statute gives him to appeal to higher authority, his obligation of obedience has not yet matured. Therefore he has not failed to discharge his obligation under the Act. The duty to obey is not merely a duty to obey an order of the draft board, but to obey such an order after it is no longer subject to review within the Selective Service System. "The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe." Estep made the claim that he was effectively denied the right to appeal in addition to his inadmissible defense that the local board classified him improperly. He offered to prove that for all practical purposes the local board frustrated his right to have his case go to the appeal board, in violation of the board's duty under the Act and the Regulations. Estep should have been allowed to make

proof of this claim by appropriate motion to be disposed of by the court. As in situations of comparable legal significance, a trial court may, of course, leave controverted issues of fact to the jury.

Another issue is presented by the petitioner in No. 66. The indictment alleges a failure to report for induction. While the petitioner did not report at the local board as he was ordered to do, he was forcibly taken to the induction center and went through the pre-induction physical examination but subsequently refused to submit to induction. An order to report for induction, as we said in *Billings* v. *Truesdell,* "includes a command to submit to induction." 321 U. S., at 557; *United States* v. *Collura,* 139 F. 2d 345 (C. C. A. 2d, 1943). There is, however, basis for the petitioner's contention that the case was tried and submitted to the jury on the theory that he failed to show up at his local board. He substantially complied with that request by being at the induction center for examination. The trial court's charge is at best ambiguous. The court more than once apparently charged not that he did not submit to induction, but that he failed to appear voluntarily at the induction points. "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Bollenbach* v. *United States,* 326 U. S. 607. On this ground the conviction is properly reversed.

MR. JUSTICE BURTON, with whom MR. CHIEF JUSTICE STONE concurs, dissenting.

The CHIEF JUSTICE and I think that the judgment of conviction in these cases should be affirmed for reasons stated in Part I of MR. JUSTICE FRANKFURTER'S opinion.

We think that under § 10 (a) (2) of the Selective Service Act, rightly construed, the registrant is required, on pain of criminal penalties, to obey the local board's order to report for induction into the armed forces, even though the board's order or the action of the appeal board on

which it is based, is erroneous. "In order to obtain a judicial determination of such issues such registrants must first submit to induction and raise the issue by habeas corpus." H. Rep. No. 36, 79th Cong., 1st Sess. (1945) 5. It follows that if the registrant is indicted for disobedience of the board's order he cannot defend on the ground that the draft procedure has not been complied with or, if convicted, secure his release on that ground by resort to habeas corpus. The result is that such relief is open to him only if he obeys the order and submits to induction, when he is free to seek habeas corpus.

We do not find in the record of either case sufficient basis for reversal thereof on the grounds suggested in Part II of MR. JUSTICE FRANKFURTER'S opinion.

HANNEGAN, POSTMASTER GENERAL, *v.* ESQUIRE, INC.

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

No. 399. Argued January 11, 1946.—Decided February 4, 1946.

1. Section 14 of the Classification Act of 1879 provides that, in order to be admitted as second-class mail, a publication "must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts . . ." *Held* that, under this provision, the Postmaster General is without power to prescribe standards for the literature or the art which a mailable periodical (not obscene) disseminates, or to determine whether the contents of the periodical meet some standard of the public good or welfare. Pp. 148, 158.
2. A purpose on the part of Congress to grant the Postmaster General a power of censorship—a power so abhorrent to our traditions—is not lightly to be inferred. P. 151.
3. When read in the context of the postal laws of which it is an integral part, the provisions of § 14 must be taken as establishing standards which relate to the format of the publication and to the nature of its contents, but not to their quality, worth, or value. P. 152.

In that view, "literature" and the "arts" mean no more than productions which convey ideas by words, pictures, or drawings. P. 153.

151 F. 2d 49, affirmed.

In a suit by the respondent to enjoin the Postmaster General from carrying into effect an order revoking respondent's second-class-mail permit, the district court denied the injunction and dismissed the complaint. The Court of Appeals for the District of Columbia reversed. 151 F. 2d 49. This Court granted certiorari. 326 U. S. 708. *Affirmed,* p. 159.

Marvin C. Taylor argued the cause for petitioner. With him on the brief were *Solicitor General McGrath, Assistant Attorney General Sonnett* and *Vincent M. Miles.*

Bruce Bromley argued the cause for respondent. With him on the brief were *Morris L. Ernst* and *Harriet F. Pilpel.*

Briefs were filed by the following as *amici curiae,* in support of respondent: *James W. Stites, George Roberts* and *Whitney North Seymour; Elisha Hanson* for the American Newspaper Publishers Association; *Francis H. Scheetz* and *Arthur H. Clephane* for the Curtis Publishing Company; *Robert E. Coulson* and *William R. Sherwood* for the Reader's Digest Association, Inc.; *Sidney R. Fleisher* for the Authors' League of America, Inc.; and *Charles Horsky, Arthur Dehon Hill, Luther Ely Smith* and *Arthur Garfield Hays* for the American Civil Liberties Union.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Congress has made obscene material nonmailable (35 Stat. 1129, 18 U. S. C. § 334), and has applied criminal sanctions for the enforcement of that policy. It has

divided mailable matter into four classes, periodical publications constituting the second-class.[1] § 7 of the Classification Act of 1879, 20 Stat. 358, 43 Stat. 1067, 39 U. S. C. § 221. And it has specified four conditions upon which a publication shall be admitted to the second-class. § 14 of the Classification Act of 1879, 20 Stat. 359, 48 Stat. 928, 39 U. S. C. § 226. The Fourth condition, which is the only one relevant here,[2] provides:

> "Except as otherwise provided by law, the conditions upon which a publication shall be admitted to the second class are as follows . . . Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers. Nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

Respondent is the publisher of Esquire Magazine, a monthly periodical which was granted a second-class permit in 1933. In 1943, pursuant to the Act of March 3, 1901, 31 Stat. 1107, 39 U. S. C. § 232, a citation was issued

---

[1] "That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the conditions named in sections twelve and fourteen." § 10 of the Classification Act of 1879, 20 Stat. 359, 39 U. S. C. § 224. For other periodical publications which are included in second-class matter, see 37 Stat. 550, 39 U. S. C. § 229; 31 Stat. 660, 39 U. S. C. § 230.

[2] The first three conditions are:

> "First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively. Second. It must be issued from a known office of publication. Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications: *Provided*, That publications produced by the stencil, mimeograph, or hectograph process or in imitation of typewriting shall not be regarded as printed within the meaning of this clause."

to respondent by the then Postmaster General (for whom the present Postmaster General has now been substituted as petitioner) to show cause why that permit should not be suspended or revoked.[3] A hearing was held before a board designated by the then Postmaster General.[4] The board recommended that the permit not be revoked. Petitioner's predecessor took a different view. He did not find that Esquire Magazine contained obscene material and therefore was nonmailable. He revoked its second-class permit because he found that it did not comply with the Fourth condition. The gist of his holding is contained in the following excerpt from his opinion:

> "The plain language of this statute does not assume that a publication must in fact be 'obscene' within the intendment of the postal obscenity statutes before it can be found not to be 'originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry.'
>
> "Writings and pictures may be indecent, vulgar, and risque and still not be obscene in a technical sense. Such writings and pictures may be in that obscure and treacherous borderland zone where the average person hesitates to find them technically obscene, but still may see ample proof that they are morally improper and not for the public welfare and the public good. When such writings or pictures occur in isolated instances their dangerous tendencies and malignant qualities may be considered of lesser importance.
>
> "When, however, they become a dominant and systematic feature they most certainly cannot be said to be for the public good, and a publication which uses them in that manner is not making the 'special con-

[3] Sec. 1 of that Act provides:

> "When any publication has been accorded second-class mail privileges, the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested."

[4] See 7 Fed. Reg. 3001.

tribution to the public welfare' which Congress intended by the Fourth condition.

"A publication to enjoy these unique mail privileges and special preferences is bound to do more than refrain from disseminating material which is obscene or bordering on the obscene. It is under a positive duty to contribute to the public good and the public welfare."

Respondent thereupon sued in the District Court for the District of Columbia to enjoin the revocation order. The parties stipulated at a pre-trial conference that the suit would not be defended on the ground that Esquire Magazine was obscene or was for any other reason nonmailable.[5] The district court denied the injunction and dismissed the complaint. 55 F. Supp. 1015. The court of appeals reversed. 151 F. 2d 49. The case is here on a petition for a writ of certiorari which we granted because of the importance of the problem in the administration of the postal laws.

The issues of Esquire Magazine under attack are those for January to November, inclusive, of 1943. The material complained of embraces in bulk only a small percentage of those issues.[6] Regular features of the magazine (called "The Magazine for Men") include articles on topics of current interest, short stories, sports articles or stories, short articles by men prominent in various fields of activities, articles about men prominent in the news, a book review department headed by the late William Lyon Phelps, a theatrical department headed by George Jean Nathan, a department on the lively arts by Gilbert Seldes, a department devoted to men's clothing, and pictorial features, including war action paintings, color photographs of dogs and water colors or etchings of game

[5] It was not contended that Esquire Magazine does not comply with the first three conditions of 39 U. S. C. § 226, set forth in note 2, *supra*.

[6] Items taking up a part or all of 86 pages out of a total of 1,972 pages.

birds and reproductions of famous paintings, prints and drawings. There was very little in these features which was challenged. But petitioner's predecessor found that the objectionable items, though a small percentage of the total bulk, were regular recurrent features which gave the magazine its dominant tone or characteristic. These include jokes, cartoons, pictures, articles, and poems. They were said to reflect the smoking-room type of humor, featuring, in the main, sex. Some witnesses found the challenged items highly objectionable, calling them salacious and indecent. Others thought they were only racy and risque. Some condemned them as being merely in poor taste. Other witnesses could find no objection to them.

An examination of the items makes plain, we think, that the controversy is not whether the magazine publishes "information of a public character" or is devoted to "literature" or to the "arts." It is whether the contents are "good" or "bad." To uphold the order of revocation would, therefore, grant the Postmaster General a power of censorship. Such a power is so abhorrent to our traditions that a purpose to grant it should not be easily inferred.

The second-class privilege is a form of subsidy.[7] From the beginning Congress has allowed special rates to certain classes of publications. The Act of February 20, 1792, 1 Stat. 232, 238, granted newspapers a more favorable rate. These were extended to magazines and pamphlets by the Act of May 8, 1794, 1 Stat. 354, 362. Prior to the Classification Act of 1879, periodicals were put into the second-class,[8] which by the Act of March 3, 1863, 12 Stat.

[7] It was found to be worth $500,000 a year to Esquire Magazine. "A newspaper editor fears being put out of business by the administrative denial of the second-class mailing privilege much more than the prospect of prison subject to a jury trial." Chafee, Freedom of Speech (1920), p. 199.

[8] Rates on periodicals, designed primarily for advertising purposes or for free circulation, were increased by the Act of July 12, 1876, 19 Stat. 78, 82.

701, 705, included "all mailable matter exclusively in print, and regularly issued at stated periods, without addition by writing, mark, or sign." That Act plainly adopted a strictly objective test and left no discretion to the postal authorities to withhold the second-class privilege from a mailable newspaper or periodical because it failed to meet some standard of worth or value or propriety. There is nothing in the language or history of the Classification Act of 1879 which suggests that Congress in that law made any basic change in its treatment of second-class mail, let alone such an abrupt and radical change as would be entailed by the inauguration of even a limited form of censorship.

The postal laws make a clear-cut division between mailable and nonmailable material. The four classes of mailable matter are generally described by objective standards which refer in part to their contents, but not to the quality of their contents.[9] The more particular descriptions of the first,[10] third,[11] and fourth [12] classes follow the same

[9] Sec. 7 of the Classification Act of 1879, as amended, 39 U. S. C. § 221, provides:

"Mailable matter shall be divided into four classes:
"First, written matter;
"Second, periodical publications;
"Third, miscellaneous printed matter and other mailable matter not in the first, second, or fourth classes;
"Fourth, merchandise and other mailable matter weighing not less than eight ounces and not in any other class."

[10] *First class.* "Mailable matter of the first class shall embrace letters, postal cards, and all matters wholly or partly in writing . . ." 39 U. S. C. § 222.

[11] *Third class.* "Mail matter of the third class shall include books, circulars, and other matter wholly in print (except newspapers and other periodicals entered as second-class matter), proof sheets, corrected proof sheets, and manuscript copy accompanying same, merchandise (including farm and factory products) and all other mailable matter not included in the first or second class, or in the fourth class . . ." 39 U. S. C. § 235.

[12] *Fourth class.* "Mail matter of the fourth class shall weigh in excess of eight ounces, and shall include books, circulars, and other matter wholly in print (except newspapers and other periodicals entered as

pattern, as do the first three conditions specified for second-class matter.[13] If, therefore, the Fourth condition is read in the context of the postal laws of which it is an integral part, it, too, must be taken to supply standards which relate to the format of the publication and to the nature of its contents, but not to their quality, worth, or value. In that view, "literature" or the "arts" mean no more than productions which convey ideas by words, pictures, or drawings.

If the Fourth condition is read in that way, it is plain that Congress made no radical or basic change in the type of regulation which it adopted for second-class mail in 1879. The inauguration of even a limited type of censorship would have been such a startling change as to have left some traces in the legislative history. But we find none. Congressman Money, a member of the Postal Committee who defended the bill on the floor of the House, stated that it was "nothing but a simplification of the postal code. There are no new powers granted to the Department by this bill, none whatever." 8 Cong. Rec. 2134. The bill contained registration provisions which were opposed on the ground that they might be the inception of a censorship of the press. *Id.*, p. 2137. These were deleted. *Id.*, pp. 2137, 2138. It is difficult to imagine that the Congress, having deleted them for fear of censorship, gave the Postmaster General by the Fourth

---

second-class matter), proof sheets, corrected proof sheets and manuscript copy accompanying same, merchandise (including farm and factory products), and all other mailable matter not included in the first or second class, or in the third class as defined in section 235 of this title, not exceeding eleven pounds in weight, nor greater in size than seventy-two inches in length and girth combined, nor in form or kind likely to injure the person of any postal employee or damage the mail equipment or other mail matter and not of a character perishable within a period reasonably required for transportation and delivery." 39 U. S. C. § 240.

[13] See note 2, *supra*.

condition discretion to deny periodicals the second-class rate, if in his view they did not contribute to the public good. Congressman Money indeed referred to "the daily newspapers, with their load of gossip and scandal and every-day topics that are floating through the press" as being entitled without question to the second-class privilege. *Id.*, p. 2135. To the charge that the bill imposed a censorship, he pointed out that it only withheld the privileged rate from publications "made up simply of advertising concerns not intended for public education"; and added:

> "We know the reason for which papers are allowed to go at a low rate of postage, amounting almost to the franking privilege, is because they are the most efficient educators of our people. It is because they go into general circulation and are intended for the dissemination of useful knowledge such as will promote the prosperity and the best interests of the people all over the country. Then all this vast mass of matter is excluded from that low rate of postage. I say, instead of being a censorship upon the press, it is for the protection of the legitimate journals of the country." *Id.*, p. 2135.

The policy of Congress has been clear. It has been to encourage the distribution of periodicals which disseminated "information of a public character" or which were devoted to "literature, the sciences, arts, or some special industry," because it was thought that those publications as a class contributed to the public good.[14] The standards prescribed in the Fourth condition have been criticized, but not on the ground that they provide for censorship.[15] As stated by the Postal Commission of 1911, H. Doc. 559, 62d Cong., 2d Sess., p. 142:

---

[14] See *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288, 301; Annual Report of Postmaster General (1892), p. 71.

[15] See Report of the Postal Commission of 1906, H. Doc. 608, 59th Cong., 2d Sess., pp. xxxvi–xxxvii:

> "But in what way can it be said that a requirement that a certain printed matter should be 'devoted to literature' serves to mark it

"The original object in placing on second-class matter a rate far below that on any other class of mail was to encourage the dissemination of news and of current literature of educational value. This object has been only in part attained. The low rate has helped to stimulate an enormous mass of periodicals, many of which are of little utility for the cause of popular education. Others are of excellent quality, but the experience of the post office has shown the impossibility of making a satisfactory test based upon literary or educational values. To attempt to do so would be to set up a censorship of the press. Of necessity the words of the statute—'devoted to literature, the sciences, arts, or some special industry'—must have a broad interpretation."

We may assume that Congress has a broad power of classification and need not open second-class mail to publications of all types. The categories of publications entitled to that classification have indeed varied through the years.[16] And the Court held in *Ex parte Jackson,* 96 U. S. 727, that Congress could constitutionally make it a

---

off from anything else that can be put into print. There is practically no form of expression of the human mind that can not be brought within the scope of 'public information,' 'literature, the sciences, art, or some special industry.' It would have been just as effective and just as reasonable for the statute to have said, 'devoted to the interests of humanity,' or 'devoted to the development of civilization,' or 'devoted to human intellectual activity.'

"The prime defect in the statute is, then, that it defines not by qualities but by purposes, and the purpose described is so broad as to include everything and exclude nothing.

"With the exception of a few instances where the publication has been excluded because the information was deemed not to be public, no periodical has ever been classified by the application of tests of this kind. Any attempt to apply them generally would simply end in a press censorship."

[16] As we have seen, the Fourth condition bars admission to second-class privileges of publications "designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates." Publications of state departments of agriculture were not granted the special rate until the Act of June 6, 1900, 31 Stat. 660, 39 U. S. C. § 230. And that was not done for publications of benevolent and fra-

crime to send fraudulent or obscene material through the mails. But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. See the dissents of Mr. Justice Brandeis and Mr. Justice Holmes in *Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407, 421–423, 430–432, 437–438. Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated. The provisions of the Fourth condition would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions [17] and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country.[18]

---

ternal societies, of institutions of learning, trade unions, strictly professional, literary, historical and scientific societies until the Act of August 24, 1912, 37 Stat. 550, 39 U. S. C. § 229.

[17] See Deutsch, Freedom of the Press and of the Mails, 36 Mich. L. Rev. 703, 715–727.

[18] When Congress has been concerned with the content of matter passing through the mails, it has enacted criminal statutes making, for example, obscene material (35 Stat. 1129, 18 U. S. C. § 334), fraudulent material (35 Stat. 1130, 18 U. S. C. § 338), and seditious literature (40 Stat. 230, 18 U. S. C. § 344) nonmailable in any class. And it has granted the Postmaster General power to refuse to deliver mail for any person whom he finds to be using the mails in conducting lotteries or fraudulent schemes. Rev. Stat. 3929, 39 U. S. C. § 259.

But that power has been zealously watched and strictly confined. See, for example, S. Doc. 118, 24th Cong., 1st Sess., reporting adversely on the recommendation of President Jackson that a law be passed prohibiting the use of the mails for the transmission of publications intended to instigate the slaves to insurrection. It was said, p. 3:

> "But to understand more fully the extent of the control which the right of prohibiting circulation through the mail would give to the Government over the press, it must be borne in mind, that the power of Congress over the Post Office and the mail is an exclusive power. It must also be remembered that Congress, in the exercise of this power, may declare any road or navigable water to be a post road; and that, by the act of 1825, it is pro-

It is plain, as we have said, that the favorable second-class rates were granted periodicals meeting the requirements of the Fourth condition, so that the public good might be served through a dissemination of the class of periodicals described. But that is a far cry from assuming that Congress had any idea that each applicant for the second-class rate must convince the Postmaster General that his publication positively contributes to the public good or public welfare. Under our system of government there is an accommodation for the widest varieties of tastes and ideas.[19] What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. There doubtless would be a contrariety of views [20] concerning Cervantes' Don Quixote,

vided 'that no stage, or other vehicle which regularly performs trips on a post road, or on a road parallel to it, shall carry letters.' The same provision extends to packets, boats, or other vessels, on navigable waters. Like provision may be extended to newspapers and pamphlets; which, if it be admitted that Congress has the right to discriminate in reference to their character, what papers shall or what shall not be transmitted by the mail, would subject the freedom of the press, on all subjects, political, moral, and religious, completely to its will and pleasure. It would, in fact, in some respects, more effectually control the freedom of the press than any sedition law, however severe its penalties. The mandate of the Government alone would be sufficient to close the door against circulation through the mail, and thus, at its sole will and pleasure, might intercept all communication between the press and the people . . ."

[19] "The foolish judgments of Lord Eldon about one hundred years ago, proscribing the works of Byron and Southey, and the finding by the jury under a charge by Lord Denman that the publication of Shelley's 'Queen Mab' was an indictable offense are a warning to all who have to determine the limits of the field within which authors may exercise themselves." *United States* v. *One Book Entitled Ulysses*, 72 F. 2d 705, 708.

[20] In the present case petitioner's predecessor said in his report:

"when the polls of public opinion submitted by the publication are examined, it is found that these pictures were characterized as obscene or indecent by 19 to 22% of the persons interviewed, and that 20 to 26% of the persons polled would object to having them in their homes."

Shakespeare's Venus and Adonis, or Zola's Nana. But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system. The basic values implicit in the requirements of the Fourth condition can be served only by uncensored distribution of literature. From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values. But to withdraw the second-class rate from this publication today because its contents seemed to one official not good for the public would sanction withdrawal of the second-class rate tomorrow from another periodical whose social or economic views seemed harmful to another official. The validity of the obscenity laws is recognition that the mails may not be used to satisfy all tastes, no matter how perverted. But Congress has left the Postmaster General with no power to prescribe standards for the literature or the art which a mailable periodical disseminates.

This is not to say that there is nothing left to the Postmaster General under the Fourth condition. It is his duty to "execute all laws relative to the Postal Service." Rev. Stat. § 396, 5 U. S. C. § 369. For example, questions will arise as they did in *Houghton* v. *Payne,* 194 U. S. 88; *Bates & Guild Co.* v. *Payne,* 194 U. S. 106, and *Smith* v. *Hitchcock,* 226 U. S. 53, whether the publication which seeks the favorable second-class rate is a periodical as defined in the Fourth condition or a book or other type of publication. And it may appear that the information contained in a periodical may not be of a "public character." But the power to determine whether a periodical (which is mailable) contains information of a public character, literature or art does not include the further power

to determine whether the contents meet some standard of the public good or welfare.

Affirmed.

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

MR. JUSTICE FRANKFURTER, concurring.

The case lies within very narrow confines. The publication under scrutiny is a periodical. It is therefore entitled to the special rates accorded by Congress provided it is published "for the dissemination of information of a public character, or devoted to literature, the sciences, arts . . ." If it be devoted to "literature" it becomes unnecessary to consider how small an infusion of "information of a public character" entitles a periodical to the second-class mail rates when the bulk of its contents would not otherwise satisfy the Congressional conditions.

Congress has neither defined its conception of "literature" nor has it authorized the Postmaster General to do so. But it has placed a limitation upon what is to be deemed "literature" for a privilege which the Court rightly calls a form of subsidy. Matters that are declared nonmailable (Criminal Code § 211; 35 Stat. 1129, 36 Stat. 1339; 18 U. S. C. § 334) are of course not "literature" within the scope of the second-class privilege. But the Postmaster General does not contend that the periodical with which we are concerned was nonmailable. He merely contends that it was not devoted to the kind of "literature" or "art" which may claim the subsidy of second-class matter. But since Congress has seen fit to allow "literature" conveyed by periodicals to have the second-class privilege without making any allowable classification of "literature," except only that nonmailable matter as defined by § 211 of the Criminal Code is excluded, the

area of "literature, the sciences, arts" includes all composition of words, pictorial representation, or notations that are intelligible to any portion of the population, no matter whether their appeal is extensive or esoteric. Since the Postmaster General disavows the nonmailability of the issues of the periodical he had before him and since Congress did not qualify "literature, the sciences, arts" by any standards of taste or edification or public elevation, the Postmaster General exceeded his powers in denying this periodical a second-class permit.

It seems to me important strictly to confine discussion in this case because its radiations touch, on the one hand, the very basis of a free society, that of the right of expression beyond the conventions of the day, and, on the other hand, the freedom of society from constitutional compulsion to subsidize enterprise, whether in the world of matter or of mind. While one may entirely agree with Mr. Justice Holmes, in *Leach* v. *Carlile,* 258 U. S. 138, 140, as to the extent to which the First Amendment forbids control of the post so far as sealed letters are concerned, one confronts an entirely different set of questions in considering the basis on which the Government may grant or withhold subsidies through low postal rates, and huge subsidies, if one is to judge by the glimpse afforded by the present case. It will be time enough to consider such questions when the Court cannot escape decision upon them.

MEYER *v.* FLEMING ET AL., TRUSTEES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 392. Argued January 4, 1946.—Decided February 4, 1946.

1. Petitioner, owner of a substantial number of shares of stock in a corporation, filed on behalf of the corporation a claim (in the nature of a derivative suit) against a debtor in reorganization proceedings under § 77 of the Bankruptcy Act. Subsequently a petition of the corporation for reorganization under § 77 was filed and approved, and a trustee was appointed. *Held:*
   (a) The bankruptcy court should allow the claim to be amended by joining the corporation or its trustee. P. 172.
   (b) If prosecution of the claim will be inconsistent with the plan of reorganization of the corporation or the administration of its affairs, the claim should be disallowed; if not, then the claim should be considered on its merits. P. 172.
2. The "exclusive jurisdiction" granted the reorganization court by § 77 (a) is that which bankruptcy courts have customarily possessed; and the title and powers of the trustee are by § 77 (c) (2) assimilated to those of trustees in ordinary bankruptcy proceedings. P. 164.
3. So far as enforcement of claims is concerned, there is no indication that Congress adopted a different rule in proceedings under § 77 than had long obtained in ordinary bankruptcy proceedings. P. 164.
4. Litigation commenced by or on behalf of a corporation may not be defeated by supervening proceedings for reorganization of the corporation under § 77 of the Bankruptcy Act. P. 165.
5. The trustee, being in a position to take control of the litigation by reason of the fact that the cause of action has become a part of the estate, should have the opportunity to make the choice—of permitting the suit to continue without interference; of intervening in it; of starting a new suit; or of causing the suit to be abated—which is most advantageous to the estate. P. 167.
6. Since the claim in this case was filed before the petition of the corporation for reorganization under § 77 was approved, that event should have no different effect on the claim than it would have had on a suit which had been previously instituted by or on behalf of the corporation. P. 169.

7. Where a claim on behalf of a corporation is filed in a reorganization proceeding, the necessary and proper procedure is for the reorganization court to summon in the corporation or its trustee, so that all parties will be bound by any order which is entered on the merits. P. 170.
8. Continuation of the prosecution of the claim by the petitioner might be wholly compatible with the disposition of the claim by the reorganization court or with the administration of the estate. Pp. 171, 172.

149 F. 2d 529, reversed.

In a reorganization proceeding under § 77 of the Bankruptcy Act, a claim of the petitioner was disallowed. The circuit court of appeals affirmed. 149 F. 2d 529. This Court granted certiorari. 326 U. S. 707. *Reversed and remanded,* p. 172.

Walter E. Meyer argued the cause and filed a brief, *pro se.*

William Stanley argued the cause for respondents. With him on the brief was *W. F. Peter.*

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner is the owner of a substantial number of shares of stock of the St. Louis Southwestern Railway Company. In April 1934 he filed a claim for the benefit of St. Louis Southwestern in the bankruptcy proceedings which previously had been instituted under § 77 of the Bankruptcy Act (49 Stat. 911, 11 U. S. C. § 205) for the reorganization of the Chicago, Rock Island & Pacific Railway Co. The claim filed was a claim for a cause of action which St. Louis Southwestern allegedly had against the Rock Island. It amounted to many millions of dollars and arose out of an alleged conspiracy between the Rock Island and others to control the St. Louis Southwestern to their own interest, in breach of their fiduciary relationship to St. Louis Southwestern, and in violation

of the antitrust laws. It was stated in the claim that a demand on the board of directors of St. Louis Southwestern to file the claim was not made because it would be futile, the dominant stockholder and the directors of St. Louis Southwestern being parties to the conspiracy. In May 1935 the trustees of Rock Island objected to the claim by general denial. In December 1935—about a year and a half after the claim had been filed—St. Louis Southwestern filed a petition for reorganization under § 77 of the Bankruptcy Act. Shortly thereafter the petition was approved and a trustee was appointed. Thereupon the trustees of Rock Island further objected to the claim filed by petitioner on the ground that all causes of action belonging to St. Louis Southwestern had become vested in its bankruptcy trustee and could no longer be asserted in the Rock Island proceeding by petitioner. The claim was referred to a special master who, in February 1942, filed his report, concluding that petitioner should not be allowed to prosecute the claim. Two years later the district court approved the special master's report and disallowed the claim. On appeal the circuit court of appeals affirmed. 149 F. 2d 529. The case is here on a petition for a writ of certiorari which we granted because the problem presented is an important one in bankruptcy law.

The circuit court of appeals held that a stockholders' derivative suit commenced before the corporation's petition under § 77 had been approved could not be continued thereafter without permission of the reorganization court. It relied on the provisions of § 77 which gave the reorganizing court exclusive jurisdiction of the debtor and its property [1] and which give a trustee appointed in those

[1] § 77 (a) provides in part:

"If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have

proceedings the title and powers of other bankruptcy trustees.[2] But the exclusive jurisdiction granted the reorganization court by § 77 (a) is that which bankruptcy courts have customarily possessed.[3] And the title and powers of the trustee are by § 77 (c) (2) assimilated to those of trustees in ordinary bankruptcy proceedings. Certainly, so far as the enforcement of claims is concerned, there is no indication that Congress adopted a different rule in proceedings under § 77 than had long obtained in ordinary bankruptcy proceedings. Yet, if the view of the circuit court of appeals were followed, any suit which had been brought by the corporation before its petition under § 77 had been approved would be defeated when that event happened. That is not the rule in ordi-

---

and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose. Process of the court shall extend to and be valid when served in any judicial district."

§ 77 (l) provides:

"In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

[2] § 77 (c) (2) provides in part:

"The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 44 of this Act or any other section of this Act, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding . . ."

[3] *Isaacs* v. *Hobbs Tie Co.*, 282 U. S. 734, 737–738; *Ex parte Baldwin*, 291 U. S. 610, 615; *Continental Illinois National Bank* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648, 682–684; *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 483. And see *Thompson* v. *Terminal Shares*, 104 F. 2d 1. Cf. *In re Standard Gas & Electric Co.*, 119 F. 2d 658, 661, arising under § 77B.

nary bankruptcy proceedings. And it would be a radical change in the law to write that rule into § 77.

Litigation instituted by a creditor may not be defeated merely by reason of the fact that he has become a bankrupt. *Thatcher* v. *Rockwell,* 105 U. S. 467, 469–470. Title to the claim vests, of course, in the bankruptcy trustee.[4] He is in position to take control of the litigation. He may, as indicated in *Johnson* v. *Collier,* 222 U. S. 538, 540, start a new suit [5] and cause the old one to be abated, or intervene in the old one [6] and obtain such benefits as it affords.[7] The choice may indeed be a valuable one. Rights might be lost if the earlier suit were abated. And the speculative nature of the litigation or the expense involved might indicate to the trustee that it was more provident for him not to intervene in the existing suit, nor to institute a new one, but to let the one which had been started

[4] Sec. 70 of the Bankruptcy Act, 52 Stat. 879, 11 U. S. C. § 110. The same is true under § 77 by reason of the provision in § 77 (c) (2), *supra* note 2.

[5] Sec. 11 (e) of the Bankruptcy Act, 11 U. S. C. § 29 (e), authorizes a receiver or trustee, within two years subsequent to the adjudication or within such further period of time as federal or state law permits, to institute proceedings in behalf of the estate upon any claim against which the statute of limitations had not expired at the time of the filing of the petition in bankruptcy.

This provision is applicable to proceedings under § 77 by reason of § 77 (l), set forth in *supra* note 1.

[6] Sec. 11 (c) of the Bankruptcy Act, 52 Stat. 849, 11 U. S. C. § 29 (c), provides that "A receiver or trustee may, with the approval of the court, be permitted to prosecute as receiver or trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him." This provision is likewise applicable to proceedings under § 77 (l), *supra* note 1.

[7] And see *Danciger* v. *Smith,* 276 U. S. 542; *Bluegrass Canning Co.* v. *Steward,* 175 F. 537, 543–544; *Paradise* v. *Vogtlandische Maschinen-Fabrik,* 99 F. 2d 53, 55; *Bennett* v. *Associated Theaters,* 247 Mich. 493, 496, 226 N. W. 239; *Griffin* v. *Mutual Life Ins. Co.,* 119 Ga. 664, 46 S. E. 870.

691100°—47——15

run its course.[8] As stated in *Johnson* v. *Collier, supra,* p. 540,

> "If, because of the disproportionate expense, or uncertainty as to the result, the trustee neither sues nor intervenes, there is no reason why the bankrupt himself should not continue the litigation. He has an interest in making the dividend for creditors as large as possible, and in some States the more direct interest of creating a fund which may be set apart to him as an exemption. If the trustee will not sue and the bankrupt cannot sue, it might result in the bankrupt's debtor being discharged of an actual liability. The statute indicates no such purpose, and if money or property is finally recovered, it will be for the benefit of the estate. Nor is there any merit in the suggestion that this might involve a liability to pay both the bankrupt and the trustee. The defendant in any such suit can, by order of the bankrupt court, be amply protected against any danger of being made to pay twice." [9]

---

[8] If the suit is continued by the bankrupt, the trustee is concluded by the judgment. *Eyster* v. *Gaff,* 91 U. S. 521, 524–525; *Paradise* v. *Vogtlandische Maschinen-Fabrik, supra* note 7, p. 55.

[9] As stated in *Van der Stegen* v. *Neuss, Hesslein & Co.,* 270 N. Y. 55, 59–60, 200 N. E. 577:

> "Again, the trustee in bankruptcy is not obliged to maintain or continue every cause of action which the bankrupt may have. He is not bound to accept burdensome property nor unprofitable contracts (*Atchison, T. & S. F. Ry. Co.* v. *Hurley,* 153 Fed. Rep. 503; affd., 213 U. S. 126), nor is he obliged to intervene in any action pending by or against the bankrupt. (*Kessler* v. *Herklotz,* 132 App. Div. 278; *Fleming* v. *Courtenay,* 98 Me. 401.) If a trustee does not take up the prosecution of a suit the defendant is not released even where the right of action is one that might have passed to the trustee. The bankrupt may continue the prosecution of the action. (*Griffin* v. *Mutual Life Ins. Co.,* 119 Ga. 664.) The relationship, therefore, between the bankrupt and his trustee is for one and the same purpose—to get out of the bankrupt's property and claims enough money to pay his debts and to relieve the bankrupt, through his discharge, from further responsibility."

The same rule obtains in equity receiverships.[10]

We see no reason why there should be a different rule in the case of stockholders' derivative suits. They are likewise suits to enforce a corporate claim. They are one of the remedies which equity designed for those situations where the management through fraud, neglect of duty or other cause declines to take the proper and necessary steps to assert the rights which the corporation has.[11] The stockholders are then allowed to take the initiative and institute the suit which the management should have started had it performed its duty. The corporation is a necessary party. *Davenport* v. *Dows,* 18 Wall. 626. Hence, it is joined as a defendant. But it is only nominally a defendant, since any judgment obtained against the real defendant runs in its favor. The reasons of policy for holding that ordinary suits to enforce a corporate claim are not abated when the corporation is adjudged a bankrupt or when a receiver is appointed are equally applicable here. The claim sought to be enforced in a derivative suit may be an important asset of the estate. It might be lost to the estate through the operation of statutes of limitations, if the trustee or receiver were required to start anew. As in case of ordinary suits to enforce corporate claims, he should be allowed a choice to let the suit continue under the stockholders' auspices; [12] to intervene in it; [13] to start a new suit; or, in case he deems it more provi-

[10] See *Missouri, K. & T. Trust Co.* v. *German National Bank,* 77 F. 117, 122–123; *Boston Elevated R. Co.* v. *Paul Boynton Co.,* 211 F. 812, 822–823; *Hartford Accident & Indemnity Co.* v. *Federal Bond & Mortgage Co.,* 59 F. 2d 950, 956. See 1 Clark on Receivers (2d ed., 1929) §§ 614, 615.

[11] Glenn, The Stockholder's Suit, 33 Yale L. Journ. 580.

[12] Cf. *American Steel Foundries* v. *Chicago, R. I. & P. R. Co.,* 231 F. 1003; *Seagrist* v. *Reid,* 171 App. Div. 755, 759, 157 N. Y. S. 979. And see 4 Cook on Corporations (8th ed., 1923) § 748.

[13] *Meyer* v. *Page,* 112 App. Div. 625, 627, 98 N. Y. S. 739; *Floyd* v. *Layton,* 172 N. C. 64, 89 S. E. 998.

dent from the point of view of the estate to make a settlement of the claim or to reserve it for the reorganized company, to cause it to be abated.[14] He might conclude that the more provident course was to let the suit continue without interference.[15] That decision might be dictated by the speculative nature of the suit and the expense involved, as *Johnson* v. *Collier, supra,* indicates. If the trustee will not sue and the stockholder cannot continue with the litigation, what might turn out to be a valuable claim might be lost to the estate, not only through the operation of statutes of limitations, but in cases like the present through a discharge of the debtor.[16] The point is that the trustee or receiver, being in a position to take control of the litigation by reason of the fact that the cause of action has become a part of the estate, should have the opportunity to make the choice which is most advantageous to the estate. Cf. *Thompson* v. *Magnolia Petroleum Co.,* 309 U. S. 478, 483. The fact that the corporation is nominally a defendant should not lead to any different result.[17] That gives the suit only a difference in form, not a difference in substance.

---

[14] Moreover, the stockholder's suit might so intimately affect the administration of the bankruptcy or receivership estate as to require that it be continued only under the auspices of the trustee or receiver. See *Adler* v. *Seaman,* 266 F. 828, 835–837; *Seaman* v. *McCulloch,* 8 F. 2d 820, 825–826.

[15] *In re National Republic Co.,* 109 F. 2d 167, 171; *McAnarney* v. *Lembeck,* 97 N. J. Eq. 361, 127 A. 197.

[16] Sec. 77 (f) provides for the discharge of the debtor "from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved . . ."

[17] But see *Coyle* v. *Skirvin,* 124 F. 2d 934, 937–938 (receivership). The provision in § 77 (j) empowering the court to "enjoin or stay the commencement or continuation of suits against the debtor until after final decree" obviously relates to suits where claims are asserted against the debtor, not where the debtor is made a nominal defendant for the purpose of obtaining a judgment in its favor.

We have in the present case not a stockholders' derivative suit filed before the bankruptcy of his corporation, but a claim filed in the bankruptcy proceedings of the alleged debtor (Rock Island) by a stockholder on behalf of his corporation, St. Louis Southwestern. If the claim were to be filed after the petition for the reorganization of St. Louis Southwestern had been approved, it could be done only with the consent of the bankruptcy court. For it has exclusive authority to determine how causes of action which have become a part of the bankruptcy estate shall be enforced. See *Porter* v. *Sabin,* 149 U. S. 473; *Klein* v. *Peter,* 284 F. 797. But since the claim was filed before the petition of St. Louis Southwestern under § 77 had been approved, no reason is apparent why that event should have a different effect on the claim than it would have had on a suit which had been previously instituted by or on behalf of the corporation. Indeed, the facts of this case emphasize the reason for giving the trustee an opportunity to choose what course to take. The claim was filed in April 1934, a year and a half prior to the time when the petition of St. Louis Southwestern under § 77 had been approved. We are told that the time for filing of claims against the Rock Island expired over eleven years ago. If the claim were now disallowed, the trustee of St. Louis Southwestern, if he desired to assert it, would be faced with the task of obtaining leave to file out of time.[18] There is, therefore, the same reason for allowing

[18] Sec. 77 (c) (7) provides that the judge "shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown . . ." This is the equity rule (5 Collier on Bankruptcy (1944) p. 537) which permits the filing of claims out of time provided the claim is equitable, the claimant is not chargeable with laches, and the assets have not been distributed (see *Conklin* v. *United States Shipbuilding Co.,* 136 F. 1006, 1009–1010; *Pennsylvania Steel Co.* v. *New York City R. Co.,* 198 F. 721, 740–742); and provided further that the late filing does not unduly delay the proceedings. *Guaranty Trust Co.* v. *Henwood,* 86 F. 2d 347, 353.

the estate to obtain the benefits of the claim which has been filed, as there would be for allowing the trustee the opportunity to take over a stockholders' derivative suit previously instituted.

It is said, however, that the claim was properly disallowed because the corporation on whose behalf the claim was filed was not before the court. As we have said, the corporation is a necessary party in a stockholders' derivative suit. *Davenport* v. *Dows, supra.* It can be joined as a party and brought in by summons in the usual way. But the filing of a claim in bankruptcy is not the institution of a plenary suit. It is a claim against assets in the hands of the bankruptcy court, not an action *in personam.* The absence of the corporation is a proper basis for an objection to the claim. But there is no way available to the stockholder to join it in the claim other than by moving the bankruptcy court to bring it in. The bankruptcy court has that power.[19] The objections to the present claim, however, were not based on the absence before the court of St. Louis Southwestern or its trustee.[20] But whether such an objection was made or not, the proper and necessary procedure for the bankruptcy court is to summon in the corporation or its trustee so that all parties

[19] Sec. 2 (a) (6) of the Bankruptcy Act, 11 U. S. C. § 11 (a) (6) grants the court power to "Bring in and substitute additional persons or parties in proceedings under this title when necessary for the complete determination of a matter in controversy." See 1 Collier on Bankruptcy (14 ed., 1940), pp. 214–218.

[20] One of the grounds on which the special master based his recommendation for disallowance of the claim was that the claim was improperly filed in the first instance, since the corporation was not made a party. But the district court, like the circuit court of appeals, proceeded on the ground that the claim could no longer be prosecuted after approval of the petition for the reorganization of St. Louis Southwestern unless the bankruptcy court in that proceeding expressly authorized it.

will be bound by any order which is entered on the merits.[21]

It is said, however, that by reason of events which have transpired since St. Louis Southwestern filed its petition for reorganization under § 77, the claim which Meyer filed in the Rock Island reorganization proceedings was properly disallowed. In the first place, it appears that a reorganization plan for the St. Louis Southwestern has been approved by the district court. *In re St. Louis Southwestern R. Co.*, 53 F. Supp. 914. The Interstate Commerce Commission, in preparing the plan, investigated Meyer's charges and concluded that they had no substantial support. *St. Louis Southwestern R. Co. Reorganization*, 249 I. C. C. 5, 46–149; 252 I. C. C. 325, 330–337. It refused to recommend that the cause of action be reserved in the plan of reorganization. 252 I. C. C., pp. 334–335. The district court concurred in that recommendation (53 F. Supp., p. 925), saying that the trustee had investigated the charges, found no basis for instituting legal proceedings on behalf of St. Louis Southwestern, and that there was no charge that the trustee had acted in bad faith or had shown a lack of diligence. 53 F. Supp. 926. Moreover, we were advised on oral argument, although the matter does not appear of record, that a motion of Meyer in the St. Louis Southwestern proceedings for an order directed to the trustee to show cause why Meyer should not be permitted to prosecute the claim filed by him in the Rock Island proceedings was denied in February 1944. The grounds of this denial do not appear. We can infer, on the basis of the opinion of the district court confirming the plan, that the motion was denied because the court was of the view that the claim had no substance. But a decision of the court not to direct or authorize its trustee to undertake the prosecution of a

[21] Cf. 14 Boston Univ. L. Rev. 802, 808.

claim is one thing; the problem presented here is quite a different one. While the court might not deem it provident to have the estate assume that burden, the continuation of the prosecution of the claim by Meyer might be wholly compatible with the disposition of the claim by the reorganization court or with the administration of the estate. It is not apparent in this case that there would be any such inconsistency in view of the fact that the plan makes no provision for the claim. As stated in *Johnson* v. *Collier, supra,* p. 540, "If the trustee will not sue and the bankrupt cannot sue, it might result in the bankrupt's debtor being discharged of an actual liability."

The order disallowing the claim will be reversed. On remand of the cause the district court will allow the claim to be amended by joining St. Louis Southwestern or its trustee. If it is established that the continued prosecution of the claim will be inconsistent with the plan of reorganization of St. Louis Southwestern or the administration of its affairs, the claim should be disallowed. If it is not so established, the claim should then be considered on its merits.

So ordered.

MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

Counsel for Parties.

MARTINO *v.* MICHIGAN WINDOW CLEANING CO.

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

No. 21. Argued October 8, 9, 1945.—Decided February 4, 1946.

Respondent corporation was engaged in washing windows within the State of its incorporation under contracts with its customers. The greater part of the work was done on premises used by its customers in the production of goods for interstate commerce. Its employees were required to work overtime and were not paid time and a half except for hours worked in excess of 44 hours per week. This was in accordance with bona fide agreements entered into with the labor union of which its employees were members. In a suit to enjoin violations of § 15 (a) of the Fair Labor Standards Act and to recover for unpaid overtime compensation under § 16 (b) of the Act, *held:*

1. Respondent's employees are engaged "in the production of goods for [interstate] commerce" so as to bring them within the coverage of the Fair Labor Standards Act. *Roland Electrical Co.* v. *Walling*, 326 U. S. 657. P. 176.

2. They are not exempt as employees of a "retail or service establishment" within the meaning of § 13 (a) (2) of the Act. *Roland Electrical Co.* v. *Walling, supra.* P. 177.

3. The existence and observance of written agreements entered into in good faith with the labor union of which the employees were members, providing for overtime pay for fewer hours than required by the Act, constitute no bar to the right of the employees to recover under § 16 (b) of the Act. P. 177.

145 F. 2d 163, reversed.

Petitioner sued to enjoin violation of § 15 (a) of the Fair Labor Standards Act and to recover under § 16 (b) for unpaid overtime compensation. The district court dismissed the complaint. 51 F. Supp. 505. The circuit court of appeals affirmed. 145 F. 2d 163. This Court granted certiorari. 325 U. S. 849. *Reversed,* p. 178.

Daniel D. Carmell argued the cause for petitioner. With him on the brief was *Leon A. Cousens.*

Larry S. Davidow argued the cause and filed a brief for respondent.

Acting Solicitor General Judson, William S. Tyson, Bessie Margolin and *George M. Szabad* filed a brief on behalf of the Administrator of the Wage and Hour Division, United States Department of Labor, as *amicus curiae,* urging reversal.

MR. JUSTICE BURTON delivered the opinion of the Court.

The questions here are the same as those in *Roland Electrical Co.* v. *Walling,* 326 U. S. 657. They are (1) whether respondent's employees, under the facts of this case, are engaged "in the production of goods for commerce" within the meaning of §§ 6 and 7 of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 1062–1063, 29 U. S. C. §§ 206 and 207), and (2) whether, if so engaged, they nevertheless are exempted from the Act because they are engaged in a "retail or service establishment the greater part of whose selling or servicing is in intrastate commerce" within the meaning of § 13 (a) (2). 29 U.S.C. § 213 (a) (2). As in the *Roland Electrical Co.* case, we answer the first question in the affirmative and the second in the negative. The respondent also urges as a defense the written agreements which it had renewed from year to year with its employees for a higher number of hours of work per week, before paying overtime, than is prescribed in the Act.

The petitioner sued the respondent in the District Court of the United States for the Eastern District of Michigan. He sued for himself as a former employee of the respondent and also in a representative capacity for its other employees similarly situated. He sought to enjoin the respondent from violation of § 15 (a) (1), (2) and (3), 29 U. S. C. § 215 (a) (1), (2) and (3), of the Fair Labor

Standards Act of 1938, and to recover under § 16 (b) of the Act [1] unpaid overtime compensation together with a like sum as liquidated damages, a reasonable attorney's fee and costs.

The district court heard the case on the pleadings, stipulations of fact and the petitioner's motion for summary judgment, made several findings of law, ordered that the petitioners recover nothing and dismissed the complaint. 51 F. Supp. 505. The circuit court of appeals affirmed the dismissal. 145 F. 2d 163. This Court has granted a writ of certiorari, 325 U. S. 849, because of divergence of opinions among the circuit courts of appeals as to the interpretation of § 13 (a) (2), and now decides this case in favor of petitioners, upon principles stated in *Roland Electrical Co.* v. *Walling, supra.*

The respondent, a Michigan corporation with its principal place of business in Detroit, was engaged in washing windows, painting and similar maintenance work. The employees of the respondent were required in some instances to work longer than 42 hours per week subsequent to October 24, 1939, and longer than 40 hours per week subsequent to October 24, 1940, but were not paid time

[1] "SEC. 16. . . .

"(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 52 Stat. 1069, 29 U. S. C. § 216 (b).

and a half except for hours worked in excess of 44 hours per week.[2]

The work of the respondent and of its employees was done within the State of Michigan and, for the most part, on the premises of the respondent's customers. It consisted primarily of cleaning the windows for those customers, always under contracts between them and the respondent. The greater part of this work was done on windows on premises used by respondent's customers in the production of goods for interstate commerce.[3] Under the circumstances of this case the cleaning of the windows of industrial plants by the employees of the respondent is an occupation necessary to the production of the goods produced in those plants.[4] If the services rendered in

[2] "SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 52 Stat. 1063, 29 U. S. C. § 207 (a).

The Fair Labor Standards Act of 1938 was approved June 25, 1938, and this section became effective October 24, 1938. 29 U. S. C. § 207 (d).

[3] Many of the customers were engaged also in interstate commerce on those premises.

[4] ". . . an employee shall be deemed to have been engaged in the production of goods if such employee was employed . . . in any process or occupation necessary to the production thereof, in any State." 29 U. S. C. § 203 (j).

See 100 Factory Management and Maintenance, March 1942, p. 101; 74 Architectural Forum, May 1941, pp. 333, 335; 41 National Safety News, March 1940, p. 88; Balderston, Karabasz and Brecht, *Management of an Enterprise* (1935) p. 145; Conover, *Clean Win-*

this case had been rendered by employees of respondent's customers engaged in the production of goods for interstate commerce, those employees would have come under the Act. Respondent's employees are not to be excluded from such coverage merely because their employment to do the same work was under independent contracts. *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 524; *Warren-Bradshaw Co.* v. *Hall,* 317 U. S. 88, 90.

The respondent was engaged almost exclusively in servicing customers for whom such services were necessary in their production of goods for interstate commerce. This took place in the midst of producing "the flow of goods in commerce" intended to be covered by the Act. Accordingly, the respondent cannot be classified as a "retail or service establishment" within the meaning of § 13 (a) (2), which contemplates an establishment serving ultimate consumers beyond the end of such "flow of goods in commerce." *Roland Electrical Co.* v. *Walling, supra.*

Throughout this case, the respondent has urged as a defense that, in good faith and from year to year, since before 1939, it has entered into and renewed written agreements with the labor union of which petitioner and those for whom this suit is brought were members. Some of these agreements, renewed since the Act became effective, applied to the periods here in question and required the respondent to pay overtime for work done in excess of 44 hours a week. This requirement was fully observed. The district court made a finding that the existence and observance of such agreements constituted no bar to the right of the employees to recover under § 16 (b) if the Fair Labor Standards Act applied to the case and required overtime pay for work done in excess of a lesser number

dows for Safety, 74 Safety Engineering, Sept. 1937, pp. 13–14; 63 The Foundry, Aug. 1935, p. 89; Randall and Martin, *Making Your Windows Deliver More Daylight,* 22 Transactions of the Illuminating Engineering Society, March 1927, pp. 239–257.

of hours per week than were stipulated in the agreements. It was not necessary for the circuit court of appeals to consider the effect of this agreement because, in its view, the Act did not apply to the respondent's employees. However, under the view which we take, the respondent is entitled to a decision on this further defense. We agree with the district court that the agreements cannot supersede the Act and are not a bar to this action. Cf. *Brooklyn Bank* v. *O'Neil*, 324 U. S. 697, 707, *et seq.*

For these reasons, the judgment of the circuit court of appeals is reversed and this case is remanded to the district court for further proceedings in accordance with this opinion.

Reversed.

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

MABEE ET AL. *v.* WHITE PLAINS PUBLISHING CO.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 57. Argued December 5, 1945.—Decided February 11, 1946.

1. The publisher of a daily newspaper with a circulation ranging from 9,000 to 11,000 copies, of which about one-half of one per cent regularly goes out of the State, is engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938. Pp. 180, 184.

(a) The maxim *de minimis* has no application here, because Congress made no distinction on the basis of volume of business, but, by § 15 (a) (1) of the Act, outlawed the shipment in interstate commerce of "*any* goods in the production of which *any* employee was employed in violation of" the overtime and minimum wage requirements of the Act. P. 181.

(b) Though it be assumed that sporadic or occasional shipments of insubstantial amounts of goods were not intended to be included in that prohibition, there is no warrant for assuming that regular shipments are to be included or excluded dependent on their size. P. 181.

(c) These views are borne out by the legislative history of the Act, by the express exemption by § 13 (a) (8) of any employee of any *weekly or semiweekly* newspaper with a circulation of less than 3,000, the major part of which is within the county of publication, and by the lack of any exemption for daily newspapers or on the basis of volume of out-of-state circulation. P. 182.

2. The principles announced in *Grosjean* v. *American Press Co.*, 297 U. S. 233, holding a state license tax on newspapers graduated in accordance with the volume of circulation unconstitutional, are not applicable here, notwithstanding the exemption of small weekly and semiweekly newspapers by § 13 (a) (8) of the Fair Labor Standards Act. P. 184.

(a) The Act does not lay a direct burden on the press in violation of the First Amendment, since the press has no special immunity from laws applicable to business in general. P. 184.

(b) The exemption of small weeklies and semiweeklies is not a "deliberate and calculated device" to penalize a certain group of newspapers but was inserted to put those papers more on a parity with other small town enterprises. P. 184.

(c) The Fifth Amendment does not require full and uniform exercise of the commerce power. Congress may weigh relative needs and restrict the application of a legislative policy to less than the entire field. P. 184.

3. The fact that the publisher of such a newspaper is engaged in the production of goods for interstate commerce does not necessarily mean that his employees are covered by the Fair Labor Standards Act of 1938, since that is dependent on the character of their work. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 524; *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564. P. 184.

4. No opinion is expressed on that phase of the case, since the state appellate courts did not pass on it. P. 185.

294 N. Y. 701, 60 N. E. 2d 848, reversed.

Petitioners sued in the New York courts for overtime compensation under § 16 (b) of the Fair Labor Standards Act. The trial court overruled a motion to dismiss the complaint, 179 Misc. 832, 38 N. Y. S. 2d 231, and gave judgment for petitioners. 180 Misc. 8, 41 N. Y. S. 2d 534. The appellate division reversed. 267 App. Div. 284, 45 N. Y. S. 2d 479. The court of appeals affirmed. 293 N. Y. 781, 58 N. E. 2d 520. It later amended the

remittitur. 294 N. Y. 701, 60 N. E. 2d 848. This Court granted certiorari. 325 U. S. 845. *Reversed,* p. 185.

David H. Moses argued the cause for petitioners. With him on the brief was *Morton Lexow.*

Elisha Hanson argued the cause for respondent. With him on the brief was *Letitia Armistead.*

By special leave of Court, *Jeter S. Ray* argued the cause for the Administrator of the Wage and Hour Division, United States Department of Labor, as *amicus curiae,* urging reversal. With him on the brief were *Solicitor General McGrath, William S. Tyson* and *Bessie Margolin.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondent publishes a daily newspaper at White Plains, New York. During the period relevant here, its daily circulation ranged from 9,000 to 11,000 copies. It had no desire for and made no effort to secure out-of-state circulation. Practically all of its circulation was local. But about one-half of 1 per cent was regularly out-of-state.[1] Petitioners are some of respondent's employees. They brought this suit in the New York courts to recover overtime compensation, liquidated damages and counsel fees pursuant to § 16 (b) of the Fair Labor Standards Act of 1938. 52 Stat. 1069, 29 U. S. C. § 216 (b). The supreme court gave judgment for the petitioners. 179 Misc. 832, 38 N. Y. S. 2d 231; 180 Misc. 8, 41 N. Y. S. 2d 534. The appellate division reversed and ordered the complaint to be dismissed. 267 App. Div. 284, 45 N. Y. S. 2d 479. That judgment was affirmed by the court of

[1] About 45 copies daily. There appears to have been an out-of-state circulation of 43, 46, and 40 for the years ending March 31, 1939, 1940, and 1941 respectively.

appeals without opinion. 293 N. Y. 781, 58 N. E. 2d 520; 294 N. Y. 701, 60 N. E. 2d 848. The case is here on a petition for a writ of certiorari which we granted because of the probable conflict between the decision below and those from the federal courts.[2]

The appellate division applied the maxim *de minimis* to exclude respondent from the provisions of the Act. We think that was error. The Court indicated in *Labor Board* v. *Fainblatt,* 306 U. S. 601, 607, that the operation of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. § 151) was not dependent on "any particular volume of commerce affected more than that to which courts would apply the maxim *de minimis.*" That Act,[3] unlike the present one (*Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564, 570–571), regulates labor disputes "affecting" commerce. 49 Stat. 450, 29 U. S. C. § 152. We need not stop to consider what different scope, if any, the maxim *de minimis* might have in cases arising thereunder. Here Congress has made no distinction on the basis of volume of business. By § 15 (a) (1) it has made unlawful the shipment in commerce of "*any* goods in the production of which *any* employee was employed in violation of" the overtime and minimum wage requirements of the Act. Though we assume that sporadic or occasional shipments of insubstantial amounts of goods were not intended to be included in that prohibition, there is no warrant for assuming that regular shipments in commerce are to be included

[2] Cf. *Davis* v. *Goodman Lumber Co.,* 133 F. 2d 52, 53; *Sun Publishing Co.* v. *Walling,* 140 F. 2d 445, 448; *New Mexico Public Service Co.* v. *Engel,* 145 F. 2d 636, 640.

[3] Sec. 1 of that Act is a statement of the policy of Congress. It states that the denial by employers of the right of the employees to bargain collectively has the intent or effect of burdening or obstructing commerce by "materially affecting" the flow of goods from or into the channels of commerce or by "causing diminution of employment and wages in such volume as substantially to impair or disrupt" the market for such goods.

691100°—47——16

or excluded dependent on their size. That has been the consistent position of the Administrator. Interpretative Bull. No. 5, par. 9 (1939), 1944–45 Wage Hour Man. 21. His rulings and interpretations, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140.

We stated in *United States* v. *Darby*, 312 U. S. 100, 123, "Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present-day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great." And see *Warren-Bradshaw Co.* v. *Hall*, 317 U. S. 88, 91. That view is borne out by the legislative history of the Act. Earlier drafts had embodied the "substantial" standard.[4] These

[4] See, for example, H. R. 7200, 75th Cong., 1st Sess., introduced May 24, 1937. It provided for a Labor Standards Board to administer the Act. The Board was to be given the power to establish minimum wages when it found, *inter alia*, that wages lower than a minimum fair wage were paid to employees "engaged in the production of goods which are sold or shipped to a substantial extent in interstate commerce . . ." § 5 (a).

The Confidential Committee Print of April 13, 1938, containing a proposed amendment to S. 2475, 75th Cong., 3d Sess., and embodied in the Committee Print of April 15, 1938, S. 2475, 75th Cong., 3d Sess., would have limited the applicability of the Act to employers "engaged in commerce in any industry affecting commerce . . ." §§ 4, 5. It was further provided by § 6 of the draft that the Secretary of Labor should, after notice and hearing, determine the relation of the various industries to commerce. Only if the Secretary found that the industry was (a) "dependent for its existence upon substantial purchases or sales of goods in commerce and upon transportation in

were omitted from the coverage provisions of the one which became the law. Moreover, one of the exemptions written into the Act extends to "any employee employed in connection with the publication of any weekly or semi-weekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published . . ." § 13 (a) (8). Representative Creal of Kentucky proposed this exemption. He stated that "under this bill, because 1 or 2 percent of a paper's circulation goes outside to people who want to get the home-town paper to see whether or not Lucy got married, or whether Sally's baby has been born yet, because that infinitesimal bit of their business is with people outside the county, these publishers fall under the provisions of this bill, when on each side of this little printshop are the butcher and the baker, who are exempt and who are financially better fixed than he is." 83 Cong. Rec. p. 7445. No such exemption for daily newspapers was granted.[5] No exemption on the basis of volume of out-of-state circulation was written into the Act. Rather the exemption of the small weeklies or semi-weeklies seems to have been adopted on the assumption that without it a newspaper with a regular out-of-state circulation, no matter how small, would be under the Act. The choice Congress made was not the exemption of newspapers with small out-of-state circulations but the exemption of certain types of small newspapers. We would change the nature of the exemption which Congress saw fit to grant,

commerce," or (b) "Nation-wide in . . . scope," or (c) related to commerce "in other respects close and substantial," could the Secretary issue an order declaring the industry to be one affecting commerce and thus within the purview of the Act.

[5] A number of bills have been introduced since the passage of the Act to secure a similar exemption for daily newspapers, but none of them has passed. See H. R. 7340, 76th Cong., 1st Sess.; S. 4385, 76th Cong., 3d Sess.; H. R. 64, H. R. 4208, S. 1310, S. 284, 77th Cong., 1st Sess.

if we applied the maxim *de minimis* to this type of case. We would also disregard the plain language of § 15 (a) (1) prohibiting the shipment in commerce of "any goods" in the production of which "any employee" was employed in violation of the overtime and minimum wage requirements of the Act.

Respondent argues that to bring it under the Act, while the small weeklies or semi-weeklies are exempt by reason of § 13 (a) (8), is to sanction a discrimination against the daily papers in violation of the principles announced in *Grosjean* v. *American Press Co.*, 297 U. S. 233. Volume of circulation, frequency of issue, and area of distribution are said to be an improper basis of classification. Moreover, it is said that the Act lays a direct burden on the press in violation of the First Amendment. The *Grosjean* case is not in point here. There the press was singled out for special taxation and the tax was graduated in accordance with volume of circulation. No such vice inheres in this legislation. As the press has business aspects, it has no special immunity from laws applicable to business in general. *Associated Press* v. *Labor Board,* 301 U. S. 103, 132–133. And the exemption of small weeklies and semi-weeklies is not a "deliberate and calculated device" to penalize a certain group of newspapers. *Grosjean* v. *American Press Co., supra,* p. 250. As we have seen, it was inserted to put those papers more on a parity with other small town enterprises. 83 Cong. Rec. 7445. The Fifth Amendment does not require full and uniform exercise of the commerce power. Congress may weigh relative needs and restrict the application of a legislative policy to less than the entire field. *Steward Machine Co.* v. *Davis,* 301 U. S. 548; *Currin* v. *Wallace,* 306 U. S. 1, 13–14.

We hold that respondent is engaged in the production of goods for commerce. That, of course, does not mean that these petitioners, its employees, are covered by the Act. The applicability of the Act to them is dependent on the

character of their work. *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 524; *Walling* v. *Jacksonville Paper Co., supra,* pp. 571–572. We express no opinion on that phase of the case, as the New York appellate courts did not pass on it. Since the judgment below must be reversed, the question whether the Act is applicable to these employees will be open on the remand of the cause.

Reversed.

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

MR. JUSTICE MURPHY, dissenting.

I agree that to print approximately 10,000 newspapers a day and regularly to send 45 of them, or ½ of 1%, out of the State is to produce goods for interstate commerce. But I cannot agree that Congress meant to include a business of that nature within the ambit of the Fair Labor Standards Act of 1938.

This Court, in *Labor Board* v. *Fainblatt,* 306 U. S. 601, 606, stated that "The amount of the commerce regulated is of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication." Concededly, Congress has not excluded commerce of small volume from the coverage of the Fair Labor Standards Act by "express provision." But certainly the "fair implication" is one of exclusion. On numerous occasions we have pointed out that Congress in this Act did not exercise the full scope of its commerce power, *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 522–523, and that Congress plainly indicated its purpose to leave local business to the protection of the States so far as wage and hour problems were concerned, *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564, 570; *Phillips Co.* v. *Walling,* 324 U. S. 490, 497.

In my opinion, a company that produces 99½% of its products for local commerce is essentially and realistically a local business. True, ½ of 1% of its production is for interstate commerce, thus subjecting it to the constitutional power of Congress when and if exercised. But that fact does not make it any less a local business, which we have said Congress plainly excluded from this Act.

I would therefore affirm the judgment below in this respect.

OKLAHOMA PRESS PUBLISHING CO. *v.* WALLING, WAGE AND HOUR ADMINISTRATOR.

NO. 61. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.*

Argued October 17, 18, 1945.—Decided February 11, 1946.

1. The Fair Labor Standards Act, as applied to the business of publishing and distributing newspapers, does not violate the First or Fifth Amendment or exceed the power of Congress under the Commerce Clause. P. 192.
2. The provisions of § 11 (a) of the Fair Labor Standards Act, authorizing the Administrator to investigate conditions and practices of employment in any industry subject to the Act, and of § 9, incorporating the provisions of § 9 of the Federal Trade Commission Act authorizing the issuance and judicial enforcement of subpoenas, do not violate the prohibitions of the Fourth Amendment against unreasonable searches and seizures or any other provision of the Constitution. Pp. 194, 208, 214.
3. A review of the cases applicable to the production of corporate records and papers in response to a subpoena or order authorized by law and safeguarded by judicial sanction discloses that they hold, in effect, that:

   (a) The Fifth Amendment affords no protection by virtue of the self-incrimination provision, whether for the corporation or for its officers. P. 208.

---

*Together with No. 63, *News Printing Co., Inc.* v. *Walling, Wage and Hour Administrator,* on certiorari to the Circuit Court of Appeals for the Third Circuit. Argued and decided on the same dates.

(b) The Fourth Amendment, if applicable, guards against abuse only by way of too much indefiniteness or breadth in the things required to be "particularly described," if the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant, the gist of the protection being the requirement that the disclosure sought shall not be unreasonable. P. 208.

(c) The requirement of "probable cause, supported by oath or affirmation," literally applicable in the case of a warrant, is satisfied, in the case of an order for production, by the court's determination that the investigation is authorized by Congress and is for a purpose Congress can order and that the documents sought are relevant to the inquiry. P. 209.

(d) Beyond this, the requirement of reasonableness, including particularity in "describing the place to be searched, and the persons to be seized," also literally applicable to warrants, comes down to specification of the documents to be produced, adequate but not excessive, for the purposes of the relevant inquiry. P. 209.

4. There was no violation of petitioners' rights in these cases, since both petitioners were corporations; the only records or documents sought were corporate ones; no element of self-incrimination was presented or claimed; all the records sought were relevant to an inquiry for the purpose of determining whether petitioners were subject to the Act and, if so, whether they were violating it; and such an inquiry was authorized by § 11 (a) of the Fair Labor Standards Act. P. 209.

5. The Administrator of the Wage and Hour Division of the Department of Labor is entitled to judicial enforcement of a subpoena *duces tecum* issued by him pursuant to § 9 of the Fair Labor Standards Act in the course of an investigation conducted pursuant to § 11 (a) of the Act, without a prior adjudication that the industry or activity sought to be investigated is covered by the provisions of the Act. Pp. 209, 214.

(a) Congress has authorized the Administrator, rather than the district courts in the first instance, to determine the question of coverage in the preliminary investigation of possible violations of the Fair Labor Standards Act; in doing so to exercise his subpoena power for securing evidence upon that question by obtaining the production of relevant books, records and papers; and, in case of refusal to obey his subpoena, to have the aid of the district courts in enforcing it. P. 214.

(b) The explicit language of §§ 9 and 11 (a) of the Act leaves no room to doubt that the intent of Congress, in authorizing in-

vestigations supported by subpoenas and enforcement orders, was to enable the Administrator to discover and procure evidence, not to prove a pending charge or complaint, but to enable him to make one if, in his judgment, the facts thus discovered should justify doing so. Pp. 194, 197, 201, 214.

(c) Since there has been no change in the language of the statute, expressions in committee reports on subsequent appropriations, coming largely from one house of Congress, can not be held to change or qualify the plain and unambiguous wording of the statute. P. 197, n. 20.

6. In § 9 of the Federal Trade Commission Act (incorporated in § 9 of the Fair Labor Standards Act), which authorizes the Administrator to invoke the aid of the court "in case of disobedience of the subpoena" and authorizes the court to give assistance "in case of contumacy or refusal to obey a subpoena," Congress made no express requirement of any showing of "probable cause"; and any possible constitutional requirement of that sort was satisfied when the Administrator, in invoking the aid of a court to enforce a subpoena against a corporation, set forth that it was a newspaper publisher, that the Administrator had reason to believe it was violating the Act, that it was "engaged in commerce and in the production of goods for commerce," that he was proceeding with his investigation in accordance with the mandate of Congress, and that the specified records sought were relevant for that purpose. P. 215.
7. The Administrator's investigative function, in searching out violations with a view to enforcing the Act, is essentially the same as the grand jury's or the court's in issuing other pretrial orders for the discovery of evidence, and is governed by the same limitations—that he shall not act arbitrarily or in excess of his statutory authority. P. 216.

147 F. 2d 658; 148 F. 2d 57, affirmed.

No. 61. Upon application of the Administrator of the Wage and Hour Division of the Department of Labor, a district court issued an order directing that he be given access to certain documents and records of a newspaper publishing corporation, pursuant to §§ 9 and 11 (a) of the Fair Labor Standards Act. 7 Wage Hour Rep. 656. The circuit court of appeals affirmed. 147 F. 2d 658. This Court granted certiorari. 325 U. S. 845. *Affirmed*, p. 218.

No. 63. A district court denied an application of the Administrator of the Wage and Hour Division of the Department of Labor for an order to enforce a subpoena *duces tecum* issued by him pursuant to § 9 of the Fair Labor Standards Act requiring the production of certain books, records and documents of a newspaper publishing corporation. 49 F. Supp. 659. The circuit court of appeals reversed. 148 F. 2d 57. This Court granted certiorari. 325 U. S. 845. *Affirmed,* p. 218.

Elisha Hanson argued the cause for petitioners. With him on the briefs were *Joseph C. Stone* and *Charles A. Moon* in No. 61, and *Letitia Armistead* in No. 63.

Irving J. Levy argued the cause for respondent. With him on the brief were *Solicitor General McGrath, Ralph F. Fuchs, William S. Tyson* and *Bessie Margolin.*

Mr. Justice Rutledge delivered the opinion of the Court.

These cases bring for decision important questions concerning the Administrator's right to judicial enforcement of *subpoenas duces tecum* issued by him in the course of investigations conducted pursuant to § 11 (a) of the Fair Labor Standards Act. 52 Stat. 1060. His claim is founded directly upon § 9, which incorporates the enforcement provisions of §§ 9 and 10 of the Federal Trade Commission Act, 38 Stat. 717.[1] The subpoenas sought the production of specified records to determine whether petitioners were violating the Fair Labor Standards Act, including records relating to coverage. Petitioners, newspaper publishing corporations, maintain that the Act is not applicable to them, for constitutional and other reasons, and insist that the question of coverage must be adjudicated before the subpoenas may be enforced.

[1] The pertinent portions of these various statutory provisions are set forth in notes 23 and 24.

In No. 61, involving the Oklahoma Press Publishing Company, the Circuit Court of Appeals for the Tenth Circuit has rejected this view, holding that the Administrator was entitled to enforcement upon showing of "probable cause," which it found had been made. 147 F. 2d 658. Accordingly it affirmed the district court's order directing that the Administrator be given access to the records and documents specified.[2]

In No. 63, the Circuit Court of Appeals for the Third Circuit likewise rejected the company's position, one judge dissenting on the ground that probable cause had not been shown. 148 F. 2d 57. It accordingly reversed the district court's order of dismissal in the proceeding to show cause, which in effect denied enforcement for want of a showing of coverage. 49 F. Supp. 659.[3] The

[2] Upon filing of the application, an order to show cause why enforcement should not be had was issued. Thereafter the matter was heard upon the pleadings, including the application and the respondent's return, together with affidavits filed by the parties. See note 4; also note 52 *infra*. The district court made findings of fact and conclusions of law, see 7 Wage Hour Rep. at 656, which among other things determined "that the Company herein is subject to the Wage and Hour Act"; and issued its order for inspection accordingly. As to this finding and conclusion the court of appeals said: "When the matter was submitted to the trial court on the rule to show cause, it concluded coverage, but it did not have to go that far." 147 F. 2d 658, 662.

[3] In No. 63, as in No. 61, an order to show cause issued on filing of the application. Upon return made, which included affidavits attached as exhibits, the court rendered its opinion and entered its order dismissing the proceedings, stating however that since the Administrator "has not had opportunity sufficiently to argue the question of coverage, that matter is left to such further proceedings as may be appropriate. . . ." 49 F. Supp. 659, 661. The opinion, noting that to deny enforcement "would be to divide proceedings into two distinct stages—one concerning the presence of 'Commerce,' and the other to determine other elements of violation," went on to say: "There would seem to be no compelling reason why such should not be the case, for if the act does not apply to a certain business or part of an industry, it would seem to follow that the provisions of the Act should not be applied thereto. . . ." 49 F. Supp. at 660.

court of appeals thought that requiring the Administrator "to make proof of coverage would be to turn the proceeding into a suit to decide a question which must be determined by the Administrator in the course of his investigation" and relied upon *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, as being persuasive that this could not be done. Regarding the subpoena as containing no unreasonable demand, it conceived the return and affidavits filed by the company, together with the Administrator's allegations of coverage,[4] as a showing sufficient to require enforcement. Hence it directed that the district court's discretion be exercised with that effect.

Because of the importance of the issues for administration of the Act and also on account of the differences in the grounds for the two decisions, as well as between them

---

[4] See note 53. The allegations of coverage in both applications were made upon information and belief and were general rather than specific or evidentiary in character. Each application set forth that the respondent was engaged in the business of publishing a newspaper or newspapers and by virtue of that activity was engaged in interstate commerce or in the production of goods for such commerce within the meaning of the Act.

In No. 61 the further allegations appeared that in the course of its business the company "receives and sends daily news, intelligence, and communications in interstate commerce, and transports, ships and delivers goods produced by it from points within" to points outside Oklahoma; and that the Administrator "having reasonable grounds to believe that the company" was violating specified sections of the Act, entered to make an investigation as provided in § 11 (a), was refused permission to inspect records, etc.

Apart from one affidavit filed by the Administrator in No. 61 setting forth the circumstances of the company's failure to appear in response to the subpoena, no other facts, beyond the allegations of the application, were submitted by him in either case. The companies however filed affidavits in both proceedings, which supplied additional facts, as well as the affiants' conclusions, concerning coverage. See text, Part IV, at notes 52, 53.

and decisions from other circuits,[5] certiorari was granted in both cases. 325 U. S. 845.

The issues have taken wide range. They are substantially the same in the two causes, except in one respect to be noted.[6] In addition to an argument from Congress' intent, reliance falls upon various constitutional provisions, including the First, Fourth and Fifth Amendments, as well as the limited reach of the commerce clause, to show that the Administrator's conduct and the relief he seeks are forbidden.

I.

Coloring almost all of petitioners' position, as we understand them, is a primary misconception that the First Amendment knocks out any possible application of the Fair Labor Standards Act to the business of publishing and distributing newspapers. The argument has two prongs.

The broadside assertion that petitioners "could not be covered by the Act," for the reason that "application of this Act to its newspaper publishing business would violate its rights as guaranteed by the First Amendment," is

[5] Specifically, *General Tobacco & Grocery Co.* v. *Fleming,* 125 F. 2d 596 (C. C. A. 6), modified in *Walling* v. *La Belle Steamship Co.,* 148 F. 2d 198, following the decision in *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, as to which see note 49 *infra* and text. The decisions in other circuits which have passed on the matter are substantially in accord with the results in No. 61. See *Martin Typewriter Co.* v. *Walling,* 135 F. 2d 918 (C. C. A. 1); *Walling* v. *Standard Dredging Corp.,* 132 F. 2d 322 (C. C. A. 2); *Walling* v. *American Rolbal Corp.,* 135 F. 2d 1003 (C. C. A. 2); *Cudahy Packing Co.* v. *Fleming,* 119 F. 2d 209 (C. C. A. 5), rev'd on other grounds, 315 U. S. 357; *Cudahy Packing Co.* v. *Fleming,* 122 F. 2d 1005 (C. C. A. 8), rev'd on other grounds, 315 U. S. 785; *Mississippi Road Supply Co.* v. *Walling,* 136 F. 2d 391 (C. C. A. 5); *Fleming* v. *Montgomery Ward & Co.,* 114 F. 2d 384 (C. C. A. 7); *Walling* v. *Benson,* 137 F. 2d 501 (C. C. A. 8).

[6] See Part IV.

without merit. *Associated Press* v. *Labor Board,* 301 U. S. 103, and *Associated Press* v. *United States,* 326 U. S. 1; *Mabee* v. *White Plains Publishing Co.,* 327 U. S. 178.[7] If Congress can remove obstructions to commerce by requiring publishers to bargain collectively with employees and refrain from interfering with their rights of self-organization, matters closely related to eliminating low wages and long hours, Congress likewise may strike directly at those evils when they adversely affect commerce. *United States* v. *Darby,* 312 U. S. 100, 116, 117. The Amendment does not forbid this or other regulation which ends in no restraint upon expression or in any other evil outlawed by its terms and purposes.[8]

Petitioners' narrower argument, of allegedly invalid classification,[9] arises from the statutory exemptions and may be shortly dismissed. The intimation that the Act falls by reason of the exclusion of seamen, farm workers and others by § 13 (a) is hardly more than a suggestion and is dismissed accordingly. Cf. *Buck* v. *Bell,* 274 U. S. 200, 208. The contention drawn from the exemption of employees of small newspapers by § 13 (a) (8) deserves only slightly more attention.[10] It seems to be twofold,

[7] See also *Sun Publishing Co.* v. *Walling,* 140 F. 2d 445; *Fleming* v. *Lowell Sun Co.,* 36 F. Supp. 320, rev'd on other grounds, 120 F. 2d 213, affirmed, 315 U. S. 784.

[8] No question is presented whether Congress could enforce its mandate by excluding from commerce the circulation of a publisher refusing to conform. Cf. *Sun Publishing Co.* v. *Walling,* 140 F. 2d 445, 449.

[9] Since the Fifth Amendment, unlike the Fourteenth, contains no "equal protection" clause, petitioners burden due process with this duty here.

[10] The provision is as follows: "Sec. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to . . . (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand

that the Amendment forbids Congress to "regulate the press by classifying it" at all and in any event that it cannot use volume of circulation or size as a factor in the classification.[11]

Reliance upon *Grosjean* v. *American Press Co.*, 297 U.S. 233, to support these claims is misplaced. There the state statute singled out newspapers for special taxation and was held in effect to graduate the tax in accordance with volume of circulation. Here there was no singling out of the press for treatment different from that accorded other business in general. Rather the Act's purpose was to place publishers of newspapers upon the same plane with other businesses and the exemption for small newspapers had the same object. 83 Cong. Rec. 7445. Nothing in the *Grosjean* case forbids Congress to exempt some publishers because of size from either a tax or a regulation which would be valid if applied to all.

What has been said also disposes of the contention drawn from the scope of the commerce power and its applicability to the publishing business considered independently of the Amendment's influence. *Associated Press* v. *Labor Board, supra; Associated Press* v. *United States, supra.*

II.

Other questions pertain to whether enforcement of the subpoenas as directed by the circuit courts of appeals will violate any of petitioners' rights secured by the Fourth

---

the major part of which circulation is within the county where printed and published . . ."

The exemption shows conclusively that Congress intended the Act to apply to employees of publishers not within the terms of the exemption.

[11] To support these views, petitioners give interesting statistics concerning the total number of papers in the country, the number published daily, daily and Sunday, weekly, semiweekly and triweekly, and the number in each group having more or less than 3,000 circulation.

Amendment and related issues concerning Congress' intent. It is claimed that enforcement would permit the Administrator to conduct general fishing expeditions into petitioners' books, records and papers, in order to secure evidence that they have violated the Act, without a prior charge or complaint and simply to secure information upon which to base one, all allegedly in violation of the Amendment's search and seizure provisions. Supporting this is an argument that Congress did not intend such use to be made of the delegated power, which rests in part upon asserted constitutional implications, but primarily upon the reports of legislative committees, particularly in the House of Representatives, made in passing upon appropriations for years subsequent to the Act's effective date.[12]

The short answer to the Fourth Amendment objections is that the records in these cases present no question of actual search and seizure, but raise only the question whether orders of court for the production of specified records have been validly made; and no sufficient showing appears to justify setting them aside.[13] No officer or other person has sought to enter petitioners' premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections, which in fact were made.[14] Nor has any objection been taken to the breadth of the subpoenas or to any other specific defect which would invalidate them.[15]

---

[12] See note 21. The Act became effective June 25, 1938.

[13] As to the sufficiency of the showing, see Part IV.

[14] Cf. notes 2, 3, 4. The facts in both cases show that petitioners, when served with the subpoenas, declined to honor them upon the advice of counsel, and thereafter the Administrator applied to the court for enforcement in each case.

[15] Cf. text *infra* at notes 42–47; see also note 40.

What petitioners seek is not to prevent an unlawful search and seizure. It is rather a total immunity to the Act's provisions, applicable to all others similarly situated, requiring them to submit their pertinent records for the Administrator's inspection under every judicial safeguard, after and only after an order of court made pursuant to and in exact compliance with authority granted by Congress. This broad claim of immunity no doubt is induced by petitioners' First Amendment contentions. But beyond them it is rested also upon conceptions of the Fourth Amendment equally lacking in merit.

Petitioners' plea that the Fourth Amendment places them so far above the law that they are beyond the reach of congressional and judicial power as those powers have been exerted here only raises the ghost of controversy long since settled adversely to their claim.[16] They have advanced no claim founded on the Fifth Amendment's somewhat related guaranty against self-incrimination, whether or not for the sufficient reason among others that this privilege gives no protection to corporations or their officers against the production of corporate records pursuant to lawful judicial order, which is all these cases involve.[17]

The cited authorities would be sufficient to dispose of the Fourth Amendment argument, and more recent decisions confirm their ruling.[18] Petitioners however are insistent in their contrary views, both upon the constitutional phases and in their asserted bearing upon the intention of Congress. While we think those views reflect a confusion not justified by the actual state of the decisions, the confusion has acquired some currency, as the

[16] See the authorities cited in notes 31 and 32.

[17] *Hale* v. *Henkel,* 201 U. S. 43; *Wilson* v. *United States,* 221 U. S. 361; *Essgee Co.* v. *United States,* 262 U. S. 151; *United States* v. *Bausch & Lomb Optical Co.,* 321 U. S. 707, 726; cf. *United States* v. *White,* 322 U. S. 694.

[18] *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501; *Myers* v. *Bethlehem Corp.,* 303 U. S. 41, discussed *infra,* Part III, at notes 49–51.

divided state of opinion among the circuits shows.[19] Since the matter is of some importance, in order to remove any possible basis for like misunderstanding in the future, we give more detailed consideration to the views advanced and to the authorities than would otherwise be necessary.

There are two difficulties with petitioners' theory concerning the intent of Congress. One is that the argument from the so-called legislative history flies in the face of the powers expressly granted to the Administrator and the courts by §§ 9 and 11 (a), so flatly that to accept petitioners' view would largely nullify them.[20] Furthermore the excerpted history from the later appropriation matters does not give the full story and when that is considered the claimed interpretation is not made out, regardless of its retrospective aspect.[21] Moreover, the

[19] Cf. note 5 and text.

[20] In such a situation, without an accompanying change in the statute's language, an expression in committee reports on subsequent appropriations, coming largely from one house, hardly can be held to change or qualify the plain and unambiguous wording of the statute. Such a result would amount to retroactive amendment by committee report, a step in construction by reference to "prospective legislative history" not heretofore taken.

[21] The controversy as to appropriations arose over the Administrator's request for sufficient funds to allow a periodic routine inspection of every plant that might be covered by the Act. See Hearings before the Subcommittee of the Committee on Appropriations of the House of Representatives on the Department of Labor—Federal Security Agency Appropriation Bill for 1942, 77th Cong., 1st Sess., Pt. 1, 347–350. The Senate had acceded to this request. But the House Appropriations Committee thought the cost unjustifiable and therefore recommended that only enough funds be made available to permit the Administrator to make "spot inspections" of twenty-five per cent of the plants and also to permit him to inspect all plants against which complaints had actually been registered. H. Rep. No. 688, 77th Cong., 1st Sess., 13–14; see also 87 Cong. Rec. 4629, 5682–5683. After the conferees had been unable to come to an agreement and the House had instructed its conferees to insist on the smaller appropria-

statute's language leaves no room to doubt that Congress intended to authorize just what the Administrator did and sought to have the courts do.[22] Section 11 (a) ex-

---

tion, 87 Cong. Rec. 5682–5686, the Senate accepted the House version of the appropriation bill. 87 Cong. Rec. 5703.

In the following year, 1942, the House Appropriations Committee noted with disapproval that "the spot-checking system approved by the Congress" had not been adopted and reiterated its desire that the recommended procedure be followed. H. Rep. No. 2200, 77th Cong., 2d Sess., 8. See also Hearings before the Subcommittee of the Committee on Appropriations of the House of Representatives on the Department of Labor—Federal Security Agency Appropriation Bill for 1943, 77th Cong., 2d Sess., Pt. 1, 281–284; cf. Hearings before the Subcommittee of the Committee on Appropriations of the House of Representatives on the Department of Labor—Federal Security Agency Appropriation Bill for 1945, 78th Cong., 2d Sess., Pt. 1, 403–405.

This history falls far short of sustaining the view that Congress had no intent, either when the statute was enacted or later, that the Administrator should have the powers of investigation expressly and clearly conferred upon him.

[22] The sparse legislative history bearing on the question contains nothing to the contrary. The bills originally introduced did not incorporate §§ 9 and 10 of the Federal Trade Commission Act but contained substantially similar provisions. S. 2475, 75th Cong., 1st Sess., § 15, 81 Cong. Rec. 4961; H. R. 7200, 75th Cong., 1st Sess., § 15, 81 Cong. Rec. 4998. The House Committee on Labor reported of this section (then § 12) that it "contains the usual administrative provisions authorizing the Board to conduct investigations, subpena witnesses, and compel testimony." H. Rep. No. 1452, 75th Cong., 1st Sess., 18, also page 10. The Senate Committee used the same language. S. Rep. No. 884, 75th Cong., 1st Sess., 8. The House bill having been recommitted to the Committee, 82 Cong. Rec. 1834–1835, it drafted the subpoena section (then § 7) into essentially its present form. See H. Rep. No. 2182, 75th Cong., 2d Sess., 3, 11. The only substantial difference was that the subpoena power was given for the purpose of any "hearing" but not for the purpose of any "investigation." However, § 15 (b) of the bills introduced in both houses, *supra*, granted the subpoena power "for the purpose of any investigation or any other proceeding under this Act. . . ." And compare § 15 (a). The difference was remedied by the Senate and House

pressly authorizes the Administrator to "enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act." [23] The subpoena power conferred by § 9 (through adoption of § 9 of the Federal Trade Commission Act) is

---

conferees; for out of conference came § 9 as it is now written. 83 Cong. Rec. 9160; 83 Cong. Rec. 9248, 9254. See also *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, 362, n. 3.

Nothing in the reports or the discussion suggests that the power was not to be exercised, or that subpoenas issued in compliance with the terms of the statute were not to be enforced, exactly in accordance with the authority given.

[23] Section 11 (a) is as follows: "The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act."

The section thus authorizes both general and specific investigations, one for gathering statistical information concerning entire industries, cf. *Walling* v. *American Rolbal Corp.*, 135 F. 2d 1003, the other to discover specific violations. The pattern has become common since its introduction into federal law by the Interstate Commerce Commission legislation. See the summary given as to both federal and state instances in Handler, The Constitutionality of Investigations by the Federal Trade Commission (1928) 28 Col. L. Rev. 708, 905, at 905–909; see also 925–929.

given in aid of this investigation and, in case of disobedience, the district courts are called upon to enforce the subpoena through their contempt powers,[24] without express condition requiring showing of coverage.[25]

---

[24] Section 9 of the Fair Labor Standards Act reads: "For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees."

Section 9 of the Federal Trade Commission Act, 38 Stat. 717, provides that, for the purposes of the authorized investigations, the Commission or its agents shall have access to and the right to copy "any documentary evidence of any corporation being investigated or proceeded against," with the power to require by subpoena "the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation."

The section then proceeds: ". . . in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

Section 9 also contains a provision for immunity of individuals from prosecution, penalty or forfeiture on account of testimony or evidence produced in response to the subpoena.

Section 10 imposes criminal penalties upon "any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission . . ." No question is presented in these cases concerning this provision.

[25] See Part IV, at note 54; also note 24.

In view of these provisions, with which the Administrator's action was in exact compliance, this case presents an instance of "the most explicit language" [26] which leaves no room for questioning Congress' intent. The very purpose of the subpoena and of the order, as of the authorized investigation, is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgment, the facts thus discovered should justify doing so.

Accordingly, if §§ 9 and 11 (a) are not to be construed as authorizing enforcement of the orders, it must be, as petitioners say, because this construction would make them so dubious constitutionally as to compel resort to an interpretation which saves rather than to one which destroys or is likely to do so. The Court has adopted this course at least once in this type of case.[27] But if the same course is followed here, the judgments must be reversed with the effect of cutting squarely into the power of Congress. For to deny the validity of the orders would be in effect to deny not only Congress' power to enact the provisions sustaining them, but also its authority to delegate effective power to investigate violations of its own laws, if not perhaps also its own power to make such investigations.

---

[26] See note 27.

[27] See *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 305–306, in which Mr. Justice Holmes speaking for the Court said: "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 479), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent." See also note 40. Cf. *Boyd* v. *United States*, 116 U. S. 616; *Hale* v. *Henkel*, 201 U. S. 43; *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407.

III.

The primary source of misconception concerning the Fourth Amendment's function lies perhaps in the identification of cases involving so-called "figurative" or "constructive" search with cases of actual search and seizure.[28] Only in this analogical sense can any question related to search and seizure be thought to arise in situations which, like the present ones, involve only the validity of authorized judicial orders.

The confusion is due in part to the fact that this is the very kind of situation in which the decisions have moved with variant direction, although without actual conflict when all of the facts in each case are taken into account. Notwithstanding this, emphasis and tone at times are highly contrasting, with consequent overtones of doubt and confusion for validity of the statute or its application. The subject matter perhaps too often has been generative of heat rather than light, for the border along which the cases lie is one where government intrudes upon different areas of privacy and the history of such intrusions has brought forth some of the stoutest and most effec-

---

[28] "In other words, the subpoena is equivalent to a search and seizure and to be constitutional it must be a *reasonable* exercise of the power." Lasson, Development of the Fourth Amendment to the United States Constitution, 137, citing *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; *Hale* v. *Henkel*, 201 U. S. 43, 76. Cf. *Boyd* v. *United States*, 116 U. S. at 634–635 (as to which see also notes 33 and 36): ". . . We are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited . . . is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment."

See also Handler, Constitutionality of Investigations of the Federal Trade Commission (1928) 28 Col. L. Rev. 708, 905, at 909 ff., and authorities cited, characterizing the identification of an order for production with an actual search or seizure as "the figurative interpretation." P. 917, n. 56.

tive instances of resistance to excess of governmental authority.[29]

The matter of requiring the production of books and records to secure evidence is not as one-sided, in this kind of situation, as the most extreme expressions of either emphasis would indicate. With some obvious exceptions, there has always been a real problem of balancing the public interest against private security. The cases for protection of the opposing interests are stated as clearly as anywhere perhaps in the summations, quoted in the margin,[30] of two former members of this Court, each of

[29] See, in addition to the better known accounts of writs of assistance cited in *Goldman* v. *United States,* dissenting opinion, 316 U. S. at 139, n. 5, Lasson, Development of the Fourth Amendment to the United States Constitution (1937).

[30] The case for protection of the public interest was stated as follows: "The opinion of the court reminds us of the dangers that wait upon the abuse of power by officialdom unchained. The warning is so fraught with truth that it can never be untimely. But timely too is the reminder, as a host of impoverished investors will be ready to attest, that there are dangers in untruths and half truths when certificates masquerading as securities pass current in the market. There are dangers in spreading a belief that untruths and half truths, designed to be passed on for the guidance of confiding buyers, are to be ranked as peccadillos, or even perhaps as part of the amenities of business. . . . A Commission which is without coercive powers, which cannot arrest or amerce or imprison though a crime has been uncovered, or even punish for contempt, but can only inquire and report, the propriety of every question in the course of the inquiry being subject to the supervision of the ordinary courts of justice, is likened with denunciatory fervor to the Star Chamber of the Stuarts. Historians may find hyperbole in the sanguinary simile." Mr. Justice Cardozo, with whom joined the present Chief Justice and Mr. Justice Brandeis, dissenting in *Jones* v. *Securities & Exchange Commission,* 298 U. S. 1, 32–33. See also Handler, Constitutionality of Investigations of the Federal Trade Commission (1928) 28 Col. L. Rev. 708, 905, particularly at 933 ff.

On the other hand, the case for protected privacy was put by Mr. Justice Brandeis, dissenting, in *Olmstead* v. *United States,* 277 U. S. 438, 478–479: "The makers of our Constitution undertook to secure

whom was fully alive to the dual necessity of safeguarding adequately the public and the private interest. But emphasis has not always been so aptly placed.

The confusion obscuring the basic distinction between actual and so-called "constructive" search has been accentuated where the records and papers sought are of corporate character, as in these cases. Historically private corporations have been subject to broad visitorial power, both in England and in this country. And it long has been established that Congress may exercise wide investigative power over them, analogous to the visitorial power of the incorporating state,[31] when their activities take place within or affect interstate commerce.[32] Cor-

---

conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth."

[31] *Wilson* v. *United States,* 221 U. S. 361, 382; *Hale* v. *Henkel,* 201 U. S. 43, 74–75; The Fourth and Fifth Amendments and the Visitorial Power of Congress over State Corporations, Note (1930) 30 Col. L. Rev. 103.

[32] *Ibid.; Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447; *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25; *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612; *Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U. S. 194; *United States* v. *Louisville & N. R. Co.,* 236 U. S. 318; *Smith* v. *Interstate Commerce Commission,* 245 U. S. 33; *United States* v. *New York Central R. Co.,* 272 U. S. 457; cf., however, *Harriman* v. *Interstate Commerce Commission,* 211 U. S. 407; *Federal*

respondingly it has been settled that corporations are not entitled to all of the constitutional protections which private individuals have in these and related matters. As has been noted, they are not at all within the privilege against self-incrimination, although this Court more than once has said that the privilege runs very closely with the Fourth Amendment's search and seizure provisions.[33] It is also settled that an officer of the company cannot refuse to produce its records in his possession, upon the plea that they either will incriminate him or may incriminate it.[34] And, although the Fourth Amendment has been

---

Trade Commission v. *Claire Furnace Co.*, 274 U. S. 160. And see Handler, Constitutionality of Investigations by the Federal Trade Commission (1928) 28 Col. L. Rev. 708, 903.

The power is not limited to inquiring concerning matters which Congress may regulate otherwise than by requiring the production of information, at any rate when it is made to appear that some phase of the activity is in commerce or affects it. See *United States* v. *New York Central R. Co.*, 272 U. S. 457, 464, and authorities cited; *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160. Nor must the "jurisdictional" line be drawn in such cases before the information is called for. Cf. *Myers* v. *Bethlehem Corp.*, 303 U. S. 41; Handler, *op. cit. supra*, at 918 ff., and authorities cited.

[33] In the leading case of *Boyd* v. *United States*, 116 U. S. 616, 630, Mr. Justice Bradley, speaking for the Court in relation to the compelled production of "a man's own testimony or of his private papers [specifically a business invoice] to be used as evidence to convict him of crime or to forfeit his goods," said in a much quoted statement: "In this regard the Fourth and Fifth Amendments run almost into each other." The opinion, quoting at length from Lord Camden's discussion in the historic case of *Entick* v. *Carrington*, 19 Howell's State Trials 1029, relies strongly in this phase upon his conjunction of the right to freedom from search and seizure "where the law forceth evidence out of the owner's custody by process" and the privilege against self-incrimination. 116 U. S. at 629. Cf. also the statement of Mr. Justice Brandeis, quoted *supra* note 30.

[34] *Wilson* v. *United States*, 221 U. S. 361; *Hale* v. *Henkel*, 201 U. S. 43; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25.

held applicable to corporations [35] notwithstanding their exclusion from the privilege against self-incrimination, the same leading case of *Wilson* v. *United States,* 221 U. S. 361, distinguishing the earlier quite different one of *Boyd* v. *United States,* 116 U. S. 616,[36] held the process not invalid under the Fourth Amendment, although it broadly required the production of copies of letters and telegrams "signed or purporting to be signed by the President of said company during the month[s] of May and June, 1909; in regard to an alleged violation of the statutes of the United States by C. C. Wilson." 221 U. S. at 368, 375.

The *Wilson* case has set the pattern of later decisions and has been followed without qualification of its ruling.[37] Contrary suggestions or implications may be explained as dicta; [38] or by virtue of the presence of an actual illegal search and seizure, the effects of which the Government sought later to overcome by applying the more liberal doc-

---

[35] *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385; *Hale* v. *Henkel,* 201 U. S. 43; *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 448 ff. See also *Consolidated Rendering Co.* v. *Vermont,* 207 U. S. 541.

[36] See note 33. The ruling was limited, in view of the facts, to criminal proceedings and proceedings for forfeiture of property. Only a single document was called for. The vitiating element lay in the incriminating character of the unusual provision for enforcement. The statute provided that failure to produce might be taken as a confession of whatever might be alleged in the motion for production.

[37] See notes 31, 32, 40. Thus far Congress has not seen fit to leave to administrative officials authority to enforce subpoenas. The pattern adopted in §§ 9 and 10 of the Federal Trade Commission Act, of referring enforcement to the courts, has become accepted, whether by virtue of reflections of the opinion in *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, or for other reasons. The extent to which the pattern has been adopted is summarized, partially at least, in Handler, *op. cit. supra,* at 925 ff.

[38] See, for example, *Essgee Co.* v. *United States,* 262 U. S. 151.

trine developed in relation to "constructive search"; [39] or by the scope of the subpoena in calling for documents so broadly or indefinitely that it was thought to approach in this respect the character of a general warrant or writ of assistance, odious in both English and American history.[40] But no case has been cited or found in which,

[39] E. g., in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, government officers, after arresting corporate officials at their homes, "without a shadow of authority went to the office of their company and made a clean sweep of all the books, papers and documents found there," taking them to the district attorney's office, where they were photographed. After an order of court to return the originals, but impounding the copies, subpoenas to produce the originals were enforced by an order, the refusal to obey which was held a contempt. The Court's strong language in reversing this decision undoubtedly was called forth by the Government's effort, not to say subterfuge, thus to avoid the effects of its initial wrong. Cf. *Weeks* v. *United States,* 232 U. S. 383; *Gouled* v. *United States,* 255 U. S. 298.

[40] Thus, the aggravating circumstance in *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298, cf. note 27, seems to have been the Commission's claim of "an unlimited right of access to the respondents' papers with reference to the possible existence of practices in violation of § 5." 264 U. S. at 305. The Court said: "It is contrary to the first principles of justice to allow a search through all the respondents' records, *relevant or irrelevant,* in the hope that something will turn up." P. 306. (Emphasis added.) Cf. *Silverthorne Lumber Co.* v. *United States, supra,* note 39.

However in *Wheeler* v. *United States,* 226 U. S. 478, where no element of actual search and seizure was present, a subpoena was enforced which called for copies of all letters and telegrams, all cash books, ledgers, journals and other account books of the corporation covering a period of fifteen months; cf. *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447. And in *Brown* v. *United States,* 276 U. S. 134, the subpoena called for all letters, telegrams or copies thereof passing between a national trade association and its members, including their officers and agents, over a period of two and one-half years, with reference to eighteen different items. The Court, by Mr. Justice Sutherland, said: "The subpoena . . . specifies a reasonable period of time and, with reasonable particularity, the subjects to which the documents called for relate. The question is ruled, not by *Hale*

upon similar facts, the *Wilson* doctrine has not been followed. Nor in any has Congress been adjudged to have exceeded its authority, with the single exception of *Boyd* v. *United States, supra,* which differed from both the *Wilson* case and the present ones in providing a drastically incriminating method of enforcement [41] which was applied to the production of partners' business records. Whatever limits there may be to congressional power to provide for the production of corporate or other business records, therefore, they are not to be found, in view of the course of prior decisions, in any such absolute or universal immunity as petitioners seek.

Without attempt to summarize or accurately distinguish all of the cases, the fair distillation, in so far as they apply merely to the production of corporate records and papers in response to a subpoena or order authorized by law and safeguarded by judicial sanction, seems to be that the Fifth Amendment affords no protection by virtue of the self-incrimination provision, whether for the corporation or for its officers; and the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be "particularly described," if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.

As this has taken form in the decisions, the following specific results have been worked out. It is not necessary,

v. *Henkel,* but by *Consolidated Rendering Co.* v. *Vermont,* 207 U. S. 541, 553–554, and *Wheeler* v. *United States," supra.*

With reference to the breadth of the subpoena or order for production in the scope of what is called for, in addition to the authorities cited in this note and note 45, see *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322; *United States* v. *Bausch & Lomb Optical Co.,* 321 U. S. 707; Handler, *op. cit. supra,* at 913 ff.

[41] See note 36.

as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command. This has been ruled most often perhaps in relation to grand jury investigations,[42] but also frequently in respect to general or statistical investigations authorized by Congress.[43] The requirement of "probable cause, supported by oath or affirmation," literally applicable in the case of a warrant, is satisfied in that of an order for production by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry.[44] Beyond this the requirement of reasonableness, including particularity in "describing the place to be searched, and the persons or things to be seized," also literally applicable to warrants, comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. Necessarily, as has been said, this cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry.[45]

When these principles are applied to the facts of the present cases, it is impossible to conceive how a violation of petitioners' rights could have been involved. Both

[42] E. g., *Hale* v. *Henkel,* 201 U. S. 43; *Wilson* v. *United States,* 221 U. S. 361, 372.

[43] *Smith* v. *Interstate Commerce Commission,* 245 U. S. 33; *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612; cf. *Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U. S. 194; *Harriman* v. *Interstate Commerce Commission,* 211 U. S. 407, 419. And see Handler, *op. cit. supra,* 918 ff.

[44] Cf. the authorities cited in notes 42 and 43.

[45] Cf. *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 357; *Boyd* v. *United States,* 116 U. S. at 630, and note 40 *supra.*

were corporations. The only records or documents sought were corporate ones. No possible element of self-incrimination was therefore presented or in fact claimed. All the records sought were relevant to the authorized inquiry,[46] the purpose of which was to determine two issues, whether petitioners were subject to the Act and, if so, whether they were violating it. These were subjects of investigation authorized by § 11 (a), the latter expressly, the former by necessary implication.[47] It is not to be doubted that Congress could authorize investigation of these matters. In all these respects,[48] the specifications

---

[46] The subpoena in No. 61 called for production of:

> "All of your books, papers and documents showing the hours worked by and wages paid to each of your employees between October 28, 1938, and the date hereof, including all payroll ledgers, time sheets, time cards and time clock records, and all your books, papers and documents showing the distribution of papers outside the State of Oklahoma, the dissemination of news outside the State of Oklahoma, the source and receipt of news from outside the State of Oklahoma, and the source and receipt of advertisements of nationally advertised goods."

The specification in No. 63 was substantially identical except for the period of time covered by the demand.

[47] See the language of the section, note 24 *supra*. Of course violation could be found only in situations where coverage would exist. Authority to investigate the existence of violations accordingly included authority to investigate coverage. Cf. *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501; *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, discussed in the text herein at notes 49–51; and authorities cited in note 32 *supra*.

[48] The description was made with all of the particularity the nature of the inquiry and the Administrator's situation would permit. See note 46. The subpoenas were limited to the books, papers and documents of the respective corporations, to which alone they were addressed. They required production at specified times and places in the cities of publication and stated the purpose of the investigation to be one affecting the respondent, pursuant to the provisions of §§ 9 and 11 (c), "regarding complaints of violations by said company of Sections 6, 7, 11 (c), 15 (a) (1), 15 (a) (2) and 15 (a) (5) of the Act." Cf. the authorities cited in notes 32 and 45.

more than meet the requirements long established by many precedents.

More recent confirmation of those rulings may be found in *Endicott Johnson Corp.* v. *Perkins, supra,* and *Myers* v. *Bethlehem Corp.,* 303 U. S. 41. It is true that these cases involved different statutes substantially and procedurally. But, notwithstanding the possible influence of the doctrine of governmental immunity to suit in the *Endicott Johnson* case, it would be anomalous to hold that under the Walsh-Healey Act, 49 Stat. 2036, the district court was not authorized to decide the question of coverage or, on the basis of its adverse decision, to deny enforcement to the Secretary's subpoena seeking relevant evidence on that question, because Congress had committed its initial determination to him; and at the same time to rule that Congress could not confer the same power upon the Administrator with reference to violations of the Fair Labor Standards Act.[49] The question at issue is not in either case the nature of the legal obligation, violation of which the evidence is sought to show. It is rather whether evidence relevant to the violation, whatever the obligation's character, can be drawn forth by the exercise of the subpoena power.

The *Myers* case did not involve a *subpoena duces tecum,* but was a suit to enjoin the National Labor Relations Board from holding a hearing upon a complaint against an employer alleged to be engaged in unfair labor practices forbidden by the Wagner Act, 49 Stat. 449. The hearing required an investigation and determination of coverage, involving as in this case the question whether the company was engaged in commerce. It denied this upon allegations thought to sustain the denial, as well as

[49] This Court, in granting certiorari in the *Endicott Johnson* case, did so, among other reasons, "because of probable conflict with" *General Tobacco & Grocery Co.* v. *Fleming,* 125 F. 2d 596, a case arising under the Fair Labor Standards Act. 317 U. S. at 502.

the futility, expensiveness and vexatious character of the hearing to itself.[50] This Court held that the district court was without jurisdiction to enjoin the hearing. Regarding as appropriate the procedure before the Board and as adequate the provisions for judicial review of its action, including its determination of coverage, the Court sustained the exclusive jurisdiction of the Board, and of the court of appeals upon review, to determine that question, with others committed to their judgment, in the statutory proceeding for determining whether violations of the Act exist. The opinion referred to the Board's subpoena power, also to its authority to apply to a district court for enforcement, and stated that "to such an application appropriate defence may be made." But the decision's necessary effect was to rule that it was not "an appropriate defence" that coverage had not been determined prior to the hearing or, it would seem necessarily to follow, prior to the Board's preliminary investigation of violation. If this is true in the case of the Board, it would seem to be equally true in that of the Administrator.[51]

---

[50] To the argument of "irreparable damage," the Court said: "The contention is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. . . . Obviously, the rule . . . cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact." 303 U. S. at 50.

[51] It is true that in the *Myers* situation the Board's determination is quasi-judicial, is given finality as to the facts if there is evidence to sustain its findings, National Labor Relations Act, § 10 (e) (49 Stat. 454), and is expressly made exclusive, *ibid.*, § 10 (a), whereas in the situations now presented the Administrator's investigation is only preliminary to instituting proceedings in court and thus has none of the finality or quasi-judicial character given to the Board's determi-

In these results under the later as well as the earlier decisions, the basic compromise has been worked out in a manner to secure the public interest and at the same time to guard the private ones affected against the only abuses from which protection rightfully may be claimed. The latter are not identical with those protected against invasion by actual search and seizure, nor are the threatened abuses the same. They are rather the interests of men to be free from officious intermeddling, whether because irrelevant to any lawful purpose or because unauthorized by law, concerning matters which on proper occasion and within lawfully conferred authority of broad limits are subject to public examination in the public interest. Officious examination can be expensive, so much so that it eats up men's substance. It can be time consuming, clogging the processes of business. It can become persecution when carried beyond reason.

On the other hand, petitioners' view, if accepted, would stop much if not all of investigation in the public interest at the threshold of inquiry and, in the case of the Administrator, is designed avowedly to do so. This would render substantially impossible his effective discharge of the duties of investigation and enforcement which Congress has placed upon him. And if his functions could be thus blocked, so might many others of equal importance.

---

nation. But, as the Court noted, the Board also has preliminary investigative authority, incidental to preparation for the hearing, to which its subpoena power applies, National Labor Relations Act, § 11 (49 Stat. 455, 456); and, as we have said, if the courts are forbidden to determine coverage prior to the Board's quasi-judicial proceeding for deciding that question, it would seem necessarily to follow that they are forbidden also to decide it prior to the Board's preliminary investigation to determine whether the proceeding shall be instituted.

The mere fact that the first stage of formal adjudication is administrative in the one case and judicial in the other would seem to make no difference with the power of Congress to authorize either the preliminary investigation or the use of the subpoena power in aid of it.

691100°—47——18

We think, therefore, that the courts of appeals were correct in the view that Congress has authorized the Administrator, rather than the district courts in the first instance, to determine the question of coverage in the preliminary investigation of possibly existing violations; in doing so to exercise his subpoena power for securing evidence upon that question, by seeking the production of petitioners' relevant books, records and papers; and, in case of refusal to obey his subpoena, issued according to the statute's authorization, to have the aid of the district court in enforcing it. No constitutional provision forbids Congress to do this. On the contrary, its authority would seem clearly to be comprehended in the "necessary and proper" clause, as incidental to both its general legislative and its investigative powers.

IV.

What has been said disposes of petitioners' principal contention upon the sufficiency of the showing. Other assignments, however, present the further questions whether any showing is required beyond the Administrator's allegations of coverage and relevance of the required materials to that question; and, if so, of what character. Stated otherwise, they are whether the court may order enforcement only upon a finding of "probable cause," that is, probability in fact, of coverage, as was held by the Court of Appeals for the Tenth Circuit in No. 61, following the lead of the Eighth Circuit in *Walling* v. *Benson,* 137 F. 2d 501, or may do so upon the narrower basis accepted by the Third Circuit in No. 63.

The showing in No. 61 was clearly sufficient to constitute "probable cause" in this sense under conceptions of coverage prevailing at the time of the hearing,[52] whether

[52] The evidence that the company or its employees were engaged in commerce, etc., was supplied largely by it in the return to the rule to show cause and the supporting affidavits, consisting of admissions

or not that showing was necessary. Accordingly the judgment in that case must be affirmed.

In No. 63 the showing was less extensive, and it is doubtful that it would constitute "probable cause" of coverage as that term was used in the decisions from the Tenth and Eighth Circuits.[53] The Court of Appeals for the Third Circuit did not so label it, but held the showing sufficient.

Congress has made no requirement in terms of any showing of "probable cause"; [54] and, in view of what has already been said, any possible constitutional requirement

---

and statements of fact concerning its modes of doing business. The admissions obviously were made upon petitioner's broad theory that the publishing business is not subject to the Act or to the commerce power. But those conclusions do not nullify the factual character of the admissions and, so taken, they adequately sustain the appellate court's conclusion of "probable cause" of coverage.

[53] See notes 3, 4. The Administrator's allegations, more general than in No. 61, merely set forth that the company was a newspaper publisher, that the Administrator had reason to believe it was violating the Act, and that it was "engaged in commerce and in the production of goods for commerce." This conclusion was denied. The admissions of the return, including the affidavits, supplied only the pertinent facts in relation to coverage that the respondent, News Printing Co., was engaged in the business of publishing and distributing the "Paterson Evening News," a daily paper, that less than one per cent of its circulation of more than 23,000 copies, or a daily average of 278 copies, was distributed outside New Jersey, where the paper was published, and that the business was conducted in the same manner as other "local" papers according to the methods shown by the affidavits. These disclosed nothing material concerning interstate phases of such businesses generally, except as might be inferred from statements that they publish national and international as well as local news, and must do so as quickly as possible after the events occur.

[54] Section 9 of the Federal Trade Commission Act authorizes the Administrator to invoke the aid of the court "in case of disobedience to a subpoena" and the court is authorized to give assistance "in case of contumacy or refusal to obey a subpoena issued to any corporation or other person . . ." Cf. note 24.

of that sort was satisfied by the Administrator's showing in this case, including not only the allegations concerning coverage, but also that he was proceeding with his investigation in accordance with the mandate of Congress and that the records sought were relevant to that purpose. Actually, in view of today's ruling in *Mabee* v. *White Plains Publishing Co., supra,* the showing here, including the facts supplied by the response, was sufficient to establish coverage itself, though that was not required.

The result therefore sustains the Administrator's position that his investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grand jury's, or the court's in issuing other pretrial orders for the discovery of evidence,[55] and is governed by the same limitations. These are that he shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be "limited . . . by forecasts of the probable result of the investigation . . ." *Blair* v. *United States,* 250 U. S. 273, 282; cf. *Hale* v. *Henkel,* 201 U. S. 43. Nor is the judicial function either abused or abased, as has been suggested,[56] by leaving to it the determination of the

[55] The bill of discovery in equity would seem to furnish an instance. Cf. *Sinclair Refining Co.* v. *Jenkins Petroleum Co.,* 289 U. S. 689, 696–697. See also the provisions for pretrial examination and the taking of depositions, Federal Rules of Civil Procedure, Rules 26 (b), 30 (d), 45; *Union Central Life Ins. Co.* v. *Burger,* 27 F. Supp. 556; *Bloomer* v. *Sirian Lamp Co.,* 4 F. R. D. 167, 8 F. R. S. 26b.31, Case 3; *Lewis* v. *United Air Lines Transport Corp.,* 27 F. Supp. 946, 947. The power of Congress itself to call for information presents a related illustration. *McGrain* v. *Daugherty,* 273 U. S. 135, 156–158.

[56] In *General Tobacco & Grocery Co.* v. *Fleming,* 125 F. 2d 596, 599, the court said: "In the exercise of the judicial power to review questions of law, as conferred by an Act of Congress, the seal of a United States Court should not become a mere rubber stamp for the approval of arbitrary action by an administrative agency." In this case, No. 63, the district court said: ". . . the functions of the Courts remain, and those functions are not merely to act as an adjunct of administrative bodies. . . ." 49 F. Supp. 659, 661.

important questions which the Administrator's position concedes the courts may decide.[57]

Petitioners stress that enforcement will subject them to inconvenience, expense and harassment. That argument is answered fully by what was said in *Myers* v. *Bethlehem Corp.*[58] There is no harassment when the subpoena is issued and enforced according to law. The Administrator is authorized to enter and inspect, but the Act makes his right to do so subject in all cases to judicial supervision. Persons from whom he seeks relevant information are not required to submit to his demand, if in any respect it is unreasonable or overreaches the authority Congress has given. To it they may make "appropriate defence" surrounded by every safeguard of judicial restraint. In view of these safeguards, the expressed fears of unwarranted intrusions upon personal liberty are effective only to recall Mr. Justice Cardozo's reply to the same exaggerated forebodings in *Jones* v. *Securities & Exchange Commission:* "Historians may find hyperbole in the sanguinary simile." [59]

Nor is there room for intimation that the Administrator has proceeded in these cases in any manner contrary to

[57] The issues of authority to conduct the investigation, relevancy of the materials sought, and breadth of the demand are neither minor nor ministerial matters. Nor would there be any failure to satisfy fully the discretionary power implied in the statute's use of the word "may," rather than "shall," see note 24, in authorizing the court to enforce the subpoenas. It would be going far to say that Congress could not proceed upon this basis, but could go forward only by requiring a showing of probable cause of coverage in the sense of probability in fact of coverage. Cf. note 44 and text. Coverage is but one element in violation and if probable cause, in that sense, must be shown concerning it, it is difficult to understand why probable cause must not be shown also concerning exemptions, see *Martin Typewriter Co.* v. *Walling,* 135 F. 2d 918; *Walling* v. *La Belle S. S. Co.,* 148 F. 2d 198, or any other essential element in violation.

[58] See note 50 *supra.*

[59] See note 30.

petitioners' fundamental rights or otherwise than strictly according to law. It is to be remembered that petitioners' are not the only rights which may be involved or threatened with possible infringement. Their employees' rights and the public interest under the declared policy of Congress also would be affected if petitioners should enjoy the practically complete immunity they seek.

No sufficient reason was set forth in the returns or the accompanying affidavits for not enforcing the subpoenas, a burden petitioners were required to assume in order to make "appropriate defence."

Accordingly the judgments in both causes, No. 61 and No. 63, are

Affirmed.

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

MR. JUSTICE MURPHY, dissenting.

It is not without difficulty that I dissent from a procedure the constitutionality of which has been established for many years. But I am unable to approve the use of non-judicial subpoenas issued by administrative agents.

Administrative law has increased greatly in the past few years and seems destined to be augmented even further in the future. But attending this growth should be a new and broader sense of responsibility on the part of administrative agencies and officials. Excessive use or abuse of authority can not only destroy man's instinct for liberty but will eventually undo the administrative processes themselves. Our history is not without a precedent of a successful revolt against a ruler who "sent hither swarms of officers to harass our people."

Perhaps we are too far removed from the experiences of the past to appreciate fully the consequences that may result from an irresponsible though well-meaning use of

the subpoena power. To allow a non-judicial officer, unarmed with judicial process, to demand the books and papers of an individual is an open invitation to abuse of that power. It is no answer that the individual may refuse to produce the material demanded. Many persons have yielded solely because of the air of authority with which the demand is made, a demand that cannot be enforced without subsequent judicial aid. Many invasions of private rights thus occur without the restraining hand of the judiciary ever intervening.

Only by confining the subpoena power exclusively to the judiciary can there be any insurance against this corrosion of liberty. Statutory enforcement would not thereby be made impossible. Indeed, it would be made easier. A people's desire to cooperate with the enforcement of a statute is in direct proportion to the respect for individual rights shown in the enforcement process. Liberty is too priceless to be forfeited through the zeal of an administrative agent.

GRIFFIN *v.* GRIFFIN.

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

No. 86. Argued December 10, 1945.—Decided February 25, 1946.

In 1924 a New York court entered an interlocutory decree divorcing respondent from petitioner. The decree was modified in 1926 to provide that petitioner should pay to respondent alimony in a specified amount annually. Both parties were then residents of New York, and the proceedings were contested. In 1936 the court, also in contested proceedings, entered an order declaring that there was due from petitioner to respondent, for the period ending October 25, 1935, alimony arrears and accrued interest in a specified amount. In 1938, without notice to the petitioner, a judgment was by order of the court docketed in favor of the respondent against petitioner, and execution ordered to issue thereon, in an amount embracing what was due upon the 1936 order plus alimony arrears and interest from October 25, 1935, to the date of the 1938 order. Respondent sued petitioner in the district court of the District of Columbia upon the 1938 judgment, and was awarded summary judgment in the amount of the 1938 judgment plus interest. *Held*:

1. To the extent that it adjudged as due and owing arrears of alimony accrued since October 25, 1935, the 1938 judgment was wanting in procedural due process and unenforceable. Pp. 223, 233.

(a) Because of the want of notice to petitioner of the proceeding to docket judgment against him for accrued alimony, and to the extent that petitioner was thus deprived of an opportunity which under the law of New York was open to him to raise defenses in such a proceeding, there was want of procedural due process and hence want of that jurisdiction over the person of petitioner prerequisite to the rendition of a judgment *in personam* against him. P. 228.

The law of New York is examined and found to differ significantly from that involved in *Sistare* v. *Sistare*, 218 U. S. 1. P. 233.

(b) It is immaterial whether petitioner at the time of the 1938 proceeding was a domiciled resident of New York, either within or temporarily without the State, or a resident of some other jurisdiction. In any event, a judgment *in personam* direct-

ing execution to issue against petitioner, and thus purporting to cut off all available defenses, could not be rendered on any theory of the State's power over him, without some form of notice by personal or substituted service. P. 228.

(c) Although the 1926 decree, in light of the New York practice, gave petitioner notice at the time of its entry that further proceedings might be taken to docket in judgment form the obligation to pay installments accruing under the decree, due process nevertheless required further notice of the time and place of such further proceedings, inasmuch as they undertook substantially to affect his rights in ways in which the 1926 decree did not. P. 229.

(d) The assertion for the first time by the 1938 judgment of power to adjudicate petitioner's liability for accrued alimony and to direct its enforcement by execution, does not differ in its nature and constitutional effect from the like assertion of power to issue execution by any other judgment rendered without notice. P. 231.

(e) The contention that the 1938 judgment is not a final adjudication of the defenses which the petitioner might have had, and that notice was therefore not required, is irreconcilable with the fact that the judgment authorizes immediate execution thereon. P. 232.

(f) Even though petitioner could, if he knew of the judgment before execution is actually levied, move to set the judgment aside, that could not save the judgment from its due process infirmity, since it and the New York practice purport to authorize the levy of execution before petitioner is notified of the proceeding or the judgment. P. 232.

2. To the extent that the 1938 judgment infringes due process, it cannot be made the instrument for enforcing in another jurisdiction the rights purportedly adjudicated by it. P. 232.

(a) A judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction. P. 228.

(b) Due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process. P. 232.

3. To the extent that the 1938 judgment confirmed the 1936 adjudication of the amount of alimony and interest due as of October 25, 1935, respondent was entitled to maintain suit upon it. P. 233.

(a) The 1936 order was a final adjudication between the parties that arrears of alimony were then due and owing by petitioner to respondent in the specified amount. P. 233.

(b) Existence of a power to modify or revoke installments of alimony already accrued is not lightly to be implied. P. 233.

(c) The 1938 judgment, so far as it confirmed the 1936 order by which petitioner was already bound, impaired no rights of petitioner and foreclosed no defense which he had not had opportunity to offer. P. 233.

(d) Due process does not require that notice be given before confirmation of rights theretofore established in a proceeding of which adequate notice was given. Pp. 233–234.

(e) Upon remand of the cause, respondent will be taken as having established the amount of alimony accrued to October 25, 1935, remaining due and unpaid as of February 25, 1936, subject to any subsequent defense going to the discharge of the obligation so established, which petitioner should be permitted to raise, if any he has. P. 234.

4. Upon remand the district court will be free to consider whether respondent, upon issues appropriately framed in conformity to the summary judgment procedure, or by amended pleadings, may recover on the basis of the 1926 decree arrears of alimony accruing since October 25, 1935. P. 235.

5. Petitioner's claim that the judgment of the New York court was procured or affected by fraud, and that parts of his answer and response to the motion for summary judgment were improperly stricken by the district court, is unsupported. P. 236.

148 F. 2d 17, reversed.

In a suit in the District of Columbia to enforce a New York decree for alimony, the plaintiff was awarded summary judgment. The United States Court of Appeals for the District of Columbia affirmed. 148 F. 2d 17. This Court granted certiorari. 326 U. S. 705. *Reversed and remanded,* p. 236.

Petitioner argued the cause and filed a brief *pro se.*

A. M. Goldstein argued the cause and filed a brief for respondent.

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

This is a suit brought in the district court of the District of Columbia, in which respondent sought to recover the amount of a judgment which she had secured against petitioner in 1938 in the Supreme Court of New York for arrears of alimony. The question for decision is the extent to which due process permits the New York adjudication to be made the basis for recovery in another jurisdiction.

The record abounds in confusing and irrelevant matter, but the following facts may be gleaned from the papers in the New York court proceedings which it contains. On June 24, 1924, the Supreme Court of the State of New York entered its interlocutory judgment divorcing respondent from petitioner, which judgment was, in 1926, modified to provide that petitioner should pay to respondent alimony in the sum of $3,000 annually in equal monthly installments. Both parties were then residents of New York, and the divorce action was contested. Petitioner left New York in 1929, and though he has returned to the jurisdiction intermittently since that time, the record does not show whether he ever again took up residence there. Petitioner was a resident of the District of Columbia at the time this suit was begun.

In 1935 respondent moved in the original divorce proceeding to punish petitioner for contempt for his failure to pay installments of alimony as directed by the decree of divorce, and petitioner, in conformity to New York procedure, made a cross-motion to modify the original judgment by reducing past due and future installments of alimony. Thereupon the New York court entered an order referring to a referee for determination two of the issues of fact raised by the motions, (a) the amount of unpaid installments of alimony due from petitioner to respondent, and (b) petitioner's then ability to pay them. These questions were litigated by the parties in contested

hearings before the referee, whose report of January 7, 1936, found the amount then due from petitioner to respondent as arrears of alimony, and that petitioner had failed to present any credible testimony showing his inability to pay. The New York supreme court then entered its order of February 25, 1936, declaring that there was due from petitioner to respondent for the period ending October 25, 1935 alimony arrears and accrued interest in the sum of $18,493.64. Petitioner's appeal from this order to the Appellate Division of the New York supreme court was dismissed for want of prosecution.

Some time later, respondent made a further motion in the supreme court for an order directing the county clerk to enter as a money judgment the arrears of alimony due and unpaid under the judgment of divorce. This motion was granted, and an order was entered February 19, 1938 directing the clerk to docket a judgment in favor of respondent against petitioner in the sum of $25,382.75. As indicated in the order this amount was made up of the following items:

Installments of alimony accrued to October 25, 1935, found due by the order of the supreme court of February 25, 1936	$18,493.64
Interest on this amount to date of entry of the 1938 order	2,589.11
Installments of alimony due from October 25, 1935, to the date of the 1938 order	3,750.00
Interest on these installments	550.00
	$25,382.75

A judgment that respondent recover this amount from petitioner and have execution upon it was entered by the clerk on February 23, 1938. Both the order of February 19, 1938 and the judgment upon it were entered ex parte, without notice to petitioner, as then seems to have been

permitted under § 538 of the New York Civil Practice Act. *Thayer* v. *Thayer,* 145 App. Div. 268, 129 N. Y. S. 1035 (1st Dept.).[1] Petitioner, by his answer in the present suit on this judgment, set up as defenses that the judgment of February 1938 was entered without notice to him, and was for that reason null and void for want of due process, and also "because of gross fraud in its incidents, and in its procurement, and in its making and entry, and in its monetary contents, and in the amount claimed to be due and owing under it," and so was not entitled to any recognition in the District of Columbia.

On motion for summary judgment, supported by pleadings, affidavit and admissions establishing the several judgments, orders and records of the New York supreme court to which we have referred, the district court ordered summary judgment in the sum of $25,382.75, with interest from February 23, 1938. The court of appeals for the District affirmed without opinion. We granted certiorari, 326 U. S. 705, on a petition which urges the sufficiency of the defenses raised below.

By Rule 56 (d) of the Rules of Civil Procedure, the court, on a motion for summary judgment, is required to

---

[1] Since the entry of the 1938 judgment, § 1171–b of the New York Civil Practice Act has been added by Laws of 1939, Ch. 431, amended, Laws of 1940, Ch. 226, so as to provide:

"§ 1171–b. Enforcement by execution of judgment or order in action for divorce, separation or annulment. Where the husband, in an action for divorce, separation, annulment, or declaration of nullity of a void marriage, makes default in paying any sum of money as required by the judgment or order directing the payment thereof, the court may make an order directing the entry of judgment for the amount of such arrears, together with ten dollars costs and disbursements. *The application for such order shall be upon such notice to the husband as the court may direct.* Such judgment may be enforced by execution or in any other manner provided by law for the collection of money judgments. The relief herein provided for is in addition to any and every other remedy to which the wife may be entitled under the law." (Italics supplied.)

ascertain by examination of the pleadings and the evidence before it what material facts exist without substantial controversy and what material facts are actually and in good faith controverted, and thereupon to make an order specifying the facts that appear without substantial controversy, and directing such further proceedings in the action as are just. For the purposes of the trial it is provided that the facts so specified shall be deemed established and the trial conducted accordingly. In the present state of the record, and in order that the summary judgment procedure may be properly followed, it becomes necessary to determine what facts appear without substantial controversy, and in the light of those facts to direct such further proceedings in the action as are just.

Of controlling significance in this case are the following uncontroverted facts of record: the judgment or decree rendered by the New York supreme court in 1926 directing annual payments of alimony in the sum of $3,000; the order of the New York supreme court in the same proceeding determining as a result of an active litigation between the parties that as of February 25, 1936, there was due and payable from petitioner to respondent arrears of alimony in the sum of $18,493.64, representing installments accrued to October 25, 1935, with interest to that date, and that petitioner was not entitled to any reduction in the amount due; and finally, the judgment of the New York supreme court of 1938, which incorporated in the amount adjudged to be due the arrears of alimony with interest found by the 1936 order to have accrued to October 25, 1935.

We have examined the New York law, and conclude that the 1926 New York alimony decree was, under the New York practice, subject to some power of modification *nunc pro tunc* as to alimony accrued but unpaid up to the time of modification. See New York Civil Practice Act,

§ 1170; Laws 1925, Ch. 240.[2] Under the local practice, alimony which has accrued under a decree of divorce may not be collected by execution unless and until a judgment for the amount of alimony accrued but unpaid is docketed by order of the court which issued the decree. *Thayer* v. *Thayer, supra; Ostrin* v. *Posner,* 127 Misc. 313, 215 N. Y. S. 259. And upon a motion to docket as a judgment, arrears of alimony awarded under a prior decree, the husband may defend on the grounds that the alimony or some part of it is not due because of the death or remarriage of the wife, *Kirkbride* v. *Van Note,* 275 N. Y. 244, 9 N. E. 2d 852; or that the obligation has been discharged by payment or otherwise, *Karlin* v. *Karlin,* 280 N. Y. 32, 19 N. E. 2d 669; or that circumstances have so changed as to justify a reduction of alimony already accrued by modification of the alimony decree, *Van Dusen* v. *Van Dusen,* 258 App. Div. 1020, 17 N. Y. S. 2d 96 (3d Dept.); *Cunningham* v. *Cunningham,* 261 App. Div. 973, 25 N. Y. S. 2d 933, 934 (2d Dept.); *Eisinger* v. *Eisinger,* 261 App. Div. 1031, 26 N. Y. S. 2d 22 (3d Dept.).

---

[2] The New York law described in *Sistare* v. *Sistare,* 218 U. S. 1, decided in 1910, differs significantly from the more recent New York law which governs this case, as will be seen from the authorities cited. Ch. 240 of the Laws of 1925 amended § 1170 of the Civil Practice Act so as to provide in part: "Where an action for divorce or separation is brought by either husband or wife, the court, except as otherwise expressly prescribed by statute, must give, either in the final judgment, or by one or more orders, made from time to time before final judgment, such directions as justice requires, between the parties, . . . where the action is brought by the wife, for the support of the plaintiff. The court, by order, upon the application of either party to the action, . . . after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, may annul, vary or modify such directions, or in case no such direction or directions shall have been made, amend it by inserting such direction or directions as justice requires . . . for the support of the plaintiff in such final judgment or order or orders. . . ."

Concededly the 1938 judgment was entered without actual notice to or appearance by petitioner, and without any form of service of process calculated to give him notice of the proceedings. Compare *International Shoe Co.* v. *Washington,* 326 U. S. 310, 320–321. Because of the omission, and to the extent that petitioner was thus deprived of an opportunity to raise defenses otherwise open to him under the law of New York against the docketing of judgment for accrued alimony, there was a want of judicial due process, and hence want of that jurisdiction over the person of petitioner prerequisite to the rendition of a judgment *in personam* against him. *McDonald* v. *Mabee,* 243 U. S. 90; cf. *Webster* v. *Reid,* 11 How. 437, 459. The only indication in the record as to petitioner's residence at the time of the entry of the 1938 judgment is a recitation in the judgment itself that he was then a resident of the District of Columbia. But it is immaterial for present purposes whether or not petitioner was a domiciled resident of New York at the time, either within or temporarily without the State, or a resident of some other jurisdiction. It is plain in any case that a judgment *in personam* directing execution to issue against petitioner, and thus purporting to cut off all available defenses, could not be rendered on any theory of the State's power over him, without some form of notice by personal or substituted service. *Wuchter* v. *Pizzutti,* 276 U. S. 13, 18–20; Restatement of Conflict of Laws, § 75; and compare *Milliken* v. *Meyer,* 311 U. S. 457. Such notice cannot be dispensed with even in the case of judgments *in rem* with respect to property within the jurisdiction of the court rendering the judgment. *Roller* v. *Holly,* 176 U. S. 398, 409.

A judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction. *National Exchange Bank* v. *Wiley,* 195 U. S. 257; *Old Wayne Life Assn.* v. *Mc-*

Donough, 204 U. S. 8, 23; *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394, 401. Moreover, due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process. Restatement of Judgments, § 11, Comment *c*.

While it is undoubtedly true that the 1926 decree, taken with the New York practice on the subject, gave petitioner notice at the time of its entry that further proceedings might be taken to docket in judgment form the obligation to pay installments accruing under the decree, we find in this no ground for saying that due process does not require further notice of the time and place of such further proceedings, inasmuch as they undertook substantially to affect his rights in ways in which the 1926 decree did not.[3] By § 1170 of the New York Civil Practice Act, petitioner was afforded the opportunity to move to modify the alimony decree *nunc pro tunc*. The right afforded by that section is a substantial one, and may, under the law of New York, be exercised by him, in effect by way of defense, in addition to the defense of payment, in a proceeding begun by his wife to docket a judgment for accrued alimony. See *Van Dusen* v. *Van Dusen, supra; Cunningham* v. *Cunningham, supra; Eisinger* v. *Eisinger, supra*. As we read the 1938 judgment, which recited that the alimony was "due and unpaid," and directed the issuance of execution for its collection, it purported to cut off any defense of payment or claim under § 1170, which petitioner might have been prompted to assert, and which he

[3] We do not share in the apprehension that the cost of providing such notice as will satisfy due process requirements each time a proceeding is begun to docket a judgment for an accrued installment of alimony will be incommensurately high. In various statutes New York has been able to provide for notice by mail, which is reasonably adapted to provide actual notice and inexpensive in its operation. New York Civil Practice Act, § 229–b; New York Real Property Law, § 442–g; New York Vehicle and Traffic Law, §§ 52, 52–a; see also *Durlacher* v. *Durlacher*, 173 Misc. 329, 17 N. Y. S. 2d 643.

had the right to assert in the very proceeding which culminated in the judgment sued upon.[4] That right could not be rendered nugatory by failure to give him notice of that proceeding.

It is said that we must presume that the New York practice requires that a judgment for accrued alimony which has been docketed without notice must, quite apart from due process requirements, be set aside on the defendant's application showing to the court that he had a defense to the claim for accrued alimony.[5] From this it is said to follow that the 1938 judgment did not deprive petitioner of any right which he previously had, or of any

[4] A judgment procured by fraud may be vacated on that ground in the State of its rendition, and the fraud may perhaps be urged as a defense against its enforcement elsewhere. But a demonstration that the alimony has been paid would not necessarily establish that a judgment for arrears had been fraudulently procured by the wife's false representations to the court that they had not been paid. There are many instances in which a finding of payment will have turned on substantial questions of fact or law upon which a defendant was entitled to be heard, but as to which it could not be said that his antagonist had practiced fraud on the court. Moreover, some available defenses other than payment, as for example, change of the husband's circumstances, are of such nature as to afford no basis for attacking the judgment as fraudulent.

[5] In *Thayer* v. *Thayer*, 145 App. Div. 268, 270–271, 129 N. Y. S. 1035, it was said by way of dictum, "If the court is misled and an installment improperly docketed, the defendant will find no difficulty in having the mistake corrected." But that case was decided before the adoption of § 1170 of the New York Civil Practice Act permitting the modification of any alimony decree *nunc pro tunc* by reducing the amount of accrued alimony. See note 2, *supra*. We cannot assume that the "mistake" contemplated by that opinion was one not relating to payment or discharge. Whether under New York practice a judgment for accrued alimony, docketed without notice, could be opened and the amount of accrued alimony reduced *nunc pro tunc*, remains a matter for speculation. In any case, § 1170 itself does not appear to authorize a motion to set aside a judgment docketed for alimony accrued under an earlier decree directing payment of installments of alimony.

defense which he might have been entitled to make, and that therefore the judgment is not wanting in due process. The argument then runs that since such a judgment satisfies due process it is entitled to as much faith and credit in other jurisdictions as it has in New York. This, it is suggested, means that the judgment may be made the basis of suit in another jurisdiction, but subject there to all those defenses which would be grounds for setting it aside in New York.

But if want of notice were, without more, a sufficient ground for setting aside the judgment under the New York practice, this could hardly be held to amount to anything more than recognition by New York of the constitutional precept that a court may not act to give a personal judgment in the absence of notice. If New York, by its practice, recognizes the ineffectiveness of such a judgment, that could not be made a ground for giving the judgment effect elsewhere more than any other judgment rendered without notice. It might as well be said that any judgment which does not validly cut off defenses because rendered without due process may be made the basis of suit elsewhere subject to those defenses. To the extent that New York refuses, if it does refuse, to set aside the judgment of 1938 unless there be some affirmative showing that there was a meritorious substantive defense to its entry, there is an assertion of power in the court to enter a money judgment and issue execution upon it without notice. The assertion for the first time by the 1938 judgment of power to adjudicate petitioner's liability for accrued alimony and to direct its enforcement by execution, see *Thayer* v. *Thayer, supra,* does not differ in its nature and constitutional effect from the like assertion of power to issue execution by any other judgment rendered without notice.

Due process forbids any exercise of judicial power which, but for the constitutional infirmity, would substantially affect a defendant's rights. To the suggestion that under

the presumed New York practice the power asserted by the judgment does not include the final adjudication of any of the defenses which petitioner might have had, and that notice is therefore not required, the answer must be that the judgment authorizes the immediate issuance of execution. We are unable to reconcile the direction that petitioner's property be seized on execution to satisfy an obligation for the first time found by the judgment to be "due and unpaid" with the theory that the obligation is, for constitutional purposes, thus only tentatively adjudicated. There can be no doubt that a levy upon any property petitioner might have in New York would substantially, and in at least some instances, permanently affect his rights. We cannot say that this could be done without notice of the proceeding said to justify the levy. Even though petitioner could, if he knew of the judgment before execution is actually levied, move to set the judgment aside, that could not save the judgment from its due process infirmity, since it and the New York practice purport to authorize the levy of execution before petitioner is notified of the proceeding or the judgment.

Since by virtue of the due process clause the judgment is ineffective in New York to adjudicate petitioner's rights for enforcement purposes, it cannot be made the instrument for enforcing elsewhere the obligation purportedly adjudicated by it. And even if we were to say that by virtue of the New York practice, and without reference to due process, the 1938 judgment is not an assertion of judicial power to bind petitioner's property for the obligation which the judgment purports to establish, such a judgment would obviously add nothing to the 1926 decree as a basis for enforcing the obligation in another jurisdiction. Neither the judgment nor the earlier decree would do more than establish the original obligation to pay alimony subject to defenses which the supposed New York practice would preserve if due process did not.

It follows that to the extent that the 1938 judgment purports to adjudge as due and owing arrears of alimony accrued since October 25, 1935, the end of the period covered by the 1936 order, it is ineffective to establish petitioner's personal liability, or to deprive him of defenses to his asserted liability for those arrears.

But the 1938 judgment, so far as it confirmed the adjudication of the amount of alimony and interest due as of October 25, 1935, stands on a different footing. It has not been suggested, and we have not found any New York authority holding, that any of the questions with respect to payment or to the modification of the alimony decree *nunc pro tunc* which petitioner raised or might have raised in the 1936 proceedings were thereafter open to him as to the accrued installments which were the subject of his motion to modify the decree. The 1936 order became final upon the dismissal of petitioner's appeal from it, and was an adjudication between the parties that arrears of alimony were then due and owing by petitioner to respondent in the specified amount. As we said in *Barber* v. *Barber,* 323 U. S. 77, 82, paraphrasing *Sistare* v. *Sistare,* 218 U. S. 1, where a decree for alimony is made the basis of an action in another jurisdiction, " 'every reasonable implication must be resorted to against the existence of' a power to modify or revoke installments of alimony already accrued 'in the absence of clear language manifesting an intention to confer it.' "

Defenses which might otherwise have been open to petitioner in the 1938 proceeding with respect to alimony accrued to October 25, 1935 must thus be taken as having been foreclosed by the 1936 proceedings, of which petitioner had actual notice, and in which he actively participated. The 1938 judgment, so far as it confirmed the 1936 order by which petitioner was already bound, impaired no rights of petitioner, and foreclosed no defense which he had not had opportunity to offer. Due process does not

require that notice be given before confirmation of rights theretofore established in a proceeding of which adequate notice was given.

Upon the facts shown, respondent was therefore entitled to maintain the present suit on the 1938 judgment for the amount, with interest, thus adjudicated to be due by the order of 1936, and as so adjudicated, confirmed by the judgment of 1938. For in *Sistare* v. *Sistare, supra,* we held that the full faith and credit clause of the Constitution required a Connecticut court to render judgment for past due installments of alimony which had accrued under a New York decree for future alimony, the right to which we held had become vested under the then existing New York law, even though the decree might be subject to modification prospectively as to future installments by further orders of the New York court.

We have said that the failure to give petitioner notice of the 1938 proceeding did not prejudice him as to any of the defenses which he might have raised in the 1936 proceeding. But although it purported to do so, the 1938 judgment, because rendered without notice, could not foreclose defenses going to the discharge of the obligation established by the order of 1936, and arising since its date. It follows that, upon further proceedings upon the remand of this cause to the district court, respondent will be taken as having established the amount of alimony accrued to October 25, 1935 remaining due and unpaid as of February 25, 1936, subject to any subsequent defense going to the discharge of the obligation so established, which petitioner should be permitted to raise, if any he has.

In the present state of the record, and because of the limited nature of the questions presented and argued here, we do not determine the extent to which respondent may, upon such further proceedings as are appropriate on the return of this case to the district court, recover, upon the

1926 decree, installments of alimony which have accrued since October 25, 1935. While the 1926 decree is in the record and must be the foundation of any right respondent has to recover arrears of alimony accruing since October 25, 1935, her pleadings make it sufficiently clear that the present suit was based upon the 1938 judgment rather than upon the decree. If respondent is entitled to base a suit for installments of alimony accruing after October 25, 1935 on the 1926 decree, she has misconceived her cause of action as to those installments by seeking to recover them by virtue of the 1938 judgment, which is invalid as to them because obtained without notice. But petitioner is not to be prejudiced by respondent's mistake, for since he was entitled to regard the suit as one upon the judgment, he was not required to interpose defenses which would be apt if the suit were upon the 1926 decree. The suit on the 1938 judgment, in its present form, is not to be viewed as if it were on the 1926 decree, a new and different cause of action, and petitioner is not to be penalized for not having already raised his defenses to a claim not presented by respondent's pleadings. In remanding we leave the district court free to consider whether respondent, upon issues appropriately framed in conformity to the summary judgment procedure, or by amended pleadings, may recover on the basis of the 1926 decree, arrears of alimony accruing since October 25, 1935.[6]

Only a word need be said as to petitioner's defense that the judgment was procured by fraud. Although his answer pleads his legal conclusion that the judgment is not entitled to recognition because "of gross fraud in its incidents, and in its procurement," etc., etc., his answer sets up no facts showing the alleged fraud. A part of his answer and an unverified statement filed by petitioner

[6] See *Barber* v. *Barber*, 323 U. S. at 81; Jacobs, The Enforcement of Foreign Decrees for Alimony (1939), 6 Law & Contemporary Problems, 250, 263–4.

in response to the motion for summary judgment were ordered stricken by the trial court, evidently because irrelevant and scandalous. In these the charge of fraud is elaborated by general statements that the machinations of the New York counsel of the parties, and their racial, religious and political affiliations with the judges who have presided over the various phases of the New York litigation, have resulted in the failure of justice exemplified by the several decisions adverse to petitioner. We have examined these assertions and find that the only support for them, so far as appears, is petitioner's unsupported suspicions. We thus find no basis for the allegation that the judgment was procured or in some way affected by fraud, or for the contention that the offensive matter was improperly stricken. We have examined, but find it unnecessary to discuss various other of petitioner's contentions, which are likewise without merit.

The judgment will be reversed and the case remanded for further proceedings in conformity to this opinion.

So ordered.

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

MR. JUSTICE RUTLEDGE, dissenting in part.

I concur in the opinion except as it holds or implies that the 1938 New York judgment is invalid and therefore is not entitled to full faith and credit in so far as it includes instalments of alimony accruing after October 25, 1935, and interest upon them.

The Court apparently regards the judgment as invalid to this extent because, under the New York procedure, it was docketed without notice to the petitioner additional to the notice he had received in the original proceeding for divorce which resulted in the 1924 decree modified in 1926

to provide for the monthly accrual and payment of these instalments.

The bases for this view seem to rest in two assumptions. One is that the 1938 judgment, except as to the arrears accumulated to October 25, 1935, is precisely the same as any other money judgment and therefore falls within the prohibition of *Pennoyer* v. *Neff*, 95 U. S. 714. In this view the absence of further notice is equivalent to the absence of any; and the judgment becomes invalid for want of due process for purposes of local enforcement as well as for receiving full faith and credit in other jurisdictions.[1] The second assumption is that the docketing of the judgment cut off petitioner's right to make any of the defenses, relating to matters arising after entry of the 1924 decree, which by the law of New York he was entitled to make (and which he did make in 1935 concerning arrears then accrued) at any time prior to docketing of the judgment. I am unable to accept either of these assumptions.

I.

If it were clear, as the Court seems to hold, that petitioner's right to make the allowable defenses was extinguished under the New York law by the docketing of the judgment, we would be confronted with the necessity of determining whether that fact would bring the case within the rule and the reason of *Pennoyer* v. *Neff, supra,*

[1] ". . . the duly attested record of the judgment of a state is entitled to such faith and credit in every court within the United States as it has by law or usage in the state from which it is taken." *Adam* v. *Saenger*, 303 U. S. 59, 62; *Hanley* v. *Donoghue*, 116 U. S. 1, 5; *Hampton* v. *M'Connel*, 3 Wheat. 234; *Mills* v. *Duryee*, 7 Cranch 481; 28 U. S. C. § 687.

In this case we are not concerned with the possible exception to the general rule implicit in the situation presented by *Williams* v. *North Carolina*, 325 U. S. 226, that a decree for divorce, although not entitled to full faith and credit in other States, still may be valid as a matter of due process in the State where rendered.

and later cases following that decision.[2] In that event, the question to be decided would be whether it is within the power of a State to provide that, after full notice and hearing in a judicial proceeding resulting in a decree for alimony to be paid in monthly instalments indefinitely, those instalments should or might be docketed in the form of judgments for specific amounts as they accrue without further notice to the defendant; but with the qualification that he should have the right to come in at any time before an instalment is docketed and show that the circumstances comprehended by the original decree have so changed as to entitle him to reduce or terminate the payments. The effect of such a provision would be simply to put upon the defendant, against whom the decree had been rendered, the burden of bringing to the court's attention and proving the changed situation.

It is difficult to see how such a provision could constitute a want of due process or of notice in the jurisdictional sense contemplated by the *Pennoyer* v. *Neff* line of decisions. Nor has this Court so held heretofore. By the very terms of the alimony decree it is adjudicated that the defendant is liable to pay the instalments as they accrue. And also by its terms, together with the applicable statutes, he is notified that the instalments will be, or may be, docketed as judgments enforceable by execution, unless he takes the initiative in showing to the court before the accrual date, or any later time when the plaintiff may move for entry of judgment, that new conditions have arisen requiring or justifying change or termination. Moreover, in addition to the notice petitioner had received from the original decree and the applicable statutes, he received further notice from the 1936 order, entered after

[2] See *McDonald* v. *Mabee*, 243 U. S. 90; *Milliken* v. *Meyer*, 311 U. S. 457. See also Restatement, Judgments, § 6, Comment *b*; § 16, Comment *b*; Burdick, Service as a Requirement of Due Process in Actions in Personam (1922) 20 Mich. L. Rev. 422.

contest, by virtue of the court's finding that he then had no sufficient ground for securing a reduction, although he had contended that he was financially unable to meet these payments.

I cannot understand why such notice, clearly and unequivocally given in advance, is not sufficient both to inform the defendant fully of his peril and to afford full constitutional protection for his rights.[3] On the other hand, to compel the wife to give additional notice before docketing of each instalment is to shift to her the burden which the original decree places squarely on the husband. Moreover, in many cases where the amount of the monthly or weekly instalment is small, the effect will be practically to nullify the provision for payment of alimony, because the cost of publishing or otherwise giving notice will equal or exceed the amount of the instalment.[4] A more perfect tool hardly could be given to an absent or absconding husband for defeating the substance of the award.

---

[3] Cf. notes 9 and 13.

[4] It is no answer to say that the wife may reduce the cost of publication or giving other form of notice by allowing the instalments to accrue over long periods of time and then moving for entry of judgment in the aggregate sum, as the wife was forced to do in this case. The very purpose of the provision for payment by instalments, rather than in a lump sum, is to assure that the wife shall have them as they accrue, as much as it is that the husband shall be allowed to earn them as time goes along. She may be dependent for support of herself and children more upon the promptness of the payments than upon their ultimate certainty. And any technical requirement for notice additional to that given by the original decree can only result in depriving the wife of her right to prompt payment, if the husband can take advantage of the requirement and the small amount of the instalments to compel her to let them accumulate. Because delay so often results in loss of substantial rights, the effect frequently will be also to make impossible the ultimate as well as the immediate collection of what is due; and to substitute a right of lifelong litigation for one of certain means of subsistence. The facts of this case afford abundant illustration of both possibilities.

Due process does not require that notice of suit be given more than once or, when this has been done and a valid judgment entered, that additional notice must be given before execution, original or *alias*.[5] Jurisdiction over the person having been obtained in the original proceeding on adequate notice, further steps in the proceedings are largely within the court's discretion, except in so far as they are controlled by statute, including proceedings after judgment and on execution. True, these later steps may not be taken arbitrarily.[6] But that limitation does not require the giving of notice at each successive stage as upon the original service of summons. Nor does it forbid the court or the legislature to place upon the defendant or other parties responsibility for keeping themselves informed concerning the progress of the cause. Judgment by default, without further notice than a statutory warning to take steps to ward it off, is an everyday occurrence. After judgment the burden of taking the initiative to avoid the adjudication's effect falls even more heavily upon the defendant. Unless he assumes and discharges it, he cannot hold up execution for want of special notice that authorized steps to reach his property are about to be taken. Generally speaking, the stage of execution is committed largely to the plaintiff's control; and that notice must be given to the defendant at that stage before his property within the court's jurisdiction can be taken to satisfy the judgment is foreign both to accepted conceptions of due process and to generally prevailing statutory schemes for securing satisfaction.

In accordance with these principles, if an ordinary money judgment were entered for a fixed sum, but with authorized provision for payment in instalments over a

[5] See *Endicott Johnson Corp.* v. *Encyclopedia Press*, 266 U. S. 285; *Taylor* v. *Stowe*, 218 Mass. 248, 105 N. E. 890.

[6] See *Brown* v. *Brown*, 62 R. I. 375, 6 A. 2d 144; *State ex rel. Lane* v. *Montgomery*, 221 Mo. App. 1043, 295 S. W. 824.

definite period, to be collected by levy upon failure to pay any instalment when due, I fail to see what conceivable constitutional objection could be raised against the judgment or any such levy by reason of failure to give notice of the intended levy. Nor do I see how such a scheme could be vitiated were the State additionally to require that the levy, instead of being made automatically or ministerially at the plaintiff's instance, should be made only after further order of the court, entered either of its own motion or on application of the plaintiff. Whether judgments shall be paid in a lump sum or by instalments and in either event whether execution shall issue and be levied by one form of procedure or another, with or without further notice, are matters wholly of policy within state power to determine, raising no question of constitutional import.

These principles are not altered fundamentally merely because, in proceedings for divorce, the decree provides that monthly instalments shall continue for the period of need, in accordance with the duty to support imposed by marriage and the birth of children,[7] and take the place of a lump sum payment fixed in amount.[8] Nor do they become inapplicable because the State sees fit, as a matter

---

[7] There are two principal theories as to the nature of alimony. The modern view is that alimony "is a right of the same character as the right of support lost by the dissolution of the marriage." The historical view is that alimony "is a settlement of the property rights of the parties and a distribution of the assets of the quasi-partnership hitherto existing." Kelso, The Changing Social Setting of Alimony Law (1939) 6 Law & Contemp. Prob. 186, 194–195; *Wilson* v. *Hinman,* 182 N. Y. 408, 410–412, 75 N. E. 236.

[8] The duty of support, incurred upon marriage, is not merely the duty of a debtor arising upon a commercial transaction for the payment of a fixed sum with interest. *Barber* v. *Barber,* 217 N. C. 422, 428, 8 S. E. 2d 204. Nor is a judgment which enforces that duty to be treated in all respects as one upon a commercial obligation in order to be constitutionally valid.

of policy, to allow the defendant to show that the need, or the duty created by the decree, has ended; at the same time making it a condition of securing such relief that he shall take the initiative in showing the changed situation and shall do so before levy is made under instalments as they accrue. Certainly there is nothing unreasonable, harsh or arbitrary when a State, after full notice and hearing, determines that the basic familial obligation shall be enforced by judicial decree formulated to embody the obligation in close analogy, if not exact identity, with the obligation's substantive character, particularly when it affords the husband opportunity for showing a change affecting the substance of the obligation.

The fallacy of the Court's assumption, it seems to me, is that the opportunity is inadequate if it is limited to the period before the due date of the instalment arrives or such later date as the wife may select to ask for entry of the order. The Court has held a much less extended period adequate, as against constitutional objections, for purposes of making defense in criminal prosecution. *Yakus* v. *United States,* 321 U. S. 414. *A fortiori,* in view of the character of the obligation and the previous adjudication upon full notice and hearing, the period allowed by the New York law for making further defense should be regarded as constitutionally sufficient, even if that law is thought to cut off that right of defense when the order for judgment is entered.

No more is involved than that the husband is commanded to make payment, unless conditions have changed so as to justify nonpayment when the due date arrives; and, if such changes have taken place, he is adequately warned that he will be precluded from proving or relying upon them to avoid payment of the preexisting judgment, unless he makes the showing on or before that date. If the husband's defense is payment, he will be able subsequently to vacate or attack collaterally the judgment,

since ordinarily it would be fraudulent for the wife to docket a judgment for back alimony no longer owed to her, as the Court's opinion suggests. Even if there were a legal or factual dispute relating to payment and the wife had acted in good faith in docketing the judgment, as in a case where she had acted in ignorance of prior payment to her agent, it is inconceivable that a court, upon a showing of payment, would refuse to vacate the judgment or that equity would not come to the husband's aid. Her attempt to enforce the judgment or retain its proceeds after learning of the satisfaction would be fraudulent.

I know of nothing in the Constitution which forbids a State thus to limit the husband's right to upset the terms of the general decree or which imposes upon the wife the duty of keeping him informed of matters concerning which the law of the State binds him to inform himself. Accordingly, if it were clear, as the Court assumes, that the New York law forbids the husband to bring forward his new defenses, if any, after the entry of the judgment, I should see no valid constitutional objection to the judgment, or a levy made pursuant to it, on the score of want of notice essential to due process.[9]

II.

But I am not convinced that New York law has the effect of cutting off all right of defense upon the docketing of an instalment for the purposes of execution. Although this Court held in *Sistare* v. *Sistare,* 218 U. S. 1, that under New York law accrued instalments of alimony could not be modified, this is no longer the case in New York. N. Y. Civ. Prac. Act § 1170; *Van Dusen* v. *Van*

[9] See *Jones* v. *Jones,* 204 Ark. 654, 163 S. W. 2d 528; also the authorities cited in note 13. It does not follow, however, that when alimony decrees are enforced by other means, for example through exercise of the contempt power, notice may not be required. Cf. *Miller* v. *Miller,* 79 Colo. 118, 244 P. 66.

Dusen, 258 App. Div. 1020, 17 N. Y. S. 2d 96; *Eisinger* v. *Eisinger,* 261 App. Div. 1031, 26 N. Y. S. 2d 22. See also *Karlin* v. *Karlin,* 280 N. Y. 32, 19 N. E. 2d 669.

It is scarcely probable that, although such modification may be made after accrual but before docketing of judgment, the New York courts would hold that it could not be made after the formal act of docketing. The Court points to no decision which so rules and none has been cited or found. Indeed the Court's opinion indicates that the husband could set aside the judgment upon showing he had paid the instalment which it included. And in *Thayer* v. *Thayer,* 145 App. Div. 268, 270–271, 129 N. Y. S. 1035, which is concededly leading authority upon this general phase of New York law, the court said with reference to the practice of docketing judgments for back alimony without further notice than that given as foundation for the original decree:

> "It is sufficient that the court is satisfied from the proof presented to it that both parties are still alive, and that the alimony remains unpaid. If the court is misled and an installment improperly docketed, the defendant will find no difficulty in having the mistake corrected."

And in *Caprio* v. *Caprio,* 169 Misc. 568, 572, 8 N. Y. S. 2d 205, it was stated:

> "The docketing of a judgment for back alimony is a recognized practice . . . and the judgment is good *if* supported by facts, but, like any other judgment, it can be set aside or modified."

These statements made by courts familiar with the New York practice plainly indicate that in circumstances sufficient to justify such action the courts of New York not only will hear the defendant's objections after the judgment is docketed but, as in other cases when the showing is sufficient, will set aside the judgment or modify it as the facts may require. This, of course, may not mean

that he will be heard to raise the identical objections which he might have presented before docketing, since it is entirely possible for the court to find that he was lacking in appropriate diligence in presenting them and should not have further opportunity to do so in view of that fact. But, whether or not this is true, the quoted statements of New York practice clearly indicate that in any case of serious hardship the defendant will not be foreclosed, merely by the docketing of the judgment, from advancing his objections by appropriate procedure and having them determined. In the face of such authoritative expressions concerning the local law and practice and in the absence of any contrary expression from a source of similar authority, this Court should not substitute its own long-distance judgment or assumption to the opposite effect, especially since on its own theory the constitutionality of the New York statute in question falls on such an assumption.[10]

III.

If this view of the New York law is correct, the New York judgment is not wholly void for want of due process; for the petitioner is not deprived of any right of defense

[10] The declaration in *Sistare* v. *Sistare*, 218 U. S. 1, 22, quoted in *Barber* v. *Barber*, 323 U. S. 77, 82, that "every reasonable implication must be resorted to against the existence of" a power to modify or revoke instalments of alimony already accrued "in the absence of clear language manifesting an intention to confer it" was addressed to a different question, finality for purposes of full faith and credit, cf. Part III of this opinion, and, if applied in this case, would be in direct contradiction of the rule that legislation is presumptively constitutional.

Under the decision of the Court, § 1171–b of the New York Civil Practice Act may also be unconstitutional, as that section, enacted since the entry of the 1938 judgment, provides that the application for an order directing the entry of judgment for arrears in alimony "shall be upon such notice to the husband as the court may direct." It may be that under this wording the New York courts need not direct any notice at all.

691100°—47——20

which he may be entitled to make. It is not apparent, nor has he shown, that even now he could not make full defense upon any substantially meritorious ground in the New York courts and succeed in having the judgment set aside.

Nor, as petitioner has made his case, is the question presented whether the New York judgment is so lacking in finality that it is not entitled to receive full faith and credit in other jurisdictions.[11] But if that question is taken to lurk inescapably in the record, in the view which I have taken of the state of the New York law, it does not follow that the objection is valid.

The judgment under New York law is prima facie valid, if it is not conclusively so. It affords foundation for the issuance and levy of execution. In the absence of timely assertion of grounds requiring it to be set aside, it becomes conclusive.

This Court has not heretofore held that such a judgment is not entitled to full faith and credit. Contrary dicta reflecting the belief that it would be lacking in necessary finality are, in my opinion, neither conclusive nor sound. Certainly in the absence of any suggestion that the judgment has been questioned in the forum where rendered, adequate opportunity being there afforded, nothing but the most technical and absolute conception of "finality" could be thought to deprive it of credit. Beyond this, it is not apparent why all substantial rights of the defendant would not be fully secured, if the same effect were given to the New York judgment in the suit brought upon it elsewhere as it has in New York.

In the present case this would mean that the judgment would be enforced in the courts of the District of Co-

[11] To have objected that the New York judgment was not sufficiently final to be entitled to receive full faith and credit would have been in contradiction of petitioner's objection that it deprived him of due process, since his due process argument is founded in the view that his rights have been conclusively adjudicated.

lumbia, unless after service of summons in the suit for enforcement there the defendant could show to the court's satisfaction a change in circumstances or other defense sufficient under New York law to require modification or setting aside of the award. Indeed the Court does not altogether foreclose this possibility, since it reserves the question whether, upon further proceedings in the District Court, the wife may amend her claim so as to rest upon the 1924 decree, as modified in 1926; and the husband then may make his defenses allowed by New York law. If that can be done with reference to the original decree, I see no reason why the same thing should be forbidden as to the 1938 judgment. And I think the question should be determined now, not in still another chapter of this long drawn out litigation.

The full faith and credit clause does not in any case require that a judgment, to be credited, must be endowed with absolute finality. It is enough, in my opinion, if the judgment is endowed by the law of its origin with finality sufficient to sustain the issuance and levy of execution, although the same law may afford an opportunity for setting aside or modifying it upon the making of a specified showing. This is true, in my opinion, whether the suit is on the 1938 judgment or on the original decree. There is no sound ground for distinguishing them so as to permit suit, with the right defense, upon the one and not upon the other. The considerations stated by MR. JUSTICE JACKSON in his concurring opinion in *Barber* v. *Barber*, 323 U. S. 77, 86, sufficiently state the reasons supporting the views set forth in this paragraph.[12]

[12] It was just such rigid notions of finality which long prevented recognition of the Court of Claims as a judicial body. See *Gordon* v. *United States*, 2 Wall. 561, 117 U. S. 697; *United States* v. *Klein*, 13 Wall. 128, 144–145. Subsequently the governing statute of the Court of Claims was amended, and since that time it has never been doubted that Congress may authorize an appeal to this Court from a final

Accordingly, whether one view or the other of the New York law is taken, I think the 1938 New York judgment is entitled to full faith and credit in the District of Columbia,[13] according to the exact effect it had in New York. Since, in my opinion, the law of that State allowed the defendant on proper showing to make the defense of change in situation, whether before or after the docketing of the judgment, the same effect should be given to the judgment in the District of Columbia. As no adequate basis for modifying the judgment was tendered or proved by the defendant in the District of Columbia proceeding, I think the judgment of the Court of Appeals should be affirmed in its entirety.

MR. JUSTICE BLACK joins in this opinion.

MR. JUSTICE FRANKFURTER, dissenting.

My brother RUTLEDGE has discussed in detail difficulties involved in the Court's disposition of this case and I shall state briefly the grounds for my support of his conclusion.

---

judgment of the Court of Claims. *United States* v. *Klein, supra; Williams* v. *United States,* 289 U. S. 553, 563–564.

Even if the judgment were not sufficiently final for full faith and credit purposes, it nevertheless would be within the discretion of the District of Columbia to give it effect on grounds of comity. The full faith and credit clause commands States in certain instances to recognize the judgments of sister States; it does not prohibit them from doing so in other instances. See Jacobs, The Enforcement of Foreign Decrees for Alimony (1939) 6 Law & Contemp. Prob. 250, 263–264. See generally Note, The Finality of Judgments in the Conflict of Laws (1941) 41 Col. L. Rev. 878, 884–887.

Upon the Court's treatment of the North Carolina law in *Barber* v. *Barber,* the reservations made by MR. JUSTICE JACKSON were perhaps not required, since on that treatment the question now presented was not involved.

[13] See *Dadmun* v. *Dadmun,* 279 Mass. 217, 181 N. E. 264, where the Supreme Judicial Court of Massachusetts gave full faith and credit to a New York judgment for arrears in alimony which had been entered without notice to the defendant; Nelson, Divorce and Annulment (2d ed.) § 33.45; cf. *Barns* v. *Barns,* 9 Cal. App. 2d 427, 50 P. 2d 463; *Defoe* v. *Defoe,* 116 W. Va. 197, 179 S. E. 74.

The opportunity to defeat a claim—the right to notice before a court can determine liability—is a safeguard guaranteed by the Due Process Clause. But money judgments are not like peas in a pod. Because of differences in the source and function of liability, the demand of fairness which underlies the requirement of notice may well be satisfied by different procedures. A judgment for future alimony, as one of the incidents of jurisdiction to decree a divorce, is very unlike a judgment for the ordinary lump sum indebtedness. It is in effect an ambulatory judgment for each instalment as it becomes due. The obligation to pay arrears flows from the original judgment and may be pursued upon that judgment elsewhere than in the rendering State. *Barber* v. *Barber,* 21 How. 582; *Sistare* v. *Sistare,* 218 U. S. 1. For purposes of suability as a judgment elsewhere, the accrued instalments need not be reduced to judgment anew in the State of the original decree, whatever may be the requirements for the execution of that judgment in the rendering State.

But it is said that the State rendering the original judgment for alimony may allow, as New York has done here, mitigation of such judgment even as to accrued instalments. If so, such mitigating defenses may be set up when the decree for alimony is sued on in a sister State as well as when enforced in the rendering State. A judgment may have been paid and yet a suit thereon may be brought in another State. While such a defense, if well founded, precludes a second recovery on that judgment anywhere, the availability of such a defense does not bar suit on such a judgment in a sister State. It runs counter to no requirement of Due Process to make a judgment debtor defend a suit on that judgment by claiming discharge of its liability, whether through payment or otherwise. Such a procedure is entirely consonant with the full faith and credit which "shall be given in each State to the . . . judicial Proceedings of every other State." Article IV, § 1

of the Constitution; see the concurring opinion in *Barber* v. *Barber,* 323 U. S. 77, 86, at 87. Moreover, the District of Columbia, as is true of a State, see *Thompson* v. *Thompson,* 226 U. S. 551, may as a matter of conflict of laws go beyond what is required by the Full Faith and Credit Clause. If, perchance, relief from accrued instalments is based on considerations of policy peculiarly within the local understanding and discretionary determination of judges of the originating jurisdiction, sister State tribunals have ample power of abstention to respect such local qualifications. In any event, access to this Court is always open on such a federal issue.

I agree therefore with my brother RUTLEDGE that the judgment below should be affirmed in its entirety. While formally the suit was on the New York judgment of 1938, this in turn was based on the original judgment for alimony. That judgment is in the record and is the real source of these proceedings. If a misdescription of a criminal prosecution is deemed a formal irrelevance so long as an offense is intrinsically charged, *Williams* v. *United States,* 168 U. S. 382, a misdescription by the pleader of the basis of a suit for accrued instalments on a judgment for alimony can hardly be too tight a knot for courts to untie.

Pleadings, particularly in a case of this sort, are no longer to be dealt with in the spirit of Baron Parke. See L. Hand, *The Deficiencies of Trials to Reach the Heart of the Matter* (1921), in 3 Lectures on Legal Topics, Association of the Bar of the City of New York (1926) 89. A suitor is entitled to have relief justified by the facts he has pleaded, whether he has accurately described his pleading or has asked for relief appropriate to the pleaded facts. See *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62, 68–69; *Bemis Bro. Bag Co.* v. *United States,* 289 U. S. 28, 34. The purpose of a complaint is to give the defendant fair notice of the claim against him. If it does

that, the complaint is legally sufficient. Griffin could have had no doubt that his wife was suing in the District of Columbia for unpaid instalments of alimony which New York, as part of the divorce proceedings, had decreed in her favor. Upon the record before us the petitioner disclaimed liability for these arrears on grounds which do not save him. We ought not to deny liability flowing from a live judgment by assuming that the petitioner has better grounds for avoiding liability than those that he has already asserted. If, perchance, he could satisfy the district court that he has failed to set up a valid defense through a reasonable misconception of what was the essence of his wife's suit, namely a suit for arrears of alimony which were her due, it would not be casting an unreasonable burden on the petitioner to require him to move to set aside the judgment on appropriate grounds.

BIGELOW ET AL. *v.* RKO RADIO PICTURES, INC. ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 444. Argued February 7, 1946.—Decided February 25, 1946.

1. Petitioners owned a motion picture theatre in Chicago. Some of the respondents were distributors of motion picture films; others owned or controlled motion picture theatres in Chicago. Petitioners sued respondents under the Sherman and Clayton Acts to recover treble damages. The gist of the complaint was that, by reason of an unlawful conspiracy of the respondents, petitioners were prevented from securing pictures for exhibition in their theatre until after the preferred exhibitors had been able to show them in earlier and more desirable runs, and that petitioners were thus discriminated against in the distribution of feature films in favor of competing theatres owned or controlled by some of the respondents. It appeared that, after the introduction in 1937 of the practice of showing double features, petitioners were no longer able to secure films which had not had a prior showing. Petitioners charged that

in consequence of respondents' unlawful acts they had suffered a loss of earnings in excess of $120,000 during the 5-year period from 1937 to 1942. Two classes of evidence were introduced by petitioners to establish their damage. One was a comparison of earnings during the 5-year period of petitioners' theatre with those of a comparable theatre of the respondents, which showed a difference of nearly $116,000 in favor of the latter. The second was a comparison of the receipts of petitioners' theatre for the five years following July 1937 with the receipts for the four years immediately preceding, which showed a decline aggregating more than $125,000. The jury returned a verdict for petitioners in the sum of $120,000, and the trial court gave judgment for treble that amount. The circuit court of appeals reversed on the sole ground that the evidence of damage was insufficient for submission to the jury, and directed entry of judgment for respondents *non obstante veredicto*. *Held* that the evidence was sufficient to sustain the verdict for the petitioners. Pp. 253–254, 266.

(a) The evidence was ample to support a just and reasonable inference that petitioners were damaged by respondents' acts. P. 266.

(b) Whatever restraints respondents' distribution system may have imposed, and whether the policy later adopted of showing double features was or was not itself a product of an unlawful conspiracy, petitioners were entitled, as of right, to continue to purchase and show films which had not had prior showing, free of restraints of the unlawful distribution system. P. 262.

(c) A fair measure of the damage to that right of the petitioners was the loss of petitioners' admission receipts resulting from the operation of the unlawful distributing system. Pp. 262–263.

(d) The fact that, by reason of respondent's tortious acts in maintaining the discriminatory distribution system, the petitioners were unable to prove what their earnings would have been under freely competitive conditions, did not preclude a verdict for the petitioners. P. 263.

(e) The comparison of petitioners' receipts before and after respondents' unlawful action impinged on petitioners' business afforded a sufficient basis for the jury's computation of the damage, where respondents' wrongful action had prevented petitioners from making any more precise proof of the amount of the damages. P. 266.

2. A jury may not render a verdict based on speculation or guesswork, even where the defendant by his own wrong has precluded a more precise computation of damages. But the jury may make

a just and reasonable estimate of the damage based on relevant data and render its verdict accordingly. In such circumstances juries are allowed to act on probable and inferential as well as upon direct and positive proof. *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555; *Eastman Kodak Co.* v. *Southern Photo Co.*, 273 U. S. 359. P. 264.

3. Elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty in computing damages which his wrong has created. P. 265.

150 F. 2d 877, reversed.

From a judgment for the plaintiffs in a suit for damages under the antitrust acts, the defendants appealed. The circuit court of appeals reversed. 150 F. 2d 877. This Court granted certiorari. 326 U. S. 709. *Reversed*, p. 266.

Thomas C. McConnell argued the cause for petitioners. With him on the brief was *Hubert Van Hook*.

Edward F. McClennen argued the cause for respondents. With him on the brief was *Miles G. Seeley*.

Solicitor General McGrath, Assistant Attorney General Berge and *Charles H. Weston* filed a brief for the United States, as *amicus curiae*, in support of petitioners.

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

Petitioners brought this suit in the District Court for Northern Illinois under §§ 1, 2 and 7 of the Sherman Act (26 Stat. 209), and §§ 4 and 16 of the Clayton Act (38 Stat. 731), 15 U. S. C. §§ 1, 2, 15, and 26, for an injunction and to recover treble damages. Petitioners, who are owners of the Jackson Park motion picture theatre in Chicago, alleged by their bill of complaint that respondents, some of whom are distributors of moving picture films and some of whom own or control moving picture theatres in Chicago, entered into a conspiracy which continued from

some date prior to November 1, 1936 to the date the suit was brought, July 28, 1942, pursuant to which film was distributed among moving picture theatres in the Chicago district in such a manner that theatres owned by some of the conspirators were enabled to secure and show feature pictures in advance of independent exhibitors, not affiliated with respondents, such as petitioners.

The gist of the complaint is that, by reason of the conspiracy, petitioners were prevented from securing pictures for exhibition in their theatre until after the preferred exhibitors had been able to show them in the earlier and more desirable runs, and that petitioners have thus been discriminated against in the distribution of feature films in favor of competing theatres owned or controlled by some of the respondents. Petitioners charged that in consequence they had been subjected to loss of earnings in excess of $120,000 during the five year period from July 27, 1937 to July 27, 1942. The matter of the injunction was reserved and the case went to trial solely on the question of damages. The jury returned a verdict for $120,000 in petitioners' favor. The trial court gave judgment for treble that amount, as prescribed by § 4 of the Clayton Act. The Circuit Court of Appeals for the Seventh Circuit reversed on the sole ground that the evidence of damage was not sufficient for submission to the jury, and directed the entry of a judgment for respondents *non obstante veredicto*. 150 F. 2d 877. We granted certiorari, 326 U. S. 709, because of the importance of the problem presented.

Respondents do not now assail the jury's verdict, so far as it found an unlawful conspiracy to maintain a discriminatory system of distribution. The sole question for decision here is whether the evidence of damage is sufficient to support the verdict. As the jury returned a general verdict, the nature and extent of the unlawful conspiracy must be ascertained in the light of the instruc-

tions given to the jury, taking that view of the evidence most favorable to petitioners. Petitioners have been since November 1, 1936 the owners in partnership of the Jackson Park Theatre, located on the south side of Chicago. Respondents RKO Radio Pictures, Inc., Loew's, Inc., Twentieth Century-Fox Film Corporation, Paramount Pictures, Inc., and Vitagraph, Inc., are distributors of motion picture films. Respondent RKO also owns two large first-run theatres in the Chicago Loop. Respondent Balaban & Katz Corporation is a motion picture exhibitor, which operates a chain of some fifty theatres in Chicago and its suburbs, including the Maryland Theatre and others on the south side of Chicago which compete with the petitioners' Jackson Park Theatre. Balaban & Katz is a subsidiary of Paramount. Respondent Warner Bros. Circuit Management Corporation is an exhibitor which operates more than twenty theatres in Chicago, including several on Chicago's south side which also compete with petitioners' theatre. Warner Bros. Circuit Management Corporation and Vitagraph are subsidiaries of Warner Bros. Pictures, Inc. Respondent Warner Bros. Theatres, Inc., is also affiliated with Warner Bros. Pictures, Inc. and holds title to certain of the Warner theatres.

There was evidence from which the jury could have found that respondents maintained in the Chicago district, by a conspiracy among themselves, a discriminatory system of distributing motion pictures for showing in successive weeks of release. The release system, as described in the complaint, and shown by the proof, operated substantially as follows: Respondent distributors rent their copyrighted product to motion picture theatres for exhibition to the public. Rental contracts between distributors and exhibitors undertake to furnish films to the exhibitors for stipulated rentals, and provide for the "playing position" in which the motion picture theatre is to exhibit the films relative to the "playing position" of other

theatres in the competitive area. In Chicago, these contracts uniformly provide that the larger theatres in the Chicago Loop, all owned, leased, or operated by one or more of the respondents, shall have the right to the "first run" of the motion pictures distributed by the respondents, for one week or such longer period as they may desire to exhibit them. Following the "first run," the motion picture may not be shown in any Chicago theatre outside the Loop for three weeks, a period known as "clearance." In the fourth week following the end of the Loop run, the film is released for exhibition in theatres outside the Loop for successive runs in various theatres, for periods known as the "A", "B" and "C" "pre-release weeks," followed by weeks of "general release."

The earlier a playing position, the more desirable it is, since it is preferable to exhibit pictures before they have been shown to the public in other theatres in the competitive area. There was evidence that respondent distributors and exhibitors conspired to give to the distributor-controlled or affiliated theatres preferential playing positions in the release system over the positions allotted to independent competing theatres, including that of petitioners, with the result that petitioners' theatre was unable to obtain feature films until the first week of "general release," or ten weeks after the end of the Loop run. By that time most of respondent exhibitors' theatres, with several of which petitioners' theatre competes, and which enjoyed the prior "A", "B" or "C" pre-release runs, had finished their showings. Regardless of the price offered for rental of film, the respondent exhibitors, in execution of the conspiracy, refused to release films to petitioners' theatre except for the first week of "general release."

Although petitioners' ground for recovery, as stated by their bill of complaint, was the discriminatory operation of the system of releasing pictures for showing in allotted playing positions, whereby the petitioners were prevented

from acquiring films for exhibition until they had been shown in respondent distributors' theatres competing with the Jackson Park, evidence was introduced in the course of the trial tending to show that respondents conspired to maintain the release system as part of a conspiracy to maintain minimum admission prices to be charged by exhibitors generally. This proof indicated that the object of this conspiracy was to make it possible to maintain high admission prices in the Loop theatres by restricting the price competition of the subsequent-run theatres. The distributors' contracts with the Loop theatres provided for film rentals based on a percentage of the admission fees collected. It appeared that the rental contracts entered into between respondent distributors and the Chicago exhibitors, including respondent exhibitors and petitioners, uniformly contained schedules of minimum admission prices fixed on the basis of the playing position assigned. There was thus evidence tending to show that the release system and the price-fixing system were each an integral part of an unlawful conspiracy to give to the Loop theatres the advantages of a first-run protected from low-price competition.

Respondents' evidence, on the other hand, tended to show that the release system was a natural growth in the industry, and that the fixed-price system had resulted from the individual action of distributors, not acting in concert, to market their copyrighted product in such a manner as to secure the best possible financial return from the film distributed. See *Interstate Circuit* v. *United States,* 306 U. S. 208; consent decree in *United States* v. *Balaban & Katz Corp.,* C. C. H. Fed. Trade Reg. Serv., 7th ed., Court Decisions Supplement, p. 5025.

Two classes of evidence were introduced by petitioners to establish their damage. One was a comparison of earnings during the five year period of petitioners' Jackson Park Theatre with the earnings of its competitor, the

Maryland Theatre, the two being comparable in size, the Jackson Park being superior in location, equipment, and attractiveness to patrons. Under the discriminatory release system, the Maryland had been allowed to exhibit pictures in the C pre-release run, one week ahead of petitioners' first week of general release. The evidence showed that during the five year period, the Maryland's net receipts after deducting film rentals paid to distributors exceeded petitioners' like receipts by $115,982.34.

The second was a comparison of petitioners' receipts from the operation of the Jackson Park Theatre less cost of film for the five year period following July 1937, with the corresponding receipts for the four years immediately preceding, after making an allowance for the elimination of "Bank Night" receipts. The comparison shows a falling off of petitioners' receipts during the five year period aggregating $125,659.00, which was more than $5,000 in excess of the $120,000 damage demanded by petitioners' complaint. The significance of the comparison lies in the fact that during most of the four year period, and despite the operation of the release system as described, petitioners' theatre had been able to procure some films which had not already been shown in respondents' theatres, whereas petitioners were not able to procure such films during the five year period which followed, although there is evidence that they made diligent efforts to do so. The change is attributable to the introduction of the practice of "double features" (the showing of two films at a single performance) in theatres in the Chicago district. The evidence tended to show that when single features were being shown, exhibitors who had playing positions ahead of petitioners', in selecting films out of those which their rental contracts allowed them to show, did not exhibit all of the films distributed, so that, despite their inferior playing position, petitioners were able to exhibit pictures which had not been shown elsewhere. With the advent of double

featuring, theatres with playing positions ahead of petitioners' used nearly all of the films distributed, and the pictures which petitioners were able to exhibit in the first week of general release, by reason of the distribution system, had had prior showing in nearly every case.

The trial court left it to the jury to say whether double featuring was introduced as a part of a conspiracy among respondents, or as a spontaneous manifestation in the industry. Assuming the latter, we agree with the circuit court of appeals, which, in sustaining the jury's finding of an unlawful conspiracy to maintain the described system of distribution, held that when the double featuring was established, all film which had not already been shown "was taken away by defendants' prior contracts, made pursuant to and as a part of the conspiracy, and placed under the restriction of the illegal system, and thereafter was not obtainable by plaintiffs, except by use of the illegal system."

In submitting the two classes of evidence of damage which we have detailed, the trial court stated to the jury: "Plaintiffs seek to recover damages for the alleged acts of defendants on one of two theories . . ." It further charged that "If . . . plaintiffs have been injured by the alleged acts of defendants, they must choose one or the other of said two theories of determining damage or the amount of damages." The circuit court of appeals concluded that the jury accepted the comparison of plaintiffs' earnings before and after the adoption of double billing as establishing the measure of petitioners' damage. But it held that this proof did not furnish a proper measure of damage for the reason that, while petitioners' earnings were known and proved for both the four and five year periods in question, it could not be proved what their earnings would have been during the five year period in the absence of the illegal distribution of films. It thought that the mere fact that earnings of the Jackson Park The-

atre were greater before the adoption of double billing did not serve to show what petitioners' earnings would have been afterwards, in the absence of the release system.

Similarly, the court of appeals rejected the comparison between petitioners' receipts and those of the Maryland Theatre during the five years in question, since, as it thought, the comparison would not tend to prove what the earnings of either theatre would have been during the critical period under any system other than that which was the product of the unlawful conspiracy.

Upon the record in this case it is indisputable that the jury could have found that during the period in question a first or prior run theatre possessed competitive advantages over later run theatres, because of its greater capacity to attract patronage to pictures which had not been shown elsewhere, and its ability to charge higher admission prices than subsequent run theatres, and that, other things being equal, the establishment of the discriminatory release system was damaging to the petitioners, who were relegated by it to a playing position inferior to that of their competitors.

Each of the two classes of evidence introduced by petitioners tended to show damage. They were not mutually exclusive, as the courts below seem to have thought, since each, independently of the other, tended to show that petitioners' inability to obtain films for exhibition before they had been shown elsewhere adversely affected their receipts, in the one case by showing that those receipts decreased when petitioners could no longer purchase such films following the introduction of double features, and in the other, that petitioners' receipts from its theatre were less by substantially the same amount than receipts of its competitor, the prior-run Maryland Theatre, operated under conditions in other respects less favorable than those affecting petitioners.

Respondents' argument is, that notwithstanding the force of this evidence, it is impossible to establish any

measure of damage, because the unlawful system which respondents have created has precluded petitioners from showing that other conditions affecting profits would have continued without change unfavorable to them during the critical period if that system had not been established, and petitioners had conducted their business in a free competitive market. Respondents also contend that the jury's verdict establishes that the release system was part of a price-fixing conspiracy, and on the assumption that price-fixing and the discriminatory system of release were inseparable parts of a single scheme, argue that as the conspiracy as a whole probably enabled petitioners artificially to raise their prices to an undetermined extent, the overall effect of the conspiracy may well have been to benefit petitioners, even though the plan of distribution, one of its features, may have injured them. But we think these arguments are based on a misapprehension of the precise conditions in which the jury was permitted to and did apply the tendered measure of damages, and that it also ignores controlling principles of the law of damages.

We have already adverted to the facts that petitioners' cause of action, as stated in their complaint, was founded on the unlawful system of distributing films; that the contentions pro and con as to the existence of a conspiracy to fix prices of theatre admissions first emerged in the course of the trial; and that the jury was allowed to fix the measure of the damage with reference to the reduction of petitioners' receipts after July 1937 when petitioners were no longer able to show some films which had not been previously exhibited. Under the complaint and the instructions, the jury could, and we can assume that it did, find that the fixing of minimum prices was effectuated by the individual action of distributors, as respondents contended at the trial, and not as a part or result of the conspiracy to control distribution. The jury could have found that the only unlawful action taken by respondents was in

conspiring to prevent petitioners' theatre from bidding in open competition against other exhibitors for a preferred place in an otherwise lawful system of release. This is apparent from the following portion of the charge: "Only in the event that you find that there exists no conspiracy or combination to fix minimum admission prices, or no unreasonable restraint of trade, by the defendants by virtue of the Chicago system of release, will you have occasion to consider whether or not the plaintiffs demanded and sought to obtain a playing position in 'C' week."

The jury's verdict was, as the court below held, based on the damage suffered by petitioners in consequence of the deprivation, by the discriminatory operation of the release system, of their demonstrated freedom to rent and exhibit some films which had not had prior showing. Hence we take it that the verdict did not establish that the fixed minimum admission prices were the result of the unlawful conspiracy, or that the petitioners' purchases of such films, and the operation of their theatre, before the double feature practice was inaugurated, were, for purposes material here, affected by the conspiracy.

The record thus establishes that when petitioners acquired their theatre, it was possible for them under the conditions then prevailing to secure films which had not had prior showing and to exhibit them in competition with theatres having preferred playing positions. Whatever restraints respondents' distribution system may then have imposed, and whether the later adopted practice of showing double features was or was not itself a product of an unlawful conspiracy, petitioners were entitled, as of right, to continue to purchase and show films which had not had prior showing free of the restraints of the unlawful distribution system. The fair value of petitioners' right thus to continue their business depended on its capacity to make profits. And a fair measure of the damage to that

right by respondents' unlawful distributing system was the loss of petitioners' admission receipts resulting from the application of that system to petitioners.

Respondents only answer is that, without the conspiracy, the conditions of purchase of films might not have been the same after as they were before July, 1937; that in any case it is not possible to say what those conditions would have been if the restraints had not been imposed, and that those conditions cannot be ascertained, because respondents have not removed the restraint. Hence, it is said, petitioners' evidence does not establish the fact of damage, and that further, the standard of comparison which the evidence sets up is too speculative and uncertain to afford an accurate measure of the amount of the damage.

The case in these respects is comparable to *Eastman Kodak Co.* v. *Southern Photo Co.*, 273 U. S. 359, and *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, in which precisely the same arguments now addressed to us were rejected. There, as here, the suits were for damages caused by restraints imposed by defendants, in violation of the Sherman Antitrust Act, on the operation of the business of the complainant in each case. In the one case, the defendant, in an effort to extend its monopoly, refused to sell to the plaintiff goods which had regularly been a part of his stock in trade. In the other, the defendants, competing sellers, engaged in destructive price competition with the plaintiff in execution of an unlawful conspiracy. In the first case, the plaintiff sought to establish his damage by comparing his profits before and after the unlawful interference with his business. In the other, the plaintiff sought to show his damage by proof of the difference between the amounts actually realized from his business after the conspiracy became effective, and what, but for the conspiracy, would have been realized by it from sales at reasonable prices, the evidence of which was the

amount by which his current prices were higher before the conspiracy than after, and by the extent to which the value of plaintiff's business property had declined after the conspiracy had begun to operate.

In each case we held that the evidence sustained verdicts for the plaintiffs, and that in the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs. In this we but followed a well-settled principle. See *Hetzel* v. *Baltimore & Ohio R. Co.*, 169 U. S. 26, 38–9. The tortious acts had in each case precluded ascertainment of the amount of damages more precisely, by comparison of profits, prices and values as affected by the conspiracy, with what they would have been in its absence under freely competitive conditions. Nevertheless, we held that the jury could return a verdict for the plaintiffs, even though damages could not be measured with the exactness which would otherwise have been possible.

In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances "juries are allowed to act upon probable and inferential, as well as direct and positive proof." *Story Parchment Co.* v. *Paterson Co., supra,* 561–4; *Eastman Kodak Co.* v. *Southern Photo Co., supra,* 377–9. Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages un-

certain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. See *Package Closure Corp.* v. *Sealright Co.*, 141 F. 2d 972, 979. That principle is an ancient one, *Armory* v. *Delamirie*, 1 Strange 505, and is not restricted to proof of damage in antitrust suits, although their character is such as frequently to call for its application. In cases of collision where the offending vessel has violated regulations prescribed by statute, see *The Pennsylvania*, 19 Wall. 125, 136, and in cases of confusion of goods, *Great Southern Gas & Oil Co.* v. *Logan Natural Gas & Fuel Co.*, 155 F. 114, 115; cf. *F. W. Woolworth Co.* v. *Labor Board*, 121 F. 2d 658, 663, the wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable. And in cases where a wrongdoer has incorporated the subject of a plaintiff's patent or trade-mark in a single product to which the defendant has contributed other elements of value or utility, and has derived profits from the sale of the product, this Court has sustained recovery of the full amount of defendant's profits where his own wrongful action has made it impossible for the plaintiff to show in what proportions he and the defendant have contributed to the profits. *Westinghouse Co.* v. *Wagner Mfg. Co.*, 225 U. S. 604; *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U. S. 251; see also *Sheldon* v. *Metro-Goldwyn Corp.*, 309 U. S. 390, 406.

"The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery" for a proven invasion of the

plaintiff's rights. *Story Parchment Co.* v. *Paterson Co., supra,* 565; and see also *Palmer* v. *Connecticut R. Co.,* 311 U. S. 544, 559, and cases cited.

The evidence here was ample to support a just and reasonable inference that petitioners were damaged by respondents' action, whose unlawfulness the jury has found, and respondents do not challenge. The comparison of petitioners' receipts before and after respondents' unlawful action impinged on petitioners' business afforded a sufficient basis for the jury's computation of the damage, where the respondents' wrongful action had prevented petitioners from making any more precise proof of the amount of the damage.

We do not mean to indicate by what we have said that the jury could not, on this record, have found a conspiracy for fixing minimum prices or that the Chicago system of release was not an unreasonable restraint of trade in other respects. We conclude that there was evidence to support a verdict for damages on at least one theory on which the case was submitted to the jury. We do not imply that the verdict could not be supported on some other theory.

The judgment of the district court below will be affirmed and the judgment of the court of appeals is

Reversed.

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

MR. JUSTICE FRANKFURTER, dissenting.

The dominant purpose of the Anti-Trust Acts is protection of the public interest by prohibiting unjustifiable restrictions upon competitive enterprise. From the very nature of the public interest thus to be safeguarded and by reason of the complex and costly character of the litigation to which it normally gives rise, Congress made available to the Attorney General of the United States appropriate

preventive and punitive remedies: the injunction, to put a prompt stop to illegal restraints, and the stern sanctions of the criminal law, to deter such restraints. A right of action is also given to any individual who has been "injured in his business" by such illegality. But while action by the Government to enforce the Anti-Trust Acts merely requires proof of illegality, an individual's right of recovery is dependent on proof of legal injury to him, and legal injury is not automatically established by proof of a restraint of trade in violation of the Sherman Law. See *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156, 162–63.

Therefore our real question is whether the respondents' violation of the Sherman Law illegally injured the petitioners. This necessarily involves substantial proof that the petitioners' business would have been more profitable if the distribution of movie films in Chicago had been a free-for-all and if no factor of the scheme that constituted an illegal conspiracy had been in operation, than it was under the conditions that actually prevailed. Specifically, one feature of the conspiracy was stipulated rentals by distributors in furnishing films to exhibitors. The record appears devoid of proof that, if competitive conditions had prevailed, distributors would not have made rental contracts with their respective exhibiting affiliates to the serious disadvantage of independents like the petitioners. They might individually have done so and not have offended the Sherman Law.

I agree that *Eastman Kodak Co.* v. *Southern Photo Co.*, 273 U. S. 359, and *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, should guide the disposition of this case. But I do not find that the decisive distinction made in those cases has been observed in deciding this case. The distinction is between proving that some damages were "the certain result of the wrong" and uncertainty as to the dollars and cents value of such injuring wrong. Such

difficulty in ascertaining the exact amount of damage is a risk properly cast upon the wrong-doing defendant. But proof of the legal injury, which is the basis of his suit, is plaintiff's burden. He does not establish it merely by proving that there was a wrong to the public nor by showing that if he had been injured ascertainment of the exact amount of damages would have had an inevitable speculative element to be left for a jury's conscientious guess. This basic distinction was thus formulated in *Story Parchment Co.* v. *Paterson Co.*:

> "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount." 282 U. S. at 562.

In the *Eastman* and *Story* cases the plaintiffs established what their profit was when competitive conditions prevailed and that the subsequent loss properly became exclusively attributable to restraint of such conditions. Such a comparison is not revealed by this record. It was wholly speculative, as the Circuit Court of Appeals properly held in applying the rule in the *Story Parchment Co.* case, whether the intake of petitioners would have been more profitable if the distribution of films in Chicago had been left wholly to the haggling of a free market, 150 F. 2d 877. As to the subtleties involved in such speculation, compare *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 223–24.

Where there is conceded legal injury, as for instance where one man's chattel is taken by another, as in the old case of *Armory* v. *Delamirie*, 1 Strange 505, we start with the legal injury and the problem is merely one of ascertaining damages "uncertain in respect of their amount." Such cases are not helpful where the crucial issue, as here, is whether there is solid proof of the existence of a legal injury.

Counsel for Parties.

AMERICAN SURETY CO. OF NEW YORK *v.* SAMPSELL, TRUSTEE IN BANKRUPTCY.

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

No. 142. Argued January 28, 1946.—Decided February 25, 1946.

1. A bankruptcy court has equitable power to subordinate the claim of a surety for subrogation and indemnity for payments under a statutory construction bond to the claims of laborers and materialmen for whose benefit the bond was executed but who failed to file lien claims or notify the surety of their unpaid claims within the time required by the bond and the applicable state statute. P. 271.
2. Federal bankruptcy law, not state law, governs the distribution of a bankrupt's assets to his creditors. *Prudence Realization Corp.* v. *Geist,* 316 U. S. 89. P. 272.
3. Controlling equitable principles forbid a surety from sharing a bankrupt's assets on equal terms with creditors who are members of the class its bond was given to protect. *American Surety Co.* v. *Westinghouse Electric Co.,* 296 U. S. 133. P. 272.
4. Failure to give the notice required by state law does not deprive materialmen and laborers of the protection of this rule. P. 273.

148 F. 2d 986, affirmed.

A bankruptcy court subordinated the claim of a surety for subrogation and indemnity for amounts paid under a statutory construction bond to the claims of laborers and materialmen who had not filed liens or notified the surety of their unpaid claims within the time specified by the bond and the applicable state statute. 53 F. Supp. 131. The circuit court of appeals affirmed. 148 F. 2d 986. This Court granted certiorari. 326 U. S. 699. *Affirmed,* p. 274.

Homer Cummings argued the cause for petitioner. With him on the brief were *Carl McFarland* and *Gordon F. Hampton.*

Martin Gendel argued the cause for respondent. With him on the brief was *Thomas S. Tobin.*

MR. JUSTICE BLACK delivered the opinion of the Court.

This case raises questions concerning the equitable power of a federal bankruptcy court to subordinate claims of some creditors to those of others. The creditors are a surety entitled to subrogation for payments upon its surety bond and laborers and materialmen for whose benefit the bond was executed.

Stratton, now in bankruptcy, made certain alterations in factory buildings located in California. In connection with this project Stratton as principal, and the petitioner, American Surety Company of New York, as surety, executed a joint statutory bond for $39,500, by which they bound themselves to pay all persons furnishing materials for, or performing work on, the job. The bond strictly conformed in all respects with requirements of the California law governing laborers' and materialmen's liens and was filed and recorded as provided by § 1183 of the California Code of Civil Procedure. Parts of the bond's language incorporated portions of §§ 1183 and 1187 of the California Code of Civil Procedure which provide that "no action" on a recorded bond may be maintained unless within a specified statutory period a mechanic's lien claim shall have been filed or the surety shall have been given notice of the unpaid claim.

Because of financial difficulties Stratton was unable to pay all the laborers and materialmen. Some of them, with claims aggregating $6,724.78, filed lien claims and gave notice within the statutory period and the surety paid their claims in full. Others failed to file claims or give the required notice and the surety did not pay them.

Stratton was later adjudged a bankrupt. The petitioner surety company filed a claim for the money it had been compelled to expend in payment of the materialmen and laborers who had given the statutory notice. Its claim rested on an agreement by Stratton to indemnify it and on the equitable doctrine of subrogation. Three of

the materialmen and laborers who had failed to give notice also filed claims totalling $1,336.11 owed them for materials furnished and work performed. The referee allowed all of these claims including that of the surety company as general claims in bankruptcy. Upon motion of the respondent trustee, the referee subordinated the petitioner's claim to that of the unpaid laborers and materialmen, holding that as long as there are "creditors of the class for whose benefit the original surety bond was written . . . the Surety Company cannot participate in dividends from the estate until these creditors have been paid in full." Thus under the order the three unpaid laborers and materialmen were to receive in addition to dividends on their own claims a pro-rata share of dividends otherwise due the petitioner until they had been paid in full or the petitioner's dividend had been exhausted. The district court sustained the referee's order, 53 F. Supp. 131, and the circuit court of appeals affirmed, 148 F. 2d 986. We granted certiorari because of petitioner's contention that the order subordinating its claims failed to take into consideration contractual rights of the surety under state law.

Petitioner argues that because the state statute incorporated into the bond requires laborers and materialmen either to file a lien claim or notify the surety within a specified period after completion of the job, the referee erred in subordinating the surety's claim to those of the laborers and materialmen who had not complied with the statutory notice provision. The rights of those creditors, it is argued, had never, under California law, been more than inchoate, and even as such had been completely extinguished prior to the bankruptcy proceedings because of a failure to give the statutory notice. Consequently, the petitioner urges, these claims ought not to be preferred in a federal bankruptcy proceeding. We think this contention is without merit and that the order of the referee was correct.

We recently had occasion to reiterate that federal bankruptcy law, not state law, governs the distribution of a bankrupt's assets to his creditors. *Prudence Realization Corp.* v. *Geist,* 316 U. S. 89, 95. See also *Pepper* v. *Litton,* 308 U. S. 295, 303–306; *Prudence Realization Corp.* v. *Ferris,* 323 U. S. 650, 653. True, we stated in both *Prudence* opinions that the federal law governing distribution of a bankrupt's estate should be applied with "appropriate regard for rights acquired under rules of state law . . ." But the extent to which state law is to be so considered is in the last analysis a matter of federal law. Here the referee's subordination of the surety company's claim did not only follow the well-established rule under federal bankruptcy law, but also achieved a result in complete harmony with California's aim, expressed by both its Constitution [1] and statutes, of providing materialmen's and workers' claims with extraordinary security.

The established federal rule of distribution in a situation such as the one before us was clearly set forth in *American Surety Co.* v. *Westinghouse Electric Co.,* 296 U. S. 133. In that case the surety company had paid out to various creditors the full amount of the statutory surety bond and filed a claim in the bankruptcy proceeding based on those payments. The surety company argued that since its full liability had been extinguished, it should be permitted to share ratably with all the bankrupt's general creditors. That contention was rejected. The Court pointed out that while liability of the surety company had ended, controlling equitable principles forbade the surety

[1] Article XX, § 15, of the Constitution of the State of California is as follows:

"Mechanics, materialmen, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens."

from sharing the bankrupt's assets on equal terms with any creditors who were members of the class its bond had been given to protect. The rule stated by the Court was that where insolvency supervenes, a surety's claim is postponed until payments in full are made to all "claimants who are members of the class of creditors covered by the bond."

The petitioner attempts to distinguish this case by arguing that the materialmen and workers to whose claims its claim has been subordinated were not "covered by the bond." This contention rests on the claim that according to the construction of the applicable state statutes by the California courts the bond does not protect materialmen and workers who, as the ones here involved, have not complied with statutory filing and notice provisions. While this claim as to California law is denied by the respondent, we need not resolve the dispute. For even if petitioner's claim as to California law is correct, the creditors in the *Westinghouse* case were certainly no more protected by that bond after the surety had paid out the full amount, than the materialmen and laborers are said to be protected here after the time for notifying the surety had expired. The phrase "covered by the bond" as used in the *Westinghouse* case did not have the meaning petitioner ascribes to it but had reference rather to the class of creditors for whose benefit the statutory bond was executed. All materialmen and laborers who contributed to Stratton's job clearly come within that class. The basic reason for the rule announced in the *Westinghouse* case applies with equal force here. The bond was intended to protect materialmen and laborers who worked on the job so that they would not have to bear the risk of Stratton's insolvency. But for his insolvency and bankruptcy these laborers and materialmen would have been able to recover from him the money due them, no matter what their rights against the surety might have been. Conse-

quently the surety should not, by claiming under subrogation or indemnity for money paid to some of the creditors for whose benefit the bond was intended, be allowed to reduce the share of the bankrupt's assets due to other creditors whom the bond also was intended to protect from insolvency. For this would tend to defeat the very purpose for which the bond was given and therefore cannot be permitted under the equitable principles governing distribution of a bankrupt's assets. *Prudence Realization Corp.* v. *Geist, supra,* at p. 96.

Affirmed.

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

ASHCRAFT ET AL. *v.* TENNESSEE.

CERTIORARI TO THE SUPREME COURT OF TENNESSEE.

No. 381. Argued February 6, 7, 1946.—Decided February 25, 1946.

1. On retrial of petitioner, whose conviction in a criminal case in a state court had been reversed by this Court on the ground that it had been obtained by use of a coerced confession, *Ashcraft* v. *Tennessee,* 322 U. S. 143, the jury was permitted to hear testimony narrating everything (except the confession) that took place during the inquisition at which the confession was obtained. This resulted in another conviction. *Held*: There was no relevant distinction between the use of this evidence and the use of the confession; and the conviction is reversed as being contrary to the due process clause of the Fourteenth Amendment. P. 278.
2. In oral argument before this Court in the earlier proceeding, the State's attorney admitted that the confession was the only evidence against petitioner and this was mentioned in the opinion of this Court, which reversed the conviction and remanded the cause to the state supreme court for proceedings not inconsistent with the opinion of this Court. *Held*: The mandate of this Court did not forbid a new trial of petitioner. P. 279, n. 1.
3. A state supreme court's construction of its own mandate is final. P. 279, n. 1.

Reversed.

Petitioner was convicted as an accessory before the fact of the murder of his wife. On appeal, the conviction was affirmed by the state supreme court. On certiorari, this Court reversed the conviction on the ground that it had been obtained by use of a coerced confession, contrary to the due process clause of the Fourteenth Amendment. 322 U. S. 143. On retrial, the jury was permitted to hear testimony narrating everything (except the confession) which took place during the inquisition at which the confession was obtained. The second conviction was affirmed by the state supreme court. This Court granted certiorari. 326 U. S. 713. *Reversed* and remanded for further proceedings. P. 279.

James F. Bickers and *Grover N. McCormick* argued the cause and filed a brief, and *William A. McTighe* entered an appearance, for petitioner.

Nat Tipton, Assistant Attorney General of Tennessee, argued the cause for respondent. With him on the brief was *Roy H. Beeler,* Attorney General.

Mr. Justice Black delivered the opinion of the Court.

Mrs. Zelma Ashcraft was murdered in Shelby County, Tennessee. The petitioner Ware was convicted for the murder. The petitioner Ashcraft, husband of the deceased, was convicted for being an accessory before the fact. The Supreme Court of Tennessee affirmed the convictions. We reversed the judgment as to Ashcraft, vacated it as to Ware, and remanded the case to the Supreme Court of Tennessee for further proceedings not inconsistent with our opinion. *Ashcraft* v. *Tennessee,* 322 U. S. 143. The state supreme court then ordered the case remanded to the Criminal Court of Shelby County with the same directions as to further procedure. The petitioners were again convicted and the state supreme court affirmed.

Our reversal of Ashcraft's first conviction was on the ground that his conviction resulted from a trial so conducted as to deprive Ashcraft of due process of law in violation of the Fourteenth Amendment. At that trial the State had been permitted to introduce in evidence an alleged confession which had been obtained from Ashcraft after thirty-six hours continuous grilling by investigating officers, who were holding him incommunicado in the county jail. This alleged confession was in large part written but Ashcraft had neither written nor signed it. Ware's conviction had also rested on a confession, the admission of which as evidence he had challenged as a denial of due process. Without passing on the constitutional question raised by Ware, we vacated the judgment against him for other reasons stated in our opinion. In the joint trial of both petitioners which resulted in the judgment now before us, the State again introduced Ware's confession. His objection to it based on the due process clause was overruled. Before reaching the issues raised by Ware, we shall dispose of the questions which Ashcraft now raises.

In our first opinion we pointed out in detail alleged incriminatory admissions used to convict Ashcraft and the circumstances under which he had made them. In summary those statements and circumstances were these. On a Saturday at 7:00 P. M., nine days after his wife was found dead, officers went to Ashcraft's home and took him to a fifth-floor county jail room. There he was held without rest or sleep until 7:00 o'clock Monday morning, or 36 hours. During the entire time Ashcraft was subjected to a constant barrage of questions and charges. According to the officers' testimony he, for about 28 hours, consistently denied any knowledge about, or complicity in, the crime. The officers swore, however, that after 11:00 P. M. Sunday night Ashcraft finally confessed that he knew who killed his wife, but at the same time denied

that he had done it. According to this testimony Ashcraft said that Ware had come to his home before daylight, just as Mrs. Ashcraft was getting in an automobile to take a journey; that he watched Ware force Mrs. Ashcraft to drive the automobile away from home with Ware accompanying her; that Ashcraft, after making slight but ineffective protests went back to his room, later went to work, and that he made no report to the officers but kept his knowledge secret because he was afraid of Ware. Later on the Sunday night that Ashcraft was being interrogated in the jail, a court reporter was summoned and he, according to the evidence, took down complete confessions of guilt given both by Ware and Ashcraft. The reporter completed transcription of his notes about 7:00 o'clock Monday morning. These transcribed notes were offered as to both the petitioners in the first trial. Witnesses at that trial, including Ashcraft's doctor, also swore that both Ashcraft and Ware had been caused to strip for complete physical examinations. The only apparent purpose of this was to counteract any later claim by Ware or Ashcraft that their alleged confessions were the product of physical mistreatment.

At an early stage in the new trial, resulting in the conviction we are now reviewing, the prosecuting attorney announced that he intended to use this jail evidence again, "about everything except the confession." And that was done. The witnesses for the State in the first and the second trials were the same. Construing our mandate as prohibiting only the admission of the written unsigned confession, the trial judge allowed the jury to listen to testimony narrating everything else that took place during the entire 36 hours Ashcraft was questioned with no one present but his inquisitors and those summoned by them to buttress their future evidence.

An inspection of the record shows beyond any peradventure of doubt that the testimony used in the last trial

showing what took place during Ashcraft's examination might well have had the same practical effect on the jury the written unsigned confession might have had, had it been introduced. For the circumstances leading up to it were narrated in detail both with reference to Ware and Ashcraft. Even the doctor who examined Ware reported not only on Ware's physical condition but also testified in the same breath about his examination of Ashcraft.

Respondent claims that this testimony did not harm Ashcraft and that Ashcraft's supposed statement that he knew who killed his wife was exculpatory. In fact, in the context of this case, that statement was the strongest possible evidence against Ashcraft, who was charged with having been an accessory before the fact. For ten days following his wife's death, Ashcraft had purported to help the officers in their efforts to solve the crime, and for the first twenty-eight hours of his jail interrogation he had not only stoutly maintained his own innocence whenever it was questioned, but had also denied any knowledge whatever as to the identity of the murderer. To admit knowledge of the murder and of who committed it after these protestations by him would for most people be the equivalent of a confession of guilty participation in advance of the crime. Wilful concealment of material facts has always been considered as evidence of guilt. And statements denying guilt followed by a confession of knowledge of who the guilty person was may carry the strongest implications of a guilty knowledge. Cf. *Bram* v. *United States,* 168 U. S. 532, 562. This is particularly true where a husband admits that he has, against the strongest pressures, deliberately concealed the identity of his wife's murderer for ten days.

We see no relevant distinction between introduction of this statement and the unsigned alleged confession, except the possibility that the admission of this long-concealed knowledge was perhaps a more effective confession

of guilt than the written unsigned alleged confession would have been. All the reasons given for reversal of the judgment against Ashcraft in the first case, which we need not repeat, apply with equal force here.

The State has asked that if Ashcraft's case is reversed we follow the same course as to Ware that we did in the first case, and vacate the judgment against him. For this reason, as well as the reasons given in our former opinion, we do not pass on the constitutional question raised by Ware concerning his alleged confession, but vacate the judgment of the Supreme Court of Tennessee affirming Ware's conviction.

We need not now decide other questions that have been argued except one contention mentioned below.[1]

The judgment against petitioner Ashcraft is reversed and that against petitioner Ware is vacated. Both cases are remanded to the state supreme court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE FRANKFURTER joins in this opinion on the basis of the decision in *Ashcraft* v. *Tennessee,* 322 U. S. 143.

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

---

[1] The petitioner Ashcraft contends that in the oral argument before this Court, when the first conviction was being challenged, the State's attorney admitted that the confession was the only evidence against Ashcraft, and since we mentioned this fact in our opinion, our mandate and the state supreme court's mandate, which adopted our mandate, in effect forbade a new trial of petitioner. We do not think our mandate lends itself to such an interpretation. As to the state supreme court's mandate, that court has construed it by affirming petitioners' second convictions. The state court's construction of its own mandate is final.

COMMISSIONER OF INTERNAL REVENUE *v.* TOWER.

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

No. 317. Argued January 10, 11, 1946.—Decided February 25, 1946.

Respondent had managed and controlled a manufacturing business since 1927. From 1933 to 1937 it was operated as a corporation. He was president, owning 445 out of 500 shares; his wife was nominal vice president, owning five shares; and one Amidon was secretary, owning 25 shares. Respondent transferred 190 shares to his wife, paying a gift tax; and, three days later, in order to save taxes, the corporation was dissolved and a partnership was organized consisting of respondent and Amidon as general partners and respondent's wife as a limited partner with no authority to participate in the conduct of the business. Each contributed the value of his stock and no new capital was contributed. Respondent continued to manage and control the business, which was conducted as before except that respondent and Amidon ceased to draw salaries. The wife contributed no services to the business and used her share of the income to buy the same type of things she had bought for herself, home and family before the partnership was formed. *Held:*

1. These facts were sufficient to support a finding by the Tax Court that, as between respondent and his wife, no genuine "partnership" within the meaning of 26 U. S. C. §§ 181, 182 existed, that respondent earned the income, and that he should be taxed on it under 26 U. S. C. § 22 (a). Pp. 286, 291, 292.

2. A finding of fact by the Tax Court, being supported by evidence, is final. P. 287.

3. In passing on the question whether an alleged partnership is a real partnership within the meaning of the federal tax laws, the Tax Court is not governed by the treatment of the partnership by state law and decisions for purposes of state law. P. 287.

4. While the legal right of a taxpayer to decrease the amount of what otherwise would be his taxes or altogether avoid them by means which the law permits can not be doubted, *Gregory* v. *Helvering*, 293 U. S. 465, this Court can not order the Tax Court to shut its eyes to the realities of tax avoidance schemes. P. 288.

5. In passing on the applicability of 26 U. S. C. §§ 181, 182 to income from a "family partnership"—

(a) The question is not simply who actually owned a share of the capital attributed to the wife on the partnership books but who earned the income. P. 289.

(b) In this case, that issue depends on whether the husband and wife really intended to carry on business as a partnership. P. 289.

(c) These issues can not be decided simply by looking at a single step in a complicated transaction. Pp. 289, 290.

(d) To decide who worked for, otherwise created or controlled the income, all steps in the process of earning the profits must be taken into consideration. Pp. 290.

6. A wife may become a general or limited partner with her husband for tax, as for other, purposes; but, when the husband purports to have given her a partnership interest, she does not share in the management and control of the business, and she contributes no vital additional service, the Tax Court may properly take these circumstances into consideration in determining whether the partnership is real within the meaning of the federal tax laws. P. 290.

7. If, in the circumstances of this case, the end result of the creation of a husband-wife partnership, though valid under state laws, is that income produced by the husband's efforts continues to be used for the same business and family purposes as before the partnership, failure to tax it as the husband's income would frustrate the purpose of 26 U. S. C. § 22 (a), defining gross income as including all earnings of any individual from "any source whatever." P. 291.

8. Single tax earnings can not be divided into two tax units and surtaxes avoided by the simple expedient of drawing up papers creating a husband-wife partnership. P. 291.

148 F. 2d 388, reversed.

The Commissioner of Internal Revenue levied a deficiency assessment against respondent on the ground that the part of the earnings of a "family partnership" which had been paid to, and reported by, his wife actually had been earned by respondent and should have been reported as his income. The Tax Court sustained the levy. 3 T. C. 396. The circuit court of appeals reversed. 148

F. 2d 388. This Court granted certiorari. 326 U. S. 703. *Reversed,* p. 292.

Arnold Raum argued the cause for petitioner. With him on the brief were *Solicitor General McGrath, Assistant Attorney General Samuel O. Clark, Jr., Sewall Key, Helen R. Carloss* and *John F. Costelloe.*

Oscar E. Waer argued the cause and filed a brief for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

The Commissioner of Internal Revenue determined that respondent's wife had in her income tax returns for 1940 and 1941 reported as her earnings income that actually had been earned by her husband but had not been reported in his returns. A deficiency assessment was consequently levied against the respondent by the Commissioner. The particular earnings involved were a portion of net income attributed to a partnership, to which, according to its records, 90 per cent of the capital had been contributed by respondent and his wife; of this, 51 per cent had been contributed by the respondent and 39 per cent by his wife. If, as respondent asserts, the circumstances surrounding the formation and operation of this partnership were such as to bring it within the meaning of §§ 181 and 182 of Title 26 of the United States Code, then the respondent and his wife are liable only for their respective individual share of the business' income. These sections provide that partners are liable for taxes on partnership income only in their "individual capacity" and that each partner shall report "his distributive share of the ordinary net income . . . of the partnership . . ." But § 11 of Title 26 of the United States Code levies a tax on the "net income of every individual," and the "net income" is required to be computed on the basis of "gross income" as defined in § 22 (a), which broadly includes

all earnings of any individual from "any source whatever." And we have held that the dominant purpose of all sections of the revenue laws, including these, is "the taxation of income to those who earn or otherwise create the right to receive it and enjoy the benefit of it when paid." *Helvering* v. *Horst,* 311 U. S. 112, 119. The basic question in deciding whether the Commissioner's deficiency assessment was proper, is: Was the income attributed to the wife as a partner income from a partnership for which she alone was liable in her "individual capacity," as provided by 26 U. S. C. §§ 181 and 182, or did the husband, despite the claimed partnership, actually create the right to receive and enjoy the benefit of the income, so as to make it taxable to him under §§ 11 and 22 (a)?

The respondent asked the Tax Court to review and redetermine the Commissioner's deficiency assessment, insisting that the income in question was not the respondent's but his wife's share in a partnership. The Commissioner urged in the Tax Court that the wife had contributed neither services nor capital to the partnership and that her alleged membership in the partnership was a sham. Respondent admitted that she had not contributed her services, but contended that she had made a contribution of capital as shown by the amount attributed to her on the partnership books and that she was a bona fide partner. Her alleged contribution consisted of assets which the husband claimed to have given to her three days before the formation of the partnership.

The Tax Court concluded that the respondent had never executed a complete gift of the assets which his wife later purportedly contributed to the partnership; that after the partnership was formed respondent continued to manage and control the business as he had done for many years before; that his economic relation to the portion of the partnership income which was attributed to his wife was such that it continued to be available to be used for the

same purposes as before, including ordinary family purposes; that the effect of the whole partnership arrangement, so far as it involved respondent and his wife, was a mere reallocation of respondent's business income within the family group; and that the dissolution of the corporation and the subsequent formation of the partnership fulfilled no business purpose other than a reduction of the husband's income tax. The Tax Court concluded that this family partnership income was in fact earned by the husband; that there was no real partnership between petitioner and his wife for purposes of carrying on a business enterprise; that the wife received a portion of the income "only by reason of her marital relationship," and held that the entire income was, therefore, taxable to the respondent under 26 U. S. C. § 22 (a). 3 T. C. 396. The Circuit Court of Appeals for the Sixth Circuit reversed. 148 F. 2d 388. The Circuit Court of Appeals for the Third Circuit sustained a holding by the Tax Court, based on facts in all material respects similar to the ones in this case, that all the income from a husband-wife partnership was taxable income of the husband under 26 U. S. C. § 22 (a). *Lusthaus* v. *Commissioner,* 149 F. 2d 232. Other circuit courts of appeals have also sustained similar holdings by the Tax Court.[1] As is indicated by numerous Tax Court decisions, attempts to escape surtaxes by dividing one earned income into two or more through the device of family partnerships have recently created an acute problem.[2] Because of the various views expressed as to controlling legal principles in the decisions discussing such arrangements, we granted certiorari both in this and the *Lusthaus* case, *post,* p. 293.

[1] *Earp* v. *Jones,* 131 F. 2d 292 (C. C. A. 10th); *Mead* v. *Commissioner,* 131 F. 2d 323 (C. C. A. 5th); *Argo* v. *Commissioner,* 150 F. 2d 67 (C. C. A. 5th); *Lorenz* v. *Commissioner,* 148 F. 2d 527 (C. C. A. 6th).

[2] See cases collected in Paul, Partnerships in Tax Avoidance, 13 Geo. Wash. L. Rev. 121.

A statement of some of the pertinent facts shown by the record and on which the Tax Court based its conclusion will cast some light on the problem. Broadly speaking, these facts follow a general pattern found in many of the "family partnership" cases. The business here involved, R. J. Tower Iron Works, is located in Greenville, Michigan and has manufactured and sold sawmill machinery and wood and metal stampings. Respondent's participation in the business dates back twenty-eight years. He has managed and controlled the company since the death of his father in 1927. During the tax years in question the business had forty to sixty employees on its pay roll. From 1933 to 1937 the business was operated as a corporation. The respondent was the president of the corporation and owned 445 out of the 500 shares outstanding,[3] his wife was vice president and owned five shares, and one Mr. Amidon was the secretary, owning twenty-five shares. These three also constituted the Board of Directors, and while Tower managed the corporate affairs, Amidon acted as bookkeeper. Mrs. Tower performed no business services.

In 1937 substantial profits pointed to increased taxes. Respondent's attorney and his tax accountant advised him that dissolution of the corporation and formation of a partnership with his wife as a principal partner would result in tax savings and eliminate the necessity of filing various corporate returns. The suggested change was put into effect. August 25, 1937, respondent transferred 190 shares of the corporation's stock to his wife on the condition that she place the corporate assets represented by these shares into the new partnership. Respondent, treating the stock transfer to his wife as a gift valued at $57,000.00, later paid a gift tax of $213.44. Three days

[3] For about six months immediately following incorporation the respondent owned only 425 shares.

after the stock transfer the corporation was liquidated, a limited partnership was formed and a certificate of partnership was duly filed for record as required by Michigan law. According to the books, the value of the donated stock became the wife's contribution to the partnership. The formation of the partnership did not in any way alter the conduct of the business, except that both Amidon and Tower ceased to draw salaries. By an agreement made shortly thereafter, a readjustment was made in the amount of profits each partner was to receive, under which Amidon's share became the equivalent of, if not more than, the amount of the salary he had previously drawn. Under the partnership agreement the respondent continued to have the controlling voice in the business, as to purchases, sales, salaries, the time of distribution of income, and all other essentials. Respondent's wife, as a limited partner, was prohibited from participation in the conduct of the business. So far as appears, the part of her purported share of the partnership business she actually expended was used to buy what a husband usually buys for his wife such as clothes and things for the family or to carry on activities ordinarily of interest to the family as a group.

We are of the opinion that the foregoing facts were sufficient to support the Tax Court's finding that the wife was not a partner in the business.[4] A partnership is generally said to be created when persons join together their money, goods, labor, or skill for the purpose of carrying on a trade, profession, or business and when there is community of interest in the profits and losses.[5] When the existence of

[4] Since the Commissioner had determined that the wife was not really a partner, the burden rested upon the respondent to produce sufficient evidence to convince the Tax Court that the Commissioner's determination was wrong. *Welch* v. *Helvering*, 290 U. S. 111; *Commissioner* v. *Heininger*, 320 U. S. 467, 475.

[5] *Ward* v. *Thompson*, 22 How. 330, 333, 334; *Meehan* v. *Valentine*, 145 U. S. 611, 618.

an alleged partnership arrangement is challenged by outsiders, the question arises whether the partners really and truly intended to join together for the purpose of carrying on business and sharing in the profits or losses or both. And their intention in this respect is a question of fact, to be determined from testimony disclosed by their "agreement, considered as a whole, and by their conduct in execution of its provisions." *Drennen* v. *London Assurance Co.*, 113 U. S. 51, 56; *Cox* v. *Hickman*, 8 H. L. Cas. 268. We see no reason why this general rule should not apply in tax cases where the Government challenges the existence of a partnership for tax purposes.[6] Here the Tax Court, acting pursuant to its authority in connection with the enforcement of federal laws, has found from testimony before it that respondent and his wife did not intend to carry on business as a partnership. This finding of fact, since supported by evidence, is final. *Commissioner* v. *Heininger*, 320 U. S. 467, 475; *Dobson* v. *Commissioner*, 320 U. S. 489. The decision of the Tax Court was therefore correct unless, as respondent contends, the Tax Court erroneously disregarded or improperly applied certain legal principles.

Respondent contends that the partnership arrangement here in question would have been valid under Michigan law and argues that the Tax Court should consequently have held it valid for tax purposes also. But the Tax Court in making a final authoritative finding on the question whether this was a real partnership is not governed by how Michigan law might treat the same circumstances for purposes of state law. Thus, Michigan could and might decide that the stock-transfer here was sufficient under state law to pass title to the wife, so that in the

[6] What would be the effect for tax purposes should taxpayers after holding themselves out as a partnership later challenge the existence of the partnership, is a question not here presented. See *Higgins* v. *Smith*, 308 U. S. 473, 477.

event of her death it would pass to whatever members of her family would be entitled to receive it under Michigan's law of descent and distribution. But Michigan cannot, by its decisions and laws governing questions over which it has final say, also decide issues of federal tax law and thus hamper the effective enforcement of a valid federal tax levied against earned income. The contention was rejected in *Lucas* v. *Earl,* 281 U. S. 111. There husband and wife made an agreement for joint ownership of the husband's future income. Assuming that the husband's future earnings were under California law considered as partly owned by the wife, this Court refused to accept the State's concept of the effect of the agreement which would have reduced the federal tax on income actually earned by the husband. And in *Helvering* v. *Clifford,* 309 U. S. 331, 334–335, we held that the purpose of 26 U. S. C. § 22 (a) to tax all income against the person who controlled its distribution could not be frustrated by family group arrangements, even though the distribution arrangements were valid for state law purposes. The statutes of Congress designed to tax income actually earned because of the capital and efforts of each individual member of a joint enterprise are not to be frustrated by state laws which for state purposes prescribe the relations of the members to each other and to outsiders. Cf. *Burk-Waggoner Assn.* v. *Hopkins,* 269 U. S. 110, 114.

Respondent contends that the Tax Court's holding that he is taxable for the profits from the partnership is contrary to a principle long recognized by this Court that "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted." *Gregory* v. *Helvering,* 293 U. S. 465, 469. We do not reject that principle. It would clearly apply, for example, in a situation where a member of a partnership,

in order to keep from paying future taxes on partnership profits and in order to get into a lower income tax bracket, sells his interest to a stranger, relinquishing all control of the business. But the situation is different where the taxpayer draws a paper purporting to sell his partnership interest even to a stranger, though actually he continues to control the business to the extent he had before the "sale" and channels the income to his wife. Then a showing that the arrangement was made for the express purpose of reducing taxes simply lends further support to the inference that the husband still controls the income from his partnership interest, that no partnership really exists and that earnings are really his and are therefore taxable to him and not to his wife. The arrangement we are here considering was of the type where proof of a motive to reduce income taxes simply lent further strength to the inference drawn by the Tax Court that the wife was not really a partner. See Paul, Selected Studies in Federal Taxation, 2d series, pp. 293–300. To rule otherwise would mean ordering the Tax Court to shut its eyes to the realities of tax avoidance schemes.

Respondent urges further that the Tax Court erroneously concluded that the gift was ineffective for tax purposes because it was conditional and therefore incomplete. The Government defends the Tax Court's conclusion. We do not find it necessary to decide this issue. The question here is not simply who actually owned a share of the capital attributed to the wife on the partnership books. A person may be taxed on profits earned from property, where he neither owns nor controls it. *Lucas* v. *Earl, supra.*[7] The issue is who earned the income and that issue depends on whether this husband and wife really intended to carry on business as a partnership. Those issues cannot

[7] Under some circumstances income has been held taxable to a person even when he does not own or control it. *United States* v. *Joliet & Chicago R. Co.*, 315 U. S. 44, 46.

be decided simply by looking at a single step in a complicated transaction. To decide who worked for, otherwise created or controlled the income, all steps in the process of earning the profits must be taken into consideration. See *Commissioner* v. *Court Holding Co.,* 324 U. S. 331, 334. Of course, the question of legal ownership of the capital purportedly contributed by a wife will frequently throw light on the broader question of whether an alleged partnership is real or pretended. But here the Tax Court's findings were supported by a sufficient number of other factors in the transaction, so that we need not decide whether its holding as to the completeness of the gift was correct. Cf. *Helvering* v. *Hallock,* 309 U. S. 106, 117, 118; *Burnet* v. *Wells,* 289 U. S. 670, 677.

There can be no question that a wife and a husband may, under certain circumstances, become partners for tax, as for other, purposes. If she either invests capital originating with her or substantially contributes to the control and management of the business, or otherwise performs vital additional services, or does all of these things she may be a partner as contemplated by 26 U. S. C. §§ 181, 182. The Tax Court has recognized that under such circumstances the income belongs to the wife.[8] A wife may become a general or a limited partner with her husband. But when she does not share in the management and control of the business, contributes no vital additional service, and where the husband purports in some way to have given her a partnership interest, the Tax Court may properly take these circumstances into consideration in determining whether the partnership is real within the meaning of the federal revenue laws.

It is the command of the taxpayer over the income which is the concern of the tax laws. *Harrison* v. *Schaffner,* 312 U. S. 579, 581, 582. And income earned by one

[8] See e. g. *Croft* v. *Commissioner,* [1944 P-H T. C. Mem. Dec. ¶ 44,330] T. C. No. 1432, decided October 11, 1944.

person is taxable as his, if given to another for the donor's satisfaction. *Helvering* v. *Horst,* 311 U. S. 112, 119. It is for this reason, among others, that we said in *Helvering* v. *Clifford, supra,* 335, that transactions between husband and wife calculated to reduce family taxes should always be subjected to special scrutiny. For if under circumstances such as those now before us, the end result of the creation of a husband-wife partnership, though valid under state laws, is that income produced by the husband's efforts continues to be used for the same business and family purposes as before the partnership, failure to tax it as the husband's income would frustrate the purpose of 26 U. S. C. § 22 (a). By the simple expedient of drawing up papers, single tax earnings cannot be divided into two tax units and surtaxes cannot be thus avoided.

Judged by the actual result achieved, the Tax Court was justified in finding that the partnership here brought about no real change in the economic relation of the husband and his wife to the income in question. Before the partnership the husband managed, controlled, and did a good deal of the work involved in running the business, and he had funds at his disposal which he either used in the business or expended for family purposes. The wife did not contribute her services to the business and received money from her husband for her own and family expenses. After the partnership was formed the husband continued to control and manage the business exactly as he had before. The wife again took no part in the management or operation of the business. If it be said that as a limited partner she could not share in the management without becoming a general partner the result is the same. No capital not available for use in the business before was brought into the business as a result of the formation of the partnership. And the wife drew on income which the partnership books attributed to her only for purposes of buying and paying for the type of things she had bought

for herself, home and family before the partnership was formed. Consequently the result of the partnership was a mere paper reallocation of income among the family members. The actualities of their relation to the income did not change. There was, thus, more than ample evidence to support the Tax Court's finding that no genuine union for partnership business purposes was ever intended and that the husband earned the income. Whether the evidence would have supported a different finding by the Tax Court is a question not here presented.

Reversed.

The CHIEF JUSTICE and MR. JUSTICE REED dissent for the reasons stated in their dissenting opinion in *Lusthaus* v. *Commissioner, post,* p. 297.

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

MR. JUSTICE RUTLEDGE, concurring.

I agree with the result and with the Court's view that the evidence was amply sufficient to sustain the Tax Court's findings and conclusions in this case and in *Lusthaus* v. *Commissioner, post,* p. 293. Candor forces me to add, however, that in my judgment the decisions' effect is to rule that in situations of this character the formation of a limited partnership under state law between husband and wife, with the latter as the limited partner, following immediately upon the husband's donation to the wife of a share in the assets of the business previously and afterwards conducted by him and conditioned upon her leaving the assets in the business, as a matter of federal tax law does not accomplish the formation of a partnership sufficient to relieve the husband of tax liability for the income derived after the transfer from use in the business of the share thus donated to the wife. In other words, I think that as a matter of law the taxpayers in these cases were

liable for the taxes assessed against them, including the deficiency assessments; and, therefore, in my opinion the Tax Court is not free in these or substantially similar circumstances to draw either the contrary conclusion or opposing ones. While it is not strictly necessary to express this opinion in these cases in view of the Tax Court's consistent conclusions of liability, it is inconceivable to me that the two cases, consistently with the federal tax law, could be decided the other way or with different outcomes on the facts presented. Being of this opinion, I consider the failure to state it could only tend to perpetuate a source of possible confusion for the future.

LUSTHAUS v. COMMISSIONER OF INTERNAL REVENUE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 263. Argued January 10, 1946.—Decided February 25, 1946.

Petitioner owned and operated a retail furniture business with two stores. His wife helped in the stores, when needed, without compensation. She owned property valued at $50,000 or more. Finding himself confronted with prospects of large profits and correspondingly large income taxes, petitioner, in consultation with his accountant and attorney, worked out a plan for a husband-wife partnership. The wife had little to do with the transaction and testified that "on the advice of counsel I did what he told me to do." Petitioner executed a bill of sale by which he purported to sell his wife a half interest in the business for $105,253.81, receiving in return a check for $50,253.81 and eleven notes of $5,000 each. Petitioner borrowed $25,000 from a bank; gave his wife a check for $50,000, on which he paid a gift tax; and, upon receipt of her check, repaid the $25,000 bank loan. The wife executed a partnership agreement undertaking to share profits and losses with her husband. A certificate authorizing the conduct of the business as a partnership was obtained from the State. The wife continued to help out in the stores when she was needed; but petitioner retained full control of the management of the business, the wife

was not permitted to draw checks on the business bank account, and neither partner was permitted to sell or assign his interest in the partnership without the other's consent. At the close of each year, the profits were credited on the books to petitioner and his wife equally; but no withdrawals were permitted unless both partners agreed. The husband drew no salary. During the tax year involved, the net profits exceeded $80,000, from which respondent withdrew about $4,500 and his wife only $59.61. The following year they withdrew approximately $16,000 and $19,000, respectively, the wife's withdrawal being used largely to pay off some of the $5,000 notes given as part of her contribution to the partnership capital. *Held:* The evidence was sufficient to support a finding by the Tax Court that there was no genuine partnership within the meaning of 26 U. S. C. §§ 181, 182; and a deficiency assessment against petitioner for earnings reported as his wife's income is sustained, for the reasons stated in *Commissioner* v. *Tower, ante,* p. 280. P. 297.

149 F. 2d 232, affirmed.

The Commissioner of Internal Revenue made a deficiency assessment against petitioner for purported partnership earnings of a husband-wife partnership reported in his wife's return and not reported by petitioner. The Tax Court sustained the Commissioner on the ground that the wife was not a genuine partner. 3 T. C. 540. The circuit court of appeals affirmed. 149 F. 2d 232. This Court granted certiorari. 326 U. S. 702. *Affirmed,* p. 297.

Paul E. Hutchinson argued the cause for petitioner. With him on the brief were *W. A. Seifert, William Wallace Booth* and *Norman D. Keller.*

Arnold Raum argued the cause for respondent. With him on the brief were *Solicitor General McGrath, Assistant Attorney General Samuel O. Clark, Jr., Sewall Key, Helen R. Carloss* and *John F. Costelloe.*

Joseph B. Brennan filed a brief, as *amicus curiae,* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

The question in this case is the same as in *Commissioner* v. *Tower, ante,* p. 280. Here, too, the Commissioner made a deficiency assessment against the husband, petitioner, for purported partnership earnings reported in his wife's return for 1940 and not reported by the petitioner. The Commissioner's action was based on a determination, made after an investigation, that for income tax purposes no partnership existed between the petitioner and his wife. The following are the controlling facts: Petitioner has operated a furniture business since 1918 and since 1933 he has conducted a retail furniture business at two stores located in Uniontown, Pennsylvania. His wife helped out at the stores whenever she was needed without receiving compensation. In 1939 the petitioner found himself confronted with the prospect of large profits and correspondingly large income taxes. This caused him concern and he called in his accountant and attorney. Together they worked out a plan for the supposed husband-wife partnership here involved. The wife had little to do with the whole transaction, and testified when asked about the details that "on the advice of counsel I did what he told me to do." In accordance with the plan the petitioner executed a bill of sale to his wife by which he purported to sell her an undivided half interest in the business for $105,253.81. At the same time the wife executed a partnership agreement under which she undertook to share profits and losses with her husband. The wife paid for her undivided half interest in the following way. Petitioner borrowed $25,000 from a bank and gave his wife a check for $50,000 drawn against the amount borrowed and further funds which he had withdrawn from the business and deposited with the bank for that purpose. The wife then gave petitioner her check for $50,253.81 and the petitioner repaid the $25,000 to the bank. Petitioner's wife also gave him eleven notes in the amount of $5,000 each, which

according to an understanding were to be paid from the profits to be ascribed to the wife under the partnership agreement.[1] Petitioner reported in a 1940 gift tax return that he had made a gift of $50,000 to his wife. Pennsylvania issued petitioner and his wife a certificate authorizing them to carry on the business as a partnership. When the partnership was formed petitioner's wife owned her home, valued at twenty-five to thirty thousand dollars and securities worth up to twenty-five thousand dollars.

After the partnership was formed the wife continued to help out in the stores whenever she was needed just as she had always done. But petitioner retained full control of the management of the business. His wife was not permitted to draw checks on the business bank account. During the taxable year here involved the husband filed social security tax returns as owner of the business. Neither partner could sell or assign the interest ascribed by the partnership agreement without the other's written consent. Though, at the close of each year the profits of the business were credited on the books to petitioner and his wife equally, no withdrawals were to be made under the partnership agreement unless both partners agreed. The husband drew no salary. During 1940, which is the tax year here involved, the business net profits were in excess

[1] The Tax Court found as follows on this phase:

"He [the husband] would make her a 'gift' of a part of the purchase price and take her promissory notes for the balance. She could pay off the notes from her share of her profits of the business."

A part of the testimony supporting this finding was given by the husband as follows:

"Q. And what were the terms of that oral agreement?

"A. Just as I stated, that she [the wife] would pay me $50,000 in cash and the balance to be paid in notes.

"Q. Payable yearly?

"A. Payable yearly in notes.

"Q. In the amount of $5,000 each for 11 years?

"A. Yes.

"Q. Where was she to get the amount to be paid off yearly?

"A. From the profits of the business."

of $80,000, from which the respondent withdrew about $4,500 and his wife withdrew only $59.61. The following year they withdrew approximately $16,000 and $19,900 respectively, the wife's withdrawal being used largely to pay back some of the $5,000 notes given as part of her alleged contribution to the partnership capital. On this evidence the Tax Court found that the wife acquired no separate interest in the partnership by turning back to her husband the $50,000 which he had given her conditioned upon her turning it back to him; and that the partnership arrangements were merely superficial, and did not result in changing the husband's economic interest in the business. It concluded that while the partnership was "clothed in the outer garment of legal respectability" its existence could not be recognized for income tax purposes. 3 T. C. 540. The circuit court of appeals affirmed. 149 F. 2d 232. The petitioner challenges the Tax Court's finding that the wife was not a genuine partner on the ground that the evidence did not support it. We hold that it did.

For the reasons set out in our opinion in *Commissioner* v. *Tower, ante,* p. 280, the decision of the circuit court of appeals is affirmed.

Affirmed.

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

MR. JUSTICE REED, dissenting.

As the Court considers, and as we do, the question in this case is the same as that in *Commissioner* v. *Tower, ante,* p. 280, and as the Court relies to support its conclusion upon the reasons set out in the *Tower* opinion, we shall state the grounds for our dissent in this case rather than the *Tower* case. We choose this certiorari for our explanation because the issue stands out more boldly in the light of the facts before and findings of the Tax Court.

A. L. Lusthaus, as an individual proprietor, had operated a furniture business in Uniontown, Pennsylvania,

for a number of years. In 1939 a realization of existing and prospective federal income tax burdens caused him to cast about for a legal means of lessening the tax. Such method of tax avoidance has not heretofore been considered illegal; and, apropos of this rule, this Court says today in the *Tower* opinion, "We do not reject that principle." See *Gregory* v. *Helvering,* 293 U. S. 465, 469, and cases cited; *Bullen* v. *Wisconsin,* 240 U. S. 625, 630–31.

The statement in the Court's opinion adequately covers the facts. But it should not be inferred from the Court's statement that the notes given were "according to an understanding . . . to be paid from the profits to be ascribed to the wife under the partnership agreement," that payment of the notes was so limited. The notes were unconditional promises to pay. The payment of them from profits was only a hope.

It is essential, too, we think, to note that in these partnership cases the tax doctrine of *Lucas* v. *Earl,* 281 U. S. 111, 115, as to the attribution of income fruit to a different tree from that on which it grew is inapplicable. Here, so far as the income is attributable to the property given, the gift cannot be taken as a gift of income before it was earned or payable, as in *Lucas* v. *Earl,* 281 U. S. 111; *Helvering* v. *Horst,* 311 U. S. 112; *Helvering* v. *Eubank,* 311 U. S. 122, where the income was held taxable to the donor. It was a gift of property which thereafter produced income which was taxable to the donee, as in *Blair* v. *Commissioner,* 300 U. S. 5; cf. *Helvering* v. *Horst, supra,* 119.

From first to last, the record shows a controversy as to whether the business is a valid partnership under the tax laws. The issue never has been whether Mr. Lusthaus failed to return his personal earnings for taxation. There was no effort on the part of the Commissioner to tax him upon a part or all of the partnership earnings as personal compensation which he had earned individually but as-

signed to the partnership for collection or which he had earned individually but caused to be paid to a fictitious partnership. While the Tax Court pointed out that the income resulted in part from petitioner's managerial ability, it also recognized that the capital contributed to the earnings. 3 T. C. at 543. The Tax Court thought that the wife acquired "no separate interest of her own by turning back to petitioner the $50,000" which had been given her conditionally and for that specific purpose. Why it thought the wife did not become an owner in the partnership business, the Tax Court does not explain. The Court's opinion does not turn upon any issue which is connected with the value of Mr. Lusthaus' services and we mention it only for the purpose of focusing attention upon what seems to us the Court's error. If the case was in the posture of a tax claim against Mr. Lusthaus based upon his failure to account for income actually earned by him but paid to his wife, an entirely different issue would be presented.

Since the questions of taxability in this case turn on the wife's bona fide ownership of a share in the partnership, we cannot say that federal law is controlling. Even if it were, we are pointed to no federal law of partnership which precludes the wife's becoming a partner with her husband and making her contribution to capital from money or property given to her by her husband, as well as from any other source.[1]

---

[1] Of course, federal tax provisions are not subject to state law. *United States* v. *Pelzer*, 312 U. S. 399, 402–3. As rights under partnership arrangements are so essentially local, Congress by selecting the receipt of income as the taxable incident may have intended to leave the determination of its character as partnership or individual to state law. "State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed." *Morgan* v. *Commissioner*, 309 U. S. 78, 80; *Heiner* v. *Mellon*, 304

The Court's opinion does not hold that income of husband and wife must be taxed as one. Congress has refused to do this although urged to do so.[2] It does not hold that a wife may not be a partner of her husband under some circumstances. It is said she may be "If she either invests capital originating with her or substantially contributes to the control and management of the business, or otherwise performs vital additional services, or does all of these things . . . 26 U. S. C. §§ 181, 182." *Commissioner* v. *Tower, ante,* p. 290. But as we read the Court's opinion, it decides that a wife may not become a partner of her husband for federal income tax purposes, if the husband gives to her, directly or indirectly, the capital to finance her part of the partnership investment unless she also substantially participates in the management of the business or otherwise performs vital additional services. This conclusion we think is erroneous. There is no provision or principle of the Internal Revenue laws which prevents a husband from making a gift of property to his wife, even though his motive is to reduce his taxes, or which requires the income thereafter to be taxed to the husband if the gift is genuine and not pretended and he has retained no power to deprive the wife of the property or its income.

We have pointed out that the amount of earnings to be allocated to petitioner's managerial abilities is not in issue.

U. S. 271, 279. See *Blair* v. *Commissioner,* 300 U. S. 5, 9; *Crooks* v. *Harrelson,* 282 U. S. 55; *Uterhart* v. *United States,* 240 U. S. 598, 603.

In *Lucas* v. *Earl,* 281 U. S. 111, the validity of the contract to transfer sums earned was not significant to the inquiry as to who earned the compensation.

[2] Revenue Bill of 1941, H. R. 5417, as introduced, 77th Cong., 1st Sess., § 111; H. Rep. No. 1040, 77th Cong., 1st Sess., p. 10; 87 Cong. Rec. 6731–32. See Mandatory Joint Returns, Joint Committee on Internal Revenue Taxation, U. S. Gov. Printing Office, 1941. It is an old problem. Statement, Secy. of Treas., Tax Avoidance, 1933, Ways & Means Committee.

There is no question but that the gift of $50,000 was complete, either in itself or joined with the subsequent transfer of a half interest in the partnership assets by payment of that $50,000 plus the additional cash and notes. On termination of the partnership, half of the assets would go to her. On her death, her interest in the partnership would go to her heirs or legatees. The value of her individual property—$45,000 to $55,000—would increase the financial strength of the partnership as it would become subject to claims against the partnership. Uniform Partnership Act (Penna.), Title 59, § 37, Purdon's Penna. Stat.; cf. *Aiton* v. *Slater,* 298 Mich. 469, 474, 299 N. W. 149. Her husband paid his federal gift tax on the $50,000. The fact that the partnership "brought about no real change in the economic relation of the husband and his wife to the income in question" cannot affect taxability any more in the present than in any other marital situation where individual incomes exist within the intimate family circle. When a stockholder in a corporation gives stock to his wife, the family's gross income remains the same. It is only surtaxes which are reduced.

Congress taxes partnership income to the partners distributively.[3] It has defined partnership to the extent

---

[3] 26 U. S. C. § 182. "Tax of partners. In computing the net income of each partner, he shall include, whether or not distribution is made to him—

"(a) As part of his gains and losses from sales or exchanges of capital assets held for not more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for not more than 6 months.

"(b) As part of his gains and losses from sales or exchanges of capital assets held for more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for more than 6 months.

"(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183 (b)."

shown below.[4] The term "partnership" as used in § 182, Internal Revenue Code, means ordinary partnerships. *Burk-Waggoner Assn.* v. *Hopkins,* 269 U. S. 110, 113. When two or more people contribute property or services to an enterprise and agree to share the proceeds, they are partners.[5] The Court says, *Tower* opinion, *ante,* pp. 286–287, that "When the existence of an alleged partnership arrangement is challenged by outsiders, the question arises whether the partners really and truly intended to join together for the purpose of carrying on business and sharing in the profits or losses or both." The suggestion seems to be that an inference of intention entirely contrary to all the primary facts may be deduced at will and without challenge by the Tax Court. People intend the consequences of their acts. When all the necessary elements of a valid partnership exist and no evidence is produced which points the other way, an intention to be partners must follow. Lindley, Partnership (10th Ed.), 44. This situation exists in this and the *Tower* case. The purpose to reduce taxes on family income certainly is not evidence of intention not to form a partnership.

---

[4] 26 U. S. C. § 3797. "Definitions. (a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

. . . . . .

"(2) Partnership and partner. The term 'partnership' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term 'partner' includes a member in such a syndicate, group, pool, joint venture, or organization."

[5] *Campbell* v. *Northwest Eckington Co.,* 229 U. S. 561, 580; *Karrick* v. *Hannaman,* 168 U. S. 328, 334; *Meehan* v. *Valentine,* 145 U. S. 611, 618; *Berthold* v. *Goldsmith,* 24 How. 536, 541; *Ward* v. *Thompson,* 22 How. 330, 334.

Mich. Stat. Anno. (1937), Chap. 191, Title 20, § 20.6. "Sec. 6. (1) A partnership is an association of two [2] or more persons to carry on as co-owners a business for profit; . . ."

The wives contributed property if the gifts of money for investment in the partnerships were valid. The Court treats the validity of the gift in the *Tower* opinion, *ante*, p. 289, as immaterial. In this, the *Lusthaus* case, there is no question made by the Tax Court as to the validity of the gift. Since the Revenue Code recognizes the power of a taxpayer to make gifts of his property on payment of a gift tax where due, I. R. C., 1000 *et seq.*, such a transfer is valid if real and complete. There was no evidence in either the *Tower* or this case that the fact conditions for a completed gift were not satisfied or that a genuine gift was not intended, or that the husband in fact or in law retained any right or power to deprive the wife of the property given to her or the income from it. Property was transferred absolutely and beyond recall without consideration from the husband to the wife. That is a gift as effective between husband and wife as between strangers.[6] She did not hold in trust for her husband.

The husband was the managing partner but had no control otherwise over the distribution of assets on dissolution or of withholding her share of the earnings when distributed. Before distribution they were her earnings held subject to her right to an accounting and taxable to her under the Revenue Laws. This distinguishes the case from the short term trust of *Helvering* v. *Clifford,* 309 U. S. 331. Management of a business which involves only the risk of the capital of another is not the control to which the *Clifford* case refers.

To us the evidence shows, without any contradiction, that in consummation of the husband's gift to the wife a valid partnership was created to which the federal tax acts are applicable. There is no finding and no evidence that the transaction was pretended or a sham, or that the

[6] *Burnet* v. *Guggenheim,* 288 U. S. 280, 286; *Helvering* v. *New York Trust Co.,* 292 U. S. 455, 462; *Bogardus* v. *Commissioner,* 302 U. S. 34, majority's and minority's definition; *Smith* v. *Shaughnessy,* 318 U. S. 176; *Helvering* v. *American Dental Co.,* 318 U. S. 322, 330.

husband in fact or in law retained any power to deprive the wife of any part of her contribution to the capital or her share of income derived from it. Two right steps do not make a wrong one. From these facts the intention to form a partnership must be inferred. Upon this record the tax advantage to the husband resulting from his gift of income-producing property is lawful because the gift was lawful and therefore effective to bestow on the wife the income thereafter derived from property which was her own.

The judgment should be reversed.

The CHIEF JUSTICE joins in this dissent.

DUNCAN *v.* KAHANAMOKU, SHERIFF.

NO. 14. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.*

Argued December 7, 1945.—Decided February 25, 1946.

1. Section 67 of the Hawaiian Organic Act, 31 Stat. 141, 153, authorizing the Territorial Governor, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, to suspend the privilege of the writ of habeas corpus or "place the Territory . . . under martial law," did not give the armed forces, during a period of martial law, power to supplant all civilian laws and to substitute military for judicial trials of civilians not charged with violations of the law of war, in territory of the United States not recently regained from an enemy, at a time when the dangers apprehended by the military are not sufficient to cause them to require civilians to evacuate the area and it is not impossible for the civilian government and the courts to function. Pp. 313, 324.

(a) Although part of the language of § 67 of the Organic Act is identical with a part of the language of the original Constitution of Hawaii, Congress did not intend to adopt the decision of the Supreme Court of Hawaii in *In re Kalanianaole*, 10 Hawaii 29, sustaining military trials of civilians in Hawaii without adequate court review during periods of insurrection. P. 316.

---

*Together with No. 15, *White* v. *Steer, Provost Marshal*, on certiorari to the same court, argued and decided on the same dates.

(b) When the Organic Act is read as a whole and in the light of its legislative history, it is clear that Congress intended that civilians in Hawaii should be entitled to constitutional protection, including the guarantee of a fair trial, to the same extent as those who live in any other part of our country. Pp. 316–319.

(c) Our system of government is the antithesis of total military rule and its founders are not likely to have contemplated complete military dominance within the limits of a territory made a part of this country and not recently taken from an enemy. P. 322.

(d) When Congress passed the Organic Act and authorized the establishment of "martial law" it had in mind, and did not wish to exceed, the boundaries between military and civilian power, in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions. Pp. 319–324.

(e) The phrase "martial law," as employed in that Act, while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals. Pp. 319–324.

2. Petitioners, two civilians who were unlawfully tried, convicted and imprisoned by military tribunals in Hawaii during a period of martial law when the privilege of the writ of habeas corpus had been suspended, are entitled to their freedom on writs of habeas corpus—at least after the privilege of the writ had been restored. Pp. 312, n. 5, 324.

146 F. 2d 576, reversed.

No. 14. Petitioner, a civilian shipfitter employed in the Navy Yard at Honolulu, was arrested by military authorities and tried and sentenced to imprisonment by a military tribunal for assaulting two Marine sentries on duty at the Navy Yard in violation of a military order more than two years after the attack on Pearl Harbor. At that time, schools, bars and motion picture theatres had been reopened and the courts had been authorized to exercise their normal functions, with certain exceptions, one being that only military tribunals were permitted to try criminal prosecutions for violations of military orders.

No. 15. Petitioner, a civilian stockbroker in Honolulu having no connection with the armed forces, was arrested by military police more than eight months after the attack on Pearl Harbor on a charge of embezzling stock belonging to another civilian in violation of the laws of Hawaii. He was tried, convicted and sentenced to imprisonment by a military tribunal at a time when the courts were open and functioning to a limited extent "as agents of the Military Governor."

Both petitioned the district court for writs of habeas corpus, challenging the validity of their trials and convictions by military tribunals under a state of "martial law" which had been declared on the day of the attack on Pearl Harbor. After separate trials, the district court found that the courts had always been able to function, but for military orders closing them, and that there was no military necessity for the trial of petitioners by military tribunals rather than by regular courts. It held the trials void and ordered the release of petitioners. The circuit court of appeals reversed. 146 F. 2d 476. This Court granted certiorari. 324 U. S. 833. *Reversed,* p. 324.

J. Garner Anthony argued the cause and filed a brief for petitioner in No. 14. *Osmond K. Fraenkel* argued the cause, and *Fred Patterson* filed a brief, for petitioner in No. 15.

Edward J. Ennis argued the cause for respondents. With him on the brief were *Solicitor General McGrath, The Judge Advocate General of the Army, Ralph F. Fuchs, William J. Hughes, Jr., Eugene V. Slattery* and *Angus Taylor.*

By special leave of Court, *C. Nils Tavares,* Attorney General of Hawaii, argued the cause for the Bar Association of Hawaii et al., as *amici curiae,* urging reversal. With him on the brief were *Heaton L. Wrenn* and *J. Russell Cades.*

Bartley C. Crum, Edwin Borchard, Thurman Arnold, Pierce Butler, Winthrop Wadleigh, Osmond K. Fraenkel and *Arthur Garfield Hays* filed a brief for the American Civil Liberties Union, as *amicus curiae,* in support of petitioners.

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioners in these cases were sentenced to prison by military tribunals in Hawaii. Both are civilians. The question before us is whether the military tribunals had power to do this. The United States district court for Hawaii in habeas corpus proceedings held that the military tribunals had no such power and ordered that they be set free. The circuit court of appeals reversed, and ordered that the petitioners be returned to prison. 146 F. 2d 576. Both cases thus involve the rights of individuals charged with crime and not connected with the armed forces to have their guilt or innocence determined in courts of law which provide established procedural safeguards, rather than by military tribunals which fail to afford many of these safeguards. Since these judicial safeguards are prized privileges of our system of government we granted certiorari.

The following events led to the military tribunals' exercise of jurisdiction over the petitioners. On December 7, 1941, immediately following the surprise air attack by the Japanese on Pearl Harbor, the Governor of Hawaii by proclamation undertook to suspend the privilege of the writ of habeas corpus and to place the Territory under "martial law." Section 67 of the Hawaiian Organic Act, 31 Stat. 141, 153,[1] authorizes the Territorial Governor to

[1] "That the governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse comitatus, or

take this action "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it . . ." His action was to remain in effect only "until communication can be had with the President and his decision thereon made known." The President approved the Governor's action on December 9th.[2] The Governor's proclamation also authorized and requested the Commanding General, "during the . . . emergency and until danger of invasion is removed, to exercise all the powers normally exercised" by the Governor and by the "judicial officers and employees of this territory."

Pursuant to this authorization the commanding general immediately proclaimed himself Military Governor and undertook the defense of the Territory and the maintenance of order. On December 8th, both civil and criminal courts were forbidden to summon jurors and witnesses and to try cases. The Commanding General established military tribunals to take the place of the courts. These were to try civilians charged with violating the laws of the United States and of the Territory, and rules, regulations, orders or policies of the Military Government. Rules of evidence and procedure of courts of law were not to control the military trials. In imposing penalties the mili-

---

call out the militia of the Territory to prevent or suppress lawless violence, invasion, insurrection, or rebellion in said Territory, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known."

[2] The district court heard much evidence and from it found as follows on this subject: "By radio the Governor of Hawaii on December 7, 1941, notified the President of the United States simply that he had placed the Territory under martial law and suspended the writ. The President's approval was requested and it was granted by radio on December 8, 1941. Not until 1943 was the text of the Governor's December 7 proclamation furnished Washington officials, and it is still doubtful if it has yet been seen by the President."

tary tribunals were to be "guided by, but not limited to the penalties authorized by the courts martial manual, the laws of the United States, the Territory of Hawaii, the District of Columbia, and the customs of war in like cases." The rule announced was simply that punishment was to be "commensurate with the offense committed" and that the death penalty might be imposed "in appropriate cases." Thus the military authorities took over the government of Hawaii. They could and did, by simply promulgating orders, govern the day to day activities of civilians who lived, worked, or were merely passing through there. The military tribunals interpreted the very orders promulgated by the military authorities and proceeded to punish violators. The sentences imposed were not subject to direct appellate court review, since it had long been established that military tribunals are not part of our judicial system. *Ex parte Vallandigham,* 1 Wall. 243. The military undoubtedly assumed that its rule was not subject to any judicial control whatever, for by orders issued on August 25, 1943, it prohibited even accepting of a petition for writ of habeas corpus by a judge or judicial employee or the filing of such a petition by a prisoner or his attorney. Military tribunals could punish violators of these orders by fine, imprisonment or death.

White, the petitioner in No. 15, was a stockbroker in Honolulu. Neither he nor his business was connected with the armed forces. On August 20, 1942, more than eight months after the Pearl Harbor attack, the military police arrested him. The charge against him was embezzling stock belonging to another civilian in violation of Chapter 183 of the Revised Laws of Hawaii. Though by the time of White's arrest the courts were permitted "as agents of the Military Governor" to dispose of some non-jury civil cases, they were still forbidden to summon jurors and to exercise criminal jurisdiction. On August

22nd, White was brought before a military tribunal designated as a "Provost Court." The "Court" orally informed him of the charge. He objected to the tribunal's jurisdiction but the objection was overruled. He demanded to be tried by a jury. This request was denied. His attorney asked for additional time to prepare the case. This was refused. On August 25th he was tried and convicted. The tribunal sentenced him to five years imprisonment. Later the sentence was reduced to four years.

Duncan, the petitioner in No. 14, was a civilian shipfitter employed in the Navy Yard at Honolulu. On February 24, 1944, more than two years and two months after the Pearl Harbor attack, he engaged in a brawl with two armed Marine sentries at the yard. He was arrested by the military authorities. By the time of his arrest the military had to some extent eased the stringency of military rule. Schools, bars and motion picture theatres had been reopened. Courts had been authorized to "exercise their normal jurisdiction." They were once more summoning jurors and witnesses and conducting criminal trials. There were important exceptions, however. One of these was that only military tribunals were to try "Criminal prosecutions for violations of military orders." [3] As the record shows, these military orders still covered a wide range of day to day civilian conduct. Duncan was charged with violating one of these orders, paragraph 8.01, Title 8, of General Order No. 2, which prohibited assault on military or naval personnel with intent to resist or hinder them in

---

[3] In addition, § 3 of a Proclamation of February 8, 1943, which returned some power to the civil authorities, had reserved a right in the Military Governor to resume any or all of the powers returned to the civilian government. In approving this Proclamation the President had expressed his confidence that the Military would "refrain from exercising . . . authority over . . . normally civil functions" and his hope that there would "be a further restoration of civil authority as and when the situation permits."

the discharge of their duty. He was, therefore, tried by a military tribunal rather than the territorial court, although the general laws of Hawaii made assault a crime. Revised L. H. 1935, ch. 166. A conviction followed and Duncan was sentenced to six months imprisonment.

Both White and Duncan challenged the power of the military tribunals to try them by petitions for writs of habeas corpus filed in the district court for Hawaii on March 14 and April 14, 1944, respectively. Their petitions urged both statutory and constitutional grounds. The court issued orders to show cause. Returns to these orders contended that Hawaii had become part of an active theatre of war constantly threatened by invasion from without; that the writ of habeas corpus had therefore properly been suspended and martial law had validly been established in accordance with the provisions of the Organic Act; that consequently the district court did not have jurisdiction to issue the writ; and that the trials of petitioners by military tribunals pursuant to orders by the Military Governor issued because of military necessity were valid. Each petitioner filed a traverse to the returns, which traverse challenged among other things the suspension of habeas corpus, the establishment of martial law and the validity of the Military Governor's orders, asserting that such action could not be taken except when required by military necessity due to actual or threatened invasion, which even if it did exist on December 7, 1941, did not exist when the petitioners were tried; and that, whatever the necessity for martial law, there was no justification for trying them in military tribunals rather than the regular courts of law. The district court, after separate trials, found in each case, among other things, that the courts had always been able to function but for the military orders closing them, and that consequently there was no military necessity for the trial of petitioners by military tribunals rather than regu-

lar courts.[4] It accordingly held the trials void and ordered the release of the petitioners.

The circuit court of appeals, assuming without deciding that the district court had jurisdiction to entertain the petitions, held the military trials valid and reversed the ruling of the district court. 146 F. 2d 576. It held that the military orders providing for military trials were fully authorized by § 67 of the Organic Act and the Governor's actions taken under it. The court relied on that part of the section which, as we have indicated, authorizes the Governor with the approval of the President to proclaim "martial law" whenever the public safety requires it. The circuit court thought that the term "martial law" as used in the Act denotes among other things the establishment of a "total military government" completely displacing or subordinating the regular courts, that the decision of the executive as to what the public safety requires must be sustained so long as that decision is based on reasonable grounds and that such reasonable grounds did exist.

In presenting its argument before this Court the Government for reasons set out in the margin [5] abandons its contention as to the suspension of the writ of habeas corpus and advances the argument employed by the circuit court for sustaining the trials and convictions of the petitioners by military tribunals. The petitioners contend that "martial law" as provided for by § 67 did not authorize the military to try and punish civilians such as petitioners and urge further that if such authority should

[4] We do not set out the other grounds of challenge since under the view we take we do not reach them.

[5] The Government points out that since the privilege of the writ was restored and martial law terminated by Presidential Proclamation on October 24, 1944, petitioners are entitled to their liberty if the military tribunals were without jurisdiction to try them. We therefore do not pass upon the validity of the order suspending the privilege of habeas corpus or the power of the military to detain persons under other circumstances and conditions.

be inferred from the Organic Act, it would be unconstitutional. We need decide the constitutional question only if we agree with the Government that Congress did authorize what was done here.

Did the Organic Act during the period of martial law give the armed forces power to supplant all civilian laws and to substitute military for judicial trials under the conditions that existed in Hawaii at the time these petitioners were tried? The relevant conditions, for our purposes, were the same when both petitioners were tried. The answer to the question depends on a correct interpretation of the Act. But we need not construe the Act, insofar as the power of the military might be used to meet other and different conditions and situations. The boundaries of the situation with reference to which we do interpret the scope of the Act can be more sharply defined by stating at this point some different conditions which either would or might conceivably have affected to a greater or lesser extent the scope of the authorized military power. We note first that at the time the alleged offenses were committed the dangers apprehended by the military were not sufficiently imminent to cause them to require civilians to evacuate the area or even to evacuate any of the buildings necessary to carry on the business of the courts. In fact, the buildings had long been open and actually in use for certain kinds of trials. Our question does not involve the well-established power of the military to exercise jurisdiction over members of the armed forces,[6] those directly connected with such forces,[7] or enemy belligerents, prisoners of war, or others charged

[6] *Wilkes* v. *Dinsman,* 7 How. 89; *Ex parte Reed,* 100 U. S. 13; *Martin* v. *Mott,* 12 Wheat. 19; *In re Grimley,* 137 U. S. 147; *Johnson* v. *Sayre,* 158 U. S. 109; *Carter* v. *McClaughry,* 183 U. S. 365.

[7] *Ex parte Gerlach,* 247 F. 616; *Ex parte Falls,* 251 F. 415; *Ex parte Jochen,* 257 F. 200; *Hines* v. *Mikell,* 259 F. 28. See cases and statutes collected and discussed in Underhill, *infra,* note 11, 12 Cal. L. Rev. 81–98.

with violating the laws of war.[8] We are not concerned with the recognized power of the military to try civilians in tribunals established as a part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function.[9] For Hawaii since annexation has been held by and loyal to the United States. Nor need we here consider the power of the military simply to arrest and detain civilians interfering with a necessary military function at a time of turbulence and danger from insurrection or war.[10] And finally, there was no specialized effort of the military, here, to enforce orders which related only to military functions, such as, for illustration, curfew rules or blackouts. For these petitioners were tried before tribunals set up under a military program which took over all government and superseded all civil laws and courts. If the Organic Act, properly interpreted, did not give the armed forces this awesome power, both petitioners are entitled to their freedom.

I.

In interpreting the Act we must first look to its language. Section 67 makes it plain that Congress did in-

[8] *Ex parte Quirin,* 317 U. S. 1; *In re Yamashita,* 327 U. S. 1. See 10 U. S. C. §§ 1553, 1554. See also cases and statutes collected and discussed in Underhill, *infra,* note 11, 12 Cal. L. Rev. 81–98.

[9] *Cross* v. *Harrison,* 16 How. 164; *Leitensdorfer* v. *Webb,* 20 How. 176; *The Prize Cases,* 2 Black 635; *Mrs. Alexander's Cotton,* 2 Wall. 404; *Ford* v. *Surget,* 97 U. S. 594, 604; *New Orleans* v. *Steamship Co.,* 20 Wall. 387, 393; *Dow* v. *Johnson,* 100 U. S. 158, 166; *The Grapeshot,* 9 Wall. 129; *Mechanics' & Traders' Bank* v. *Union Bank,* 22 Wall. 276. Nor is this a case where violators of military orders are to be tried by regular courts. Cf. *Hirabayashi* v. *United States,* 320 U. S. 81.

[10] *Moyer* v. *Peabody,* 212 U. S. 78; *Ex parte Milligan,* 4 Wall. 2, 125, 126; *Luther* v. *Borden,* 7 How. 1, 45, 46; see *Sterling* v. *Constantin,* 287 U. S. 378, 400; Fairman, The Law of Martial Rule, Chicago 1943, 209–218.

tend the Governor of Hawaii, with the approval of the President, to invoke military aid under certain circumstances. But Congress did not specifically state to what extent the army could be used or what power it could exercise. It certainly did not explicitly declare that the Governor in conjunction with the military could for days, months or years close all the courts and supplant them with military tribunals. Cf. *Coleman* v. *Tennessee,* 97 U. S. 509, 514. If a power thus to obliterate the judicial system of Hawaii can be found at all in the Organic Act, it must be inferred from § 67's provision for placing the Territory under "martial law." But the term "martial law" carries no precise meaning. The Constitution does not refer to "martial law" at all and no Act of Congress has defined the term. It has been employed in various ways by different people and at different times. By some it has been identified as "military law" limited to members of, and those connected with, the armed forces. Others have said that the term does not imply a system of established rules but denotes simply some kind of day to day expression of a general's will dictated by what he considers the imperious necessity of the moment. See *United States* v. *Diekelman,* 92 U. S. 520, 526. In 1857 the confusion as to the meaning of the phrase was so great that the Attorney General in an official opinion had this to say about it: "The common law authorities and commentators afford no clue to what martial law, as understood in England, really is . . . In this country it is still worse." 8 Op. Atty. Gen. 365, 367, 368. What was true in 1857 remains true today.[11] The language of § 67

[11] For discussions of the great contrast of views see the following writings: Fairman, *supra,* Ch. II; Wiener, A Practical Manual of Martial Law, Harrisburg 1940, Ch. 1; Military Aid to the Civil Power, Fort Leavenworth 1925, pp. 230–232; Underhill, *Jurisdiction of Military Tribunals in the United States over Civilians* (1924) 12 Cal. L. Rev. 75, 163–178; Ballentine, *Qualified Martial Law* (1915) 14 Mich. L. Rev. 102, 203, 204; Max Radin, *Martial Law and the State of Siege* (1942) 30 Cal. L. Rev. 634.

thus fails to define adequately the scope of the power given to the military and to show whether the Organic Act provides that courts of law be supplanted by military tribunals.

II.

Since the Act's language does not provide a satisfactory answer, we look to the legislative history for possible further aid in interpreting the term "martial law" as used in the statute. The Government contends that the legislative history shows that Congress intended to give the armed forces extraordinarily broad powers to try civilians before military tribunals. Its argument is as follows: That portion of the language of § 67 which prescribes the prerequisites to declaring martial law is identical with a part of the language of the original Constitution of Hawaii. Before Congress enacted the Organic Act the supreme court of Hawaii had construed that language as giving the Hawaiian President power to authorize military tribunals to try civilians charged with crime whenever the public safety required it. *In re Kalanianaole,* 10 Hawaii 29. When Congress passed the Organic Act it simply enacted the applicable language of the Hawaiian Constitution and with it the interpretation of that language by the Hawaiian supreme court.

In disposing of this argument we wish to point out at the outset that even had Congress intended the decision in the *Kalanianaole* case to become part of the Organic Act, that case did not go so far as to authorize military trials of the petitioners for these reasons. There the defendants were insurrectionists taking part in the very uprising which the military were to suppress, while here the petitioners had no connection with any organized resistance to the armed forces or the established government. If, on the other hand, we should take the *Kalanianaole* case to authorize the complete supplanting of courts by military

tribunals, we are certain that Congress did not wish to make that case part of the Organic Act. For that case did not merely uphold military trials of civilians but also held that courts were to interfere only when there was an obvious abuse of discretion which resulted in cruel and inhuman practices or the establishment of military rule for the personal gain of the President and the armed forces. But courts were not to review whether the President's action, no matter how unjustifiable, was necessary for the public safety. As we shall indicate later, military trials of civilians charged with crime, especially when not made subject to judicial review, are so obviously contrary to our political traditions and our institution of jury trials in courts of law, that the tenuous circumstance offered by the Government can hardly suffice to persuade us that Congress was willing to enact a Hawaiian supreme court decision permitting such a radical departure from our steadfast beliefs.[12]

Partly in order to meet this objection the Government further contends that Congress, in enacting the *Kalanianaole* case, not only authorized military trials of civilians in Hawaii, but also could and intended to provide that "martial law" in Hawaii should not be limited by the United States Constitution or by established constitutional practice. But when the Organic Act is read as a whole and in the light of its legislative history it becomes clear that Congress did not intend the Constitution to have a limited application to Hawaii. Along with § 67 Congress enacted § 5 of the Organic Act which provides "that the Constitution . . . shall have the same force and effect within the said Territory as elsewhere in the United States . . ." 31 Stat. 141. Even when Hawaii

[12] We point out in this connection that by § 83 of the Organic Act Congress provided how juries should be constituted and provided for the drawing of grand juries and for unanimous jury verdicts in criminal cases. 31 Stat. 141, 157.

was first annexed Congress had provided that the Territory's existing laws should remain in effect unless contrary to the Constitution. 30 Stat. 750. And the House Committee Report in explaining § 5 of the Organic Act stated: "Probably the same result would obtain without this provision under section 1891, chapter 1, Title XXIII, of the Revised Statutes, *but to prevent possible question,* the section is inserted in the bill." [13] (Italics supplied.) Congress thus expressed a strong desire to apply the Constitution without qualification.

It follows that civilians in Hawaii are entitled to the constitutional guarantee of a fair trial to the same extent as those who live in any other part of our country. We are aware that conditions peculiar to Hawaii might imperatively demand extraordinarily speedy and effective measures in the event of actual or threatened invasion. But this also holds true for other parts of the United States. Extraordinary measures in Hawaii, however necessary, are not supportable on the mistaken premise that Hawaiian inhabitants are less entitled to constitutional protection than others. For here Congress did not in the Organic Act exercise whatever power it might have

[13] *Government for the Territory of Hawaii,* H. Rep. No. 305, 56th Cong., 1st Sess., p. 10. In the House, Representative Knox, the Republican leader for the bill, stated: "This bill, in so many words, extends the Constitution to Hawaii; so that there has not been practically a moment of time since the Hawaiian Islands were annexed to the United States that the Constitution has not been the standard by which all the laws of that country must be measured . . . *The decisions of the Supreme Court of the United States will be equally operative in Hawaii as in any portion of the United States as to any constitutional right which he possesses.*" 33 Cong. Rec. 3704, 3709 (1900). See the following decisions of this Court relating to the applicability of the Constitution to United States Territories. *Hawaii* v. *Mankichi,* 190 U. S. 197; *Rassmussen* v. *United States,* 197 U. S. 516; *Farrington* v. *Tokushige,* 273 U. S. 284. See also Frank, *Ex parte Milligan* v. *The Five Companies: Martial Law in Hawaii* (1944) 44 Col. L. Rev. 639, 658–660.

had to limit the application of the Constitution. Cf. *Hawaii* v. *Mankichi*, 190 U. S. 197. The people of Hawaii are therefore entitled to constitutional protection to the same extent as the inhabitants of the 48 States. And Congress did not enact the Hawaiian supreme court's decision in the *Kalanianaole* case and thus authorize the military trials of petitioners. Whatever power the Organic Act gave the Hawaiian military authorities, such power must therefore be construed in the same way as a grant of power to troops stationed in any one of the States.

III.

Since both the language of the Organic Act and its legislative history fail to indicate that the scope of "martial law" in Hawaii includes the supplanting of courts by military tribunals, we must look to other sources in order to interpret that term. We think the answer may be found in the birth, development and growth of our governmental institutions up to the time Congress passed the Organic Act. Have the principles and practices developed during the birth and growth of our political institutions been such as to persuade us that Congress intended that loyal civilians in loyal territory should have their daily conduct governed by military orders substituted for criminal laws, and that such civilians should be tried and punished by military tribunals? Let us examine what those principles and practices have been, with respect to the position of civilian government and the courts and compare that with the standing of military tribunals throughout our history.

People of many ages and countries have feared and unflinchingly opposed the kind of subordination of executive, legislative and judicial authorities to complete military rule which, according to the Government, Congress has authorized here. In this country that fear has become part of our cultural and political institutions. The story of that development is well known and we see no

need to retell it all. But we might mention a few pertinent incidents. As early as the 17th Century our British ancestors took political action against aggressive military rule. When James I and Charles I authorized martial law for purposes of speedily punishing all types of crimes committed by civilians the protest led to the historic Petition of Right [14] which in uncompromising terms objected to this arbitrary procedure and prayed that it be stopped and never repeated.[15] When later the American colonies declared their independence one of the grievances listed by Jefferson was that the King had endeavored to render the military superior to the civil power. The executive and military officials who later found it necessary to utilize the armed forces to keep order in a young and turbulent nation, did not lose sight of the philosophy embodied in the Petition of Right and the Declaration of Independence, that existing civilian government and especially the courts were not to be interfered with by the exercise of military power. In 1787, the year in which the Constitution was formulated, the Governor of Massachusetts Colony used the militia to cope with Shay's Rebellion. In his instructions to the Commander of the troops the Governor listed the "great objects" of the mission. The troops were to "protect the judicial courts . . .," "to assist the civil magistrates in executing the laws . . .," and to "aid them in apprehending the disturbers of the public peace . . ." The Commander was to consider himself "constantly as under the direction of the civil officer, saving where any armed force shall appear and oppose . . . [his] marching to execute these orders." [16] President Washington's in-

[14] 3 Chas. I, c. 1.

[15] Hallam, Constitutional History, (2d ed.) Vol. I, c. VII, pp. 531, 532, 533. See also discussions in dissent in *Luther* v. *Borden*, 7 How. 1, 48, 63; *In re McDonald*, 49 Mont. 454, 468, 143 P. 947.

[16] Federal Aid in Domestic Disturbances, Senate Document No. 263, 67th Cong., 2d Sess., 10.

structions to the Commander of the troops sent into Pennsylvania to suppress the Whiskey Rebellion of 1794 were to the same effect. The troops were to see to it that the laws were enforced and were to deliver the leaders of armed insurgents to the regular courts for trial. The President admonished the Commanding General "that the judge can not be controlled in his functions . . ." [17] In the many instances of the use of troops to control the activities of civilians that followed, the troops were generally again employed merely to aid and not to supplant the civilian authorities.[18] The last noteworthy incident before the enactment of the Organic Act was the rioting that occurred in the spring of 1899 at the Coeur d'Alene mines of Shoshone County, Idaho. The President ordered the regular troops to report to the Governor for instructions and to support the civil authorities in preserving the peace. Later the State Auditor as agent of

[17] *Id.* pp. 31, 32. See also on the same subject the dissent in *Luther* v. *Borden, supra,* 7 How. at 77–81.

[18] This appears from the facts related throughout Senate Document No. 263, 67th Cong., 2d Sess., *supra.*

After the passing of the Organic Act disturbances in the coal fields of West Virginia, a longshoremen's strike in Galveston and a packers' strike in Nebraska City, all led to criminal trials of civilians by military tribunals which were upheld by decisions of state and lower federal courts. *State ex rel. Mays* v. *Brown,* 71 W. Va. 519, 77 S. E. 243; *Ex parte Jones,* 71 W. Va. 567, 77 S. E. 1029; *United States ex rel. McMaster* v. *Wolters,* 268 F. 69; *United States ex rel. Seymour* v. *Fischer,* 280 F. 208. But cf. *In re McDonald,* 49 Mont. 454. All these cases rested on the ground that the Governor's determination of the existence of insurrection conclusively established that all the Governor had done was legal. The basis of these decisions was definitely held erroneous in *Sterling* v. *Constantin,* 287 U. S. 378, where this Court said: "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." 287 U. S. at 401. As one commentator puts it, this Court "has knocked out the prop" on which these aforementioned cases rested. Wiener, A Practical Manual of Martial Law, 1940, p. 116.

the Governor, and not the Commanding General, ordered the troops to detain citizens without trial and to aid the Auditor in doing all he thought necessary to stop the riot.[19] Once more, the military authorities did not undertake to supplant the courts and to establish military tribunals to try and punish ordinary civilian offenders.[20]

Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued. *Ex parte Quirin,* 317 U. S. 1, 19. Our system of government clearly is the antithesis of total military rule and the founders of this country are not likely to have contemplated complete military dominance within the limits of a territory made part of this country and not recently taken from an enemy. They were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws. Their philosophy has been the people's throughout our history. For that reason we have maintained legislatures chosen by citizens or their representatives and courts and juries to try those who violate legislative enactments. We have always been especially concerned about the potential evils of summary criminal trials and have guarded against them by provisions embodied in the Constitution itself. See *Ex parte Milligan,* 4 Wall. 2; *Chambers* v. *Florida,* 309 U. S. 227. Legislatures and courts are not merely cherished American institutions; they are indispensable to our Government.

Military tribunals have no such standing. For as this Court has said before: ". . . the military should always

---

[19] Senate Document No. 263, 67th Cong., 2d Sess., 190 ff., 210 ff.

[20] Even as late as 1937 when the War Department promulgated regulations concerning the employment of troops in aid of civil authorities, it was aware of this tradition. A. R. 500–50, ¶ 7e stated: ". . . Persons not normally subject to military law, taken into custody by the military forces incident to the use of troops contemplated by these regulations, should be turned over to the civil authorities. Punishment in such cases belongs to the courts of justice and not to the armed forces." But cf. A. R. 500–50, ¶ 8 (1945).

be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the Republic who advocates the contrary. The established principle of every free people is, that the law shall alone govern; and to it the military must always yield." *Dow* v. *Johnson,* 100 U. S. 158, 169. Congress prior to the time of the enactment of the Organic Act had only once authorized the supplanting of the courts by military tribunals. Legislation to that effect was enacted immediately after the South's unsuccessful attempt to secede from the Union. Insofar as that legislation applied to the Southern States after the war was at an end it was challenged by a series of Presidential vetoes as vigorous as any in the country's history.[21] And in order to prevent this Court from passing on the constitutionality of this legislation Congress found it necessary

[21] In one of these vetoes President Johnson said: "The trials having their origin under this bill are to take place without the intervention of a jury and without any fixed rules of law or evidence. The rules on which offenses are to be 'heard and determined' by the numerous agents are such rules and regulations as the President, through the War Department, shall prescribe. No previous presentment is required nor any indictment charging the commission of a crime against the laws; but the trial must proceed on charges and specifications. The punishment will be, not what the law declares, but such as a court-martial may think proper; and from these arbitrary tribunals there lies no appeal, no writ of error to any of the courts in which the Constitution of the United States vests exclusively the judicial power of the country." Messages and Papers of the Presidents, Richardson, Vol. VI, 399. In another he said: "It is plain that the authority here given to the military officer amounts to absolute despotism. But to make it still more unendurable, the bill provides that it may be delegated to as many subordinates as he chooses to appoint, for it declares that he shall 'punish or cause to be punished.' Such a power has not been wielded by any monarch in England for more than five hundred years. . . . This broad principle limits all our functions and applies to all subjects. It protects not only the citizens of States which are within the Union, but it shields every human being who comes or is brought under our jurisdiction. We have no right to do in one place more than in another that which the Constitution says we shall not do at all." *Id.,* pp. 502–503.

to curtail our appellate jurisdiction.[22] Indeed, prior to the Organic Act, the only time this Court had ever discussed the supplanting of courts by military tribunals in a situation other than that involving the establishment of a military government over recently occupied enemy territory, it had emphatically declared that "civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish." *Ex parte Milligan,* 4 Wall. 2, 124–125.

We believe that when Congress passed the Hawaiian Organic Act and authorized the establishment of "martial law" it had in mind and did not wish to exceed the boundaries between military and civilian power, in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions prior to the time Congress passed the Organic Act. The phrase "martial law" as employed in that Act, therefore, while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals. Yet the Government seeks to justify the punishment of both White and Duncan on the ground of such supposed congressional authorization. We hold that both petitioners are now entitled to be released from custody.

Reversed.

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

MR. JUSTICE MURPHY, concurring.

The Court's opinion, in which I join, makes clear that the military trials in these cases were unjustified by the

[22] *Ex parte McCardle,* 6 Wall. 318. See also Warren, The Supreme Court in United States History, Vol. 2, 464, 484.

martial law provisions of the Hawaiian Organic Act. Equally obvious, as I see it, is the fact that these trials were forbidden by the Bill of Rights of the Constitution of the United States, which applies in both spirit and letter to Hawaii. Indeed, the unconstitutionality of the usurpation of civil power by the military is so great in this instance as to warrant this Court's complete and outright repudiation of the action.

Abhorrence of military rule is ingrained in our form of government. Those who founded this nation knew full well that the arbitrary power of conviction and punishment for pretended offenses is the hallmark of despotism. See The Federalist, No. 83. History had demonstrated that fact to them time and again. They shed their blood to win independence from a ruler who they alleged was attempting to render the "Military independent of and superior to the Civil power" and who was "depriving us . . . of the benefits of Trial by Jury." In the earliest state constitutions they inserted definite provisions placing the military under "strict subordination" to the civil power at all times and in all cases. And in framing the Bill of Rights of the Federal Constitution they were careful to make sure that the power to punish would rest primarily with the civil authorities at all times. They believed that a trial by an established court, with an impartial jury, was the only certain way to protect an individual against oppression. The Bill of Rights translated that belief into reality by guaranteeing the observance of jury trials and other basic procedural rights foreign to military proceedings. This supremacy of the civil over the military is one of our great heritages. It has made possible the attainment of a high degree of liberty regulated by law rather than by caprice. Our duty is to give effect to that heritage at all times, that it may be handed down untarnished to future generations.

Such considerations led this Court in *Ex parte Milligan*, 4 Wall. 2, to lay down the rule that the military lacks

any constitutional power in war or in peace to substitute its tribunals for civil courts that are open and operating in the proper and unobstructed exercise of their jurisdiction. Only when a foreign invasion or civil war actually closes the courts and renders it impossible for them to administer criminal justice can martial law validly be invoked to suspend their functions. Even the suspension of power under those conditions is of a most temporary character. "As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power." *Id.*, 127.

Tested by the *Milligan* rule, the military proceedings in issue plainly lacked constitutional sanction. Petitioner White was arrested for embezzlement on August 20, 1942, by the provost marshal. Two days later he was orally informed of the charges against him. Various motions, including a request for a jury trial and for time to prepare a defense, were overruled. On August 25 he was convicted and sentenced to five years in prison. Petitioner Duncan was accorded similar streamlined treatment by the military. On February 24, 1944, he engaged in a fight with two armed sentries at the Navy Yard at Honolulu. He was promptly tried without a jury in the provost court on March 2 and sentenced to six months at hard labor, despite his plea of self-defense. Both the petitioners were civilians entitled to the full protection of the Bill of Rights, including the right to jury trial.

It is undenied that the territorial courts of Hawaii were open and functioning during the period when the foregoing events took place. Martial law was proclaimed on December 7, 1941, immediately after the attack on Pearl Harbor; provost courts and military commissions were immediately established for the trial of civilians accused of crime. General Orders No. 4. On the next day, December 8, the territorial courts were closed by military

order. Thereafter criminal cases of all description, whether involving offenses against federal or territorial law or violations of military orders, were handled in the provost courts and military commissions. Eight days later, however, the military permitted the reopening of the courts for the trial of limited classes of cases not requiring juries or the subpoenaing of witnesses. General Orders No. 29. On January 27, 1942, further power was restored to the courts by designating them "as agents of the Military Governor" to dispose of civil cases except those involving jury trials, habeas corpus and other specified matters and to exercise criminal jurisdiction in limited types of already pending cases. General Orders No. 57. Protests led to the issuance of General Orders No. 133 on August 31, 1942, expanding the jurisdiction of civil courts to cover certain types of jury trials. But General Orders No. 135, issued on September 4, 1942, continued military jurisdiction over offenses directed against the Government or related to the war effort. Proclamations on February 8, 1943, provided that the jurisdiction of the courts was to be reestablished in full except in cases of criminal and civil suits against persons in the armed forces and except for "criminal prosecutions for violations of military orders." These proclamations became effective on March 10, together with a revised code of military orders. Martial law was finally lifted from Hawaii on October 24, 1944.

There can be no question but that when petitioners White and Duncan were subjected to military trials on August 25, 1942, and March 2, 1944, respectively, the territorial courts of Hawaii were perfectly capable of exercising their normal criminal jurisdiction had the military allowed them to do so. The Chief Justice of the supreme court of Hawaii stated that after the month of April, 1942, he knew of "no sound reason for denial of trial by jury to civilians charged with criminal offense under the

laws of the Territory." The Governor of the Territory also testified that the trial of civilians before military courts for offenses against the laws of the Territory was unnecessary and unjustified by the conditions in the Territory when petitioner White was charged with embezzlement in August, 1942. In short, the Bill of Rights disappeared by military fiat rather than by military necessity.

Moreover, there is no question here as to the loyalty of the Hawaiian judiciary or as to the desire and ability of the judges to cooperate fully with military requirements. There is no evidence of disorder in the community which might have prevented the courts from conducting jury trials. As was said in the *Milligan* case, p. 127, "It is difficult to see how the *safety* of the country required martial law in Indiana [Hawaii]. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil as a military tribunal; and as there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law." Thus, since the courts were open and able to function, the military trials of the petitioners were in violation of the Constitution. Whether, if the courts had been closed by necessity, the military could have tried the petitioners or merely could have held them until the courts reopened is a constitutional issue absent from these cases.

The so-called "open court" rule of the *Milligan* case, to be sure, has been the subject of severe criticism, especially by military commentators. That criticism is repeated by the Government in these cases. It is said that the fact that courts are open is but one of many factors relevant to determining the necessity and hence the con-

stitutionality of military trials of civilians. The argument is made that however adequate the "open court" rule may have been in 1628 or 1864 it is distinctly unsuited to modern warfare conditions where all of the territories of a warring nation may be in combat zones or imminently threatened with long-range attack even while civil courts are operating. Hence if a military commander, on the basis of his conception of military necessity, requires all civilians accused of crime to be tried summarily before martial law tribunals, the Bill of Rights must bow humbly to his judgment despite the unquestioned ability of the civil courts to exercise their criminal jurisdiction.

The argument thus advanced is as untenable today as it was when cast in the language of the Plantagenets, the Tudors and the Stuarts. It is a rank appeal to abandon the fate of all our liberties to the reasonableness of the judgment of those who are trained primarily for war. It seeks to justify military usurpation of civilian authority to punish crime without regard to the potency of the Bill of Rights. It deserves repudiation.

The untenable basis of this proposed reversion back to unlimited military rule is revealed by the reasons advanced in support of the reasonableness of the military judgment that it was necessary, even though the civil courts were open and fully able to perform their functions, to impose military trials on all persons accused of crime in Hawaii at the time when the petitioners were tried and convicted:

First. According to the testimony of Admiral Nimitz and General Richardson, Hawaii was in the actual theatre of war from December 7, 1941, through the period in question. They stated that there was at all times a danger of invasion, at least in the nature of commando raids or submarine attacks, and that public safety required the imposition of martial law. For present purposes it is unnecessary to dispute any of such testimony. We may

assume that the threat to Hawaii was a real one; we may also take it for granted that the general declaration of martial law was justified. But it does not follow from these assumptions that the military was free under the Constitution to close the civil courts or to strip them of their criminal jurisdiction, especially after the initial shock of the sudden Japanese attack had been dissipated.

From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights. That excuse is no less unworthy of our traditions when used in this day of atomic warfare or at a future time when some other type of warfare may be devised. The right to jury trial and the other constitutional rights of an accused individual are too fundamental to be sacrificed merely through a reasonable fear of military assault. There must be some overpowering factor that makes a recognition of those rights incompatible with the public safety before we should consent to their temporary suspension. If those rights may safely be respected in the face of a threatened invasion, no valid reason exists for disregarding them. In other words, the civil courts must be utterly incapable of trying criminals or of dispensing justice in their usual manner before the Bill of Rights may be temporarily suspended. "Martial law [in relation to closing the courts] cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration." *Ex parte Milligan, supra,* 127.

Second. Delays in the civil courts and slowness in their procedure are also cited as an excuse for shearing away their criminal jurisdiction, although lack of knowledge of any undue delays in the Hawaiian courts is admitted. It is said that the military "cannot brook a delay" and that "the punishment must be swift; there is an element of time in it, and we cannot afford to let the trial linger

and be protracted." This military attitude toward constitutional processes is not novel. Civil liberties and military expediency are often irreconcilable. It does take time to secure a grand jury indictment, to allow the accused to procure and confer with counsel, to permit the preparation of a defense, to form a petit jury, to respect the elementary rules of procedure and evidence and to judge guilt or innocence according to accepted rules of law. But experience has demonstrated that such time is well spent. It is the only method we have of insuring the protection of constitutional rights and of guarding against oppression. The swift trial and punishment which the military desires is precisely what the Bill of Rights outlaws. We would be false to our trust if we allowed the time it takes to give effect to constitutional rights to be used as the very reason for taking away those rights. It is our duty, as well as that of the military, to make sure that such rights are respected whenever possible, even though time may be consumed.

Third. It is further said that the issuance of military orders relating to civilians required that the military have at its disposal some sort of tribunal to enforce those regulations. Any failure of civil courts to convict violators of such regulations would diminish the authority and ability to discharge military responsibilities. This is the ultimate and most vicious of the arguments used to justify military trials. It assumes without proof that civil courts are incompetent and are prone to free those who are plainly guilty. It assumes further that because the military may have the valid power to issue regulations there must be an accompanying power to punish the violations of those regulations; the implicit and final assumption is then made that the military must have power to punish violations of all other statutes and regulations. Nothing is more inconsistent with our form of government, with its distinction between the power to promulgate law and the power

to punish violations of the law. Application of this doctrine could soon lead to the complete elimination of civil jurisdiction over crime.

Moreover, the mere fact that it may be more expedient and convenient for the military to try violators of its own orders before its own tribunals does not and should not furnish a constitutional basis for the jurisdiction of such tribunals when civil courts are in fact functioning or are capable of functioning. Constitutional rights are rooted deeper than the wishes and desires of the military.

Fourth. Much is made of the assertion that the civil courts in Hawaii had no jurisdiction over violations of military orders by civilians and that military courts were therefore necessary. Aside from the fact that the civil courts were ordered not to attempt to exercise such jurisdiction, it is sufficient to note that Congress on March 21, 1942, vested in the federal courts jurisdiction to enforce military orders with criminal penalties. 56 Stat. 173. It is undisputed that the federal court in Hawaii was open at all times in issue and was capable of exercising criminal jurisdiction. That the military refrained from using the statutory framework which Congress erected affords no constitutional justification for the creation of military tribunals to try such violators.

Fifth. Objection is made to the enforcement in civil courts of military orders on the ground that it would subject the military to "all sorts of influences, political and otherwise, as happened in the cases on the east coast in both Philadelphia and Boston" and that "it is inconceivable that the Military Commander should be subjected for the enforcement of his orders to the control of other agents." This is merely a military criticism of the proposition that in this nation the military is subordinate to the civil authority. It does not qualify as a recognizable reason for closing the civil courts to criminal cases.

Sixth. Further objection is made that the holding of civil trials might interrupt vital work through the attendance as jurors of war workers. This also is too unmeritorious to warrant serious or lengthy discussion. War workers could easily have been excused from jury duty by military order if necessary.

Seventh. The final reason advanced relates to the testimony of military leaders that Hawaii is said to have a "heterogeneous population with all sorts of affinities and loyalties which are alien in many cases to the philosophy of life of the American Government," one-third of the civilian population being of Japanese descent. The court below observed, 146 F. 2d 576, 580, that "Governmental and military problems alike were complicated by the presence in the Territory of tens of thousands of citizens of Japanese ancestry besides large numbers of aliens of the same race. Obviously the presence of so many inhabitants of doubtful loyalty posed a continuing threat to the public security. Among these people the personnel of clandestine landing parties might mingle freely, without detection. Thus was afforded ideal cover for the activities of the saboteur and the spy. . . . To function in criminal matters the civilian courts must assemble juries; and citizens of Japanese extraction could not lawfully be excluded from jury panels on the score of race—even in cases of offenses involving the military security of the Territory. Indeed the mere assembling of juries and the carrying on of protracted criminal trials might well constitute an invitation to disorder as well as an interference with the vital business of the moment." The Government adds that many of the military personnel stationed in Hawaii were unaccustomed to living in such a community and that "potential problems" created in Hawaii by racially mixed juries in criminal cases have heretofore been recognized "although, on the whole, it has been found that members of such mixed juries have not acted on a racial basis."

The implication apparently is that persons of Japanese descent, including those of American background and training, are of such doubtful loyalty as a group as to constitute a menace justifying the denial of the procedural rights of all accused persons in Hawaii. It is also implied that persons of Japanese descent are unfit for jury duty in Hawaii and that the problems arising when they serve on juries are so great as to warrant dispensing with the entire jury system in Hawaii if the military so desires. The lack of any factual or logical basis for such implications is clear. It is a known fact that there have been no recorded acts of sabotage, espionage or fifth column activities by persons of Japanese descent in Hawaii either on or subsequent to December 7, 1941. There was thus no security reason for excluding them from juries, even making the false assumption that it was impossible to separate the loyal from the disloyal. And if there were problems arising from the use of racially mixed juries, elimination of all jury trials was hardly a reasonable or sensible answer to those problems. Especially deplorable, however, is this use of the iniquitous doctrine of racism to justify the imposition of military trials. Racism has no place whatever in our civilization. The Constitution as well as the conscience of mankind disclaims its use for any purpose, military or otherwise. It can only result, as it does in this instance, in striking down individual rights and in aggravating rather than solving the problems toward which it is directed. It renders impotent the ideal of the dignity of the human personality, destroying something of what is noble in our way of life. We must therefore reject it completely whenever it arises in the course of a legal proceeding.

The reasons here advanced for abandoning the "open court" rule of the *Milligan* case are without substance. To retreat from that rule is to open the door to rampant militarism and the glorification of war, which have de-

stroyed so many nations in history. There is a very necessary part in our national life for the military; it has defended this country well in its darkest hours of trial. But militarism is not our way of life. It is to be used only in the most extreme circumstances. Moreover, we must be on constant guard against an excessive use of any power, military or otherwise, that results in the needless destruction of our rights and liberties. There must be a careful balancing of interests. And we must ever keep in mind that "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Ex parte Milligan, supra,* 120–121.

MR. CHIEF JUSTICE STONE, concurring.

I concur in the result.

I do not think that "martial law," as used in § 67 of the Hawaiian Organic Act, is devoid of meaning. This Court has had occasion to consider its scope and has pointed out that martial law is the exercise of the power which resides in the executive branch of the Government to preserve order and insure the public safety in times of emergency, when other branches of the Government are unable to function, or their functioning would itself threaten the public safety. *Luther* v. *Borden,* 7 How. 1, 45. It is a law of necessity to be prescribed and administered by the executive power. Its object, the preservation of the public safety and good order, defines its scope, which will vary with the circumstances and necessities of the case. The exercise of the power may not extend beyond what is required by the exigency which calls it forth. *Mitchell* v. *Harmony,* 13 How. 115, 133; *United States* v. *Russell,* 13 Wall. 623, 628; *Raymond* v. *Thomas,* 91 U. S. 712, 716; *Sterling* v. *Constantin,* 287 U. S. 378, 400, 401. Any doubts that might be enter-

tained that such is the true limit of martial law in this case are put at rest by § 67 of the Hawaiian Organic Act, which, "in case of rebellion or invasion, or imminent danger thereof," authorizes martial law only "when the public safety requires it . . ."

The Executive has broad discretion in determining when the public emergency is such as to give rise to the necessity of martial law, and in adapting it to the need. Cf. *Hirabayashi* v. *United States,* 320 U. S. 81. But executive action is not proof of its own necessity, and the military's judgment here is not conclusive that every action taken pursuant to the declaration of martial law was justified by the exigency. In the substitution of martial law controls for the ordinary civil processes, "what are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." *Sterling* v. *Constantin, supra,* 401.

I take it that the Japanese attack on Hawaii on December 7, 1941, was an "invasion" within the meaning of § 67. But it began and ended long before these petitioners were tried by military tribunals in August 1942 and February 1944. I assume that there was danger of further invasion of Hawaii at the times of those trials. I assume also that there could be circumstances in which the public safety requires, and the Constitution permits, substitution of trials by military tribunals for trials in the civil courts. But the record here discloses no such conditions in Hawaii, at least during the period after February, 1942, and the trial court so found. After closing places of amusement, and after closing the civil courts on December 8, 1941, the military authorities, on December 24, 1941, ordered places of amusement to be opened. On January 27, 1942, they permitted the courts to exercise their normal functions except as to jury trials and the issuance of writs of habeas corpus. On February 4, 1942, they authorized the sale of liquor at bars.

The full record in this case shows the conditions prevailing in Hawaii throughout 1942 and 1943. It demonstrates that from February 1942 on, the civil courts were capable of functioning, and that trials of petitioners in the civil courts no more endangered the public safety than the gathering of the populace in saloons and places of amusement, which was authorized by military order. I find nothing in the entire record which would fairly suggest that the civil courts were unable to function with their usual efficiency at the times these petitioners were tried, or that their trial by jury in a civil court would have endangered good order or the public safety. The Governor of Hawaii and the Chief Justice of the Hawaiian supreme court testified to the contrary. The military authorities themselves testified and advanced no reason which has any bearing on public safety or good order for closing the civil courts to the trial of these petitioners, or for trying them in military courts. I can only conclude that the trials and the convictions upon which petitioners are now detained, were unauthorized by the statute, and without lawful authority.

We have no occasion to consider whether the arrest and detention of petitioners by the military authorities, pending their delivery to the civil authorities for trial, would have been lawful. The judgment of the circuit court of appeals should be reversed and the petitioners discharged from custody forthwith.

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

With the rest of this Court I subscribe unreservedly to the Bill of Rights. I recognize the importance of the civil courts in protecting individual rights guaranteed by the Constitution. I prefer civil to military control of civilian life and I agree that in war our Constitution contemplates the preservation of the individual rights of all

of our people in accordance with a plan of constitutional procedure fitted to the needs of a self-governing republic at war.

Our Constitution expressly provides for waging war, and it is with the constitutional instruments for the successful conduct of war that I am concerned. I recognize here, as elsewhere, the constitutional direction that our respective branches of the Government do not exceed their allotted shares of authority. The courts, as well as our other agencies of the Government, accordingly owe a constitutional obligation not to invade the fields reserved either to the people, the States, or the other coordinate branches of the Government. The courts have an obligation to help define and protect the discretion with which the people have invested their legislative and executive representatives. Within their proper spheres, the robust strength and freedom of action allowed to the policy making and policy executing agencies of our Government are as vital to the success of our great experiment in securing "the Blessings of Liberty to ourselves and our Posterity" as are the checks and balances which have been imposed upon our representatives. It is in the application of these views to the cases before us that I am obliged to dissent from the majority of this Court and to sound a note of warning against the dangers of overexpansion of judicial control into the fields allotted by the Constitution to agencies of legislative and executive action.

The controlling facts in the cases before us are the extraordinary conditions created by the surprise Japanese invasion by air of Pearl Harbor on December 7, 1941. Visualizing the devastating success of that attack and the desperate conditions resulting from it, the primary question is what discretionary action by the executive branch of our Government, including the Army and Navy, was permissible on that day and in the period following it.

Pearl Harbor and the Hawaiian Islands were the key to America's defenses in the Pacific. The attack of December 7th destroyed more of America's naval forces than our Government felt it safe to announce. America's first line of defense was pierced. The attack demonstrated that it was part of a carefully planned major military operation against not only Hawaii but the United States. Presumably it would be pressed further. It might well be followed by a land invasion of the Islands and by aerial attacks upon their centers of population.[1]

---

[1] Admiral Chester W. Nimitz, Commander in Chief of the Pacific Fleet, who assumed naval command in the Territory of Hawaii December 18, 1941, testified that the Hawaiian area constituted the only base for the Navy in the Pacific Ocean at that time and that throughout the war until the last Japanese carrier was destroyed, a Japanese surprise carrier attack on the Islands was within the enemy's capabilities. While invasion by sea-borne troops in sufficient number to seize a beach head was not probable, invasion by submarine commando raiders and espionage parties was imminent and constantly impending. Lieutenant General Robert C. Richardson, Jr., Commanding General of the Central Pacific Area, who assumed command of the Hawaiian Department on June 1, 1943, testified that the Islands were within the theatre of operations of the Pacific Ocean area and that the Islands were the keystone of the defense of the western coast of our country. He testified that the Japanese fleet in April, 1944, was still capable of making a surprise attack upon Oahu by the use of air or undersea craft and that Pearl Harbor was the most attractive target for the enemy because it was the base of the Pacific fleet. He said that it was likely that Japan would take the risk of launching an attack because of the attractiveness of the target and the considerable damage that might be inflicted. He pointed out that the probability of night attacks through the use of submarines and parties sent ashore to attack important installations was increased by the presence of disloyal individuals among the population of the Islands. The successes of our fleet had not removed the imminent danger of invasion because these successes made it more imperative for the enemy to repeat its former invasion of the Islands. He further testified that the discharge of his responsibility for military security required a method of enforcement of military security regulations which was prompt and subject to his

Handicapped by major losses of air and sea power, the commander of this isolated outpost was faced with imminent danger of further invasions under conditions calling for a desperate defense of the Islands. The Islands suddenly had become the focal point of a major action which converted them into an outpost of critical military importance to the world in general and to the United States in particular. Their invasion and possible capture overshadowed every other consideration. The Islands were a white-hot center of war ready to burst into flames.

Military attack by air, sea and land was to be expected. The complete disregard of international law evi-

---

immediate control and authority and that under martial law the provost courts provided such a method of enforcement. He testified that a military trial for such an offense as that of Duncan in attacking the Pearl Harbor Navy Yard sentries was necessary in order to uphold the authority of military sentries charged with important military duties. He also gave as his opinion that military necessity required trial of White's offense in a military tribunal in August of 1942 at which time the Japanese successful military offensive still continued. In addition to the occupation of Hong Kong, the Malay Peninsula, Singapore, the Dutch East Indies, and bases in New Guinea, the Japanese had successfully occupied our own territories of Guam and Wake which, with Midway, constituted the island chain connecting Hawaii with the Philippines which themselves were soon occupied. The enemy's occupation of the Solomon Islands, including Tulagi and Guadalcanal, gave the enemy advance air and naval bases for offensive operations against our South Pacific supply line and the north coast of Australia. Biennial Report of the Chief of Staff of the United States Army to the Secretary of War (1943) 14 (House Doc. 288, 78th Cong., 1st Sess.); McInnis, *The War, Third Year* (1942) 238.

Early in May, 1942, one Japanese attempt to extend enemy control southeastward along the borders of the Coral Sea with the ultimate objective of an attack on Australia, was repulsed in the Battle of the Coral Sea. The Japanese offensive, however, continued. In early June the Japanese attempt to occupy Midway Island preliminary to an invasion of Hawaii was thwarted in the Battle of Midway. At the same time, however, Japanese forces occupied our territory of Attu,

denced by the first attack and the possible presence on the Islands of many Japanese collaborators gave warning that the enemy's next move might take the form of disastrous sabotage and terrorism among civilians. The extraordinary breach of international law evidenced by the attack made it essential to take extraordinary steps to protect the Islands against subversive action that might spring from deeply laid plans as secret, well aimed, and destructive as the original attack.

On December 7 and in the period immediately following, every inch of the Territory of Hawaii was like a frontier stockade under savage attack with notice that such attack would not be restrained by the laws of civilized

---

Agattu and Kiska in the Aleutian Islands. Biennial Report, *supra*, p. 30. (These islands were not recovered until May, 1943. Biennial Report, *supra*, p. 31.) Japanese advances in New Guinea continued during the summer of 1942 and by September, 1942, had forced Allied ground forces back to within 30 miles of Port Moresby, a gateway to Australia. Biennial Report, *supra*, p. 14. On August 7 a landing was made on Guadalcanal by United States forces. For a time it did not appear that the effort to wrest this crucial island from the Japanese could succeed. A strong Japanese attempt to recapture Guadalcanal was beaten off as late as November 16, 1942. Not until early in 1943 was enemy resistance on Guadalcanal overcome. *Ibid.* Even then our forces had only succeeded in checking the enemy's offensive and had not launched their own offensives or ousted the enemy from any American territory. The American offensive in the Central Pacific did not begin until a year later with the invasion of the Gilbert Islands in November, 1943, followed by invasion of the Marshall Islands in January, 1944, and the invasion of the Mariana Islands in July, 1944. Biennial Report of the Chief of Staff of the United States Army to the Secretary of War (1945) 69. Our forces landed on Guam on July 21 and resistance ceased on August 10. By that time our forces in the Southwest Pacific under General MacArthur had reduced or by-passed the enemy's footholds in New Guinea and the way was prepared for the Battle of the Philippines which began with the landing on Leyte on October 20, 1944. *Id.*, p. 75 *et seq.* The "Battle of the Bulge," in the Ardennes, was fought and won at high cost in December and January, 1944–45. *Id.*, p. 44.

nations.[2] Measures of defense had to be taken on the basis that anything could happen. The relation of the Constitution of the United States to such a situation is important. Of course, the Constitution is not put aside. It was written by a generation fresh from war. The people established a more perfect union, in part, so that they might the better defend themselves from military attack. In doing so they centralized far more military power and responsibility in the Chief Executive than previously had been done. The Constitution was built for rough as well as smooth roads. In time of war the nation simply changes gears and takes the harder going under the same power.

The conduct of war under the Constitution is largely an executive function. Within the field of military action in time of war, the executive is allowed wide discretion. While, even in the conduct of war, there are many lines of jurisdiction to draw between the proper spheres of legislative, executive and judicial action, it seems clear that at least on an active battle field, the executive discretion to determine policy is there intended by the Constitution to be supreme. The question then arises: What is a battle field and how long does it remain one after the first barrage?

It is well that the outer limits of the jurisdiction of our military authorities is subject to review by our courts even under such extreme circumstances as those of the battle field. This, however, requires the courts to put themselves as nearly as possible in the place of those who had the

---

[2] "Hawaii constitutes the main Pacific outpost of the United States, and accordingly must be regarded as a fortress to whose defense the entire population of the Islands is committed. Its manpower and its economic resources must be subject to a single ultimate control." General Orders No. 133, by order of the Military Governor of the Territory of Hawaii, August 31, 1942.

constitutional responsibility for immediate executive action. For a court to recreate a complete picture of the emergency is impossible. That impossibility demonstrates the need for a zone of executive discretion within which courts must guard themselves with special care against judging past military action too closely by the inapplicable standards of judicial, or even military, hindsight. The nature of judicial authority is largely negative as contrasted with the generally positive nature of executive authority, and it is essential that the opportunity for well directed positive action be preserved and vigorously used if the Government is to serve the best interests of the people.

For this Court to intrude its judgment into spheres of constitutional discretion that are reserved either to the Congress or to the Chief Executive, is to invite disregard of that judgment by the Congress or by executive agencies under a claim of constitutional right to do so. On the other hand, this Court can contribute much to the orderly conduct of government, if it will outline reasonable boundaries for the discretion of the respective departments of the Government, with full regard for the limitations and also for the responsibilities imposed upon them by the Constitution.

It is important to approach the present cases with a full appreciation of the responsibility of the executive branch of the Government in Hawaii under the invasion which occurred on December 7, 1941. The question is not shall the Constitution apply under such circumstances? The question is with what authority has the Constitution and laws of this country vested the official representatives of the people upon whom are placed the responsibilities of leadership under those extraordinary circumstances?

The vital distinction is between conditions in "the theatre of actual military operations" and outside of that

theatre.[3] In this case Hawaii was not only in the theatre of operations, it was under fire. If the Territory of Hawaii, on that date and during the immediately succeeding period, is recognized as the battle field it was, then under such circumstances of invasion and threat of immediate further invasion, the actions taken by the Governor of Hawaii and by the Commanding General of the Hawaiian Department, supported by the President of the United States, in suspending the writ of habeas corpus, declaring martial law and vesting in such Commanding General for those first several days the powers normally exercised by the Governor and by the judicial officers and employees of the Territory (at least to the extent

---

[3] "Again, in the place where actual military operations are being conducted, the ordinary rights of citizens must yield to paramount military necessity. This was conceded in Milligan's case [4 Wall. 2, 127], where it was said in the prevailing opinion:

" 'If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of actual military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course.' " Address by Hon. Charles E. Hughes, *War Powers Under the Constitution* (1917) XLII Reports of American Bar Association 232, 244.

In the present cases the records have incorporated the following testimony of Lt. Gen. Robert C. Richardson, Jr., U. S. A., Commanding General of the Central Pacific Area:

"A. . . . this whole area under the command of the Commander-in-Chief of the Pacific Ocean Area, Admiral Nimitz, is an active theatre of war, and within that theatre of war is the theatre of operations, of which the Hawaiian Department is a part.

"Q. Will you explain what you mean, from the military viewpoint, by the terms 'active theatre of war' and 'theatre of operations'?

"A. Well, an active theatre of war is that area which is or may become actively involved in the conduct of the war. A theatre of operations is that part of an active war theatre which is needed for the operations either offensively or defensively, according to the missions

that would be involved in the present cases if they had arisen at that time), were within the executive discretion of the officials who authorized the action. The actual presence of battle in a community creates a substantially different condition from that which exists in other parts of a nation at war. That conditions of war and the means of meeting its emergencies were within the contemplation of the Constitution of the United States is shown by the broad authority vested in the President of the United States as Chief Executive and as Commander in Chief of the Army and Navy and in the war powers of the Congress and the Chief Executive to preserve the safety of

---

assigned or a combination of the missions; and it includes also the administrative agencies which are necessary for the conduct of those operations."

. . . . . .

"Q. Is there any military parlance that indicates that portion of the earth's surface where the fighting actually takes place?

"A. Yes.

"Q. What is that called?

"A. Combat zone.

"Q. You would not call Hawaii a combat zone?

"A. Yes, I would, because the theatre of operations or the combat zone also includes that part assigned to your mission, whether it be offensive or defensive. We are on the defensive mission here in Oahu, whereas the fleet operates offensively from here, and some of our troops which are based here operate offensively from this base. But concurrently with its mission as an offensive base, we have a very decided mission here as a defensive base, and that defensive mission designates or characterizes it as a part of the combat zone.

"Q. Then a combat zone can be an area where no shooting is going on at all?

"A. Oh, yes; oh, yes.

"Q. No real destruction of life or property?

"A. Absolutely. . . .

"Q. Well, do you have any term, military term, that precisely fits the place where life and property is actually being destroyed as a result of organized warfare?

"A. Yes, the battle."

the nation in time of war. The present cases arose in a Territory of the United States, directly under the care and jurisdiction of the Federal Government. That conditions of actual invasion were contemplated by Congress in the Organic Act of Hawaii is seen from the provision quoted in the majority opinion to the effect that

> "whenever it becomes necessary . . . [the Governor] may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse comitatus, or call out the militia of the Territory to prevent or suppress lawless violence, invasion, insurrection, or rebellion in said Territory, and he may, *in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known.*" § 67 of the Hawaiian Organic Act, 31 Stat. 153, 48 U. S. C. § 532. (Italics supplied.)

The Governor's proclamation demonstrates that, in so far as the discretion lay in him, he recognized in those days that a condition had arisen calling for the exercise of these powers. The proclamation of December 7, 1941, in its every word is the best evidence of the exercise of this discretion and speaks for itself:

> "Whereas, it is provided by Section 67 of the Organic Act of the Territory of Hawaii, approved April 30, 1900, that, whenever it becomes necessary, the Governor of that territory may call upon the commander of the military forces of the United States in that territory to prevent invasion; and
>
> "Whereas, it is further provided by the said section that the governor may in case of invasion or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus and place the territory under martial law; and

"Whereas, the armed forces of the Empire of Japan have this day attacked and invaded the shores of the Hawaiian Islands; and

"Whereas, it has become necessary to repel such attack and invasion; and

"Whereas, the public safety requires;

"Now, Therefore, I, J. B. Poindexter, Governor of the Territory of Hawaii, do hereby announce that, pursuant to said section, I have called upon the Commanding General, Hawaiian Department, to prevent such invasion;

"And, pursuant to the same section, I do hereby suspend the privilege of the writ of habeas corpus until further notice;

"And, pursuant to the same section, I do hereby place the said territory under martial law;

"And, I do hereby authorize and request the Commanding General, Hawaiian Department, during the present emergency and until the danger of invasion is removed, to exercise all the powers normally exercised by me as Governor;

"And I do further authorize and request the said Commanding General, Hawaiian Department, and those subordinate military personnel to whom he may delegate such authority, during the present emergency and until the danger of invasion is removed, to exercise the powers normally exercised by judicial officers and employees of this territory and of the counties and cities therein, and such other and further powers as the emergency may require;

"And I do require all good citizens of the United States and all other persons within the Territory of Hawaii to obey promptly and fully, in letter and in spirit, such proclamations, rules, regulations and orders, as the Commanding General, Hawaiian Department, or his subordinates, may issue during the present emergency."

This action was communicated by him to the President and the President's decision upon his action was made known in accordance with the Organic Act of Hawaii in the following messages:

"Dec. 7, 1941

"The President the White House
Washington D C

I Have Today Declared Martial Law Throughout the Territory of Hawaii and Have Suspended the Privilege of the Writ of Habeas Corpus Period Your Attention Is Called to Section Sixty Seven of the Hawaiian Organic Act for Your Decision on My Action

POINDEXTER"

"December 9, 1941

"Honorable Joseph B. Poindexter,
Governor, Territory of Hawaii,
Honolulu, Hawaii.

Your Telegram of December Seventh Received and Your Action in Suspending the Writ of Habeas Corpus and Placing the Territory of Hawaii Under Martial Law in Accordance with U. S. C., Title 48, Section 532 Has My Approval.

FRANKLIN D. ROOSEVELT"

The discretion to determine within reasonable limits the existence of the emergency of war contemplated by the Organic Act must be an executive discretion. Under the circumstances now generally known as to what took place at Pearl Harbor on December 7 and the seriousness of the threat which that attack carried with it, not only to the people in the Territory of Hawaii but to the United States of America, I am unable to find that on that day the President and the Governor exceeded their constitutional authority in taking the steps evidenced by the foregoing declaration of policy or that the Commanding General exceeded his authority in carrying out those instructions through the issuance of his proclamation pursuant thereto on December 7, 1941.[4]

[4] "To the People of Hawaii:

"The military and naval forces of the Empire of Japan have attacked and attempted to invade these islands.

"Pursuant to section 67 of the Organic Act of the Territory of Hawaii, approved April 30, 1900, the Governor of Hawaii has called

The findings of fact, express and implicit in these prompt and forthright expressions of executive leadership,

---

upon me, as commander of the military forces of the United States in Hawaii, to prevent such invasion; has suspended the privilege of the writ of habeas corpus; has placed the Territory under martial law; has authorized and requested me and my subordinates to exercise the powers normally exercised by the governor and by subordinate civil officers; and has required all persons within the Territory to obey such proclamations, orders, and regulations as I may issue during the present emergency.

"I announce to the people of Hawaii, that, in compliance with the above requests of the Governor of Hawaii, I have this day assumed the position of military governor of Hawaii, and have taken charge of the government of the Territory, of the preservation of order therein, and of putting these islands in a proper state of defense.

"All persons within the Territory of Hawaii, whether residents thereof or not whether citizens of the United States or not, of no matter what race or nationality, are warned that by reason of their presence here they owe during their stay at least a temporary duty of obedience to the United States, and that they are bound to refrain from giving by word or deed, any aid or comfort to the enemies of the United States. Any violation of this duty is treason, and will be punished by the severest penalties.

"The troops under my command, in putting down any disorder or rebellion and in preventing any aid to the invader, will act with such firmness and vigor and will use such arms as the accomplishment of their task may require.

"The imminence of attack by the enemy and the possibility of invasion make necessary a stricter control of your actions than would be necessary or proper at other times. I shall therefore shortly publish ordinances governing the conduct of the people of the Territory with respect to the showing of lights, circulation, meetings, censorship, possession of arms, ammunition, and explosives, the sale of intoxicating liquors and other subjects.

"In order to assist in repelling the threatened invasion of our island home, good citizens will cheerfully obey this proclamation and the ordinances to be published; others will be required to do so. *Offenders will be severely punished by military tribunals or will be held in custody until such time as the civil courts are able to function.*

"Pending further instructions from this headquarters the Hawaii Defense Act and the Proclamations of the Governor of Hawaii heretofore issued thereunder shall continue in full force and effect." (Italics supplied.)

leave no room for doubt as to the genuineness of the emergency and of the conscientious determination of these officials to act so as to meet it. At the same time, the appreciation felt by the Commanding General of his responsibility to the civilians on the Islands is shown in his three concluding paragraphs. Starting with the propriety of that battle field regulation in the presence of disastrous invasion, the question resolves itself solely to one of when and to what extent the constitutional executive discretion to continue these orders can or should be held by this Court to have been exceeded. Once the Islands are visualized as a battle field under actual invasion, threatened with further invasion, and invaluable to the enemy as a base from which to attack the continental United States, the situation is completely changed from that of an ordinary civilian community. Under conditions likely to disregard even the laws of civilized warfare, the island population was threatened with immediate destruction. It thus became necessary to organize and protect that population against imminent danger from bombing, fire, disruption of water and food supply, disease and all the other incidents of modern warfare. The limited area, limited garrison and great isolation of the Islands put a premium on the efficiency of its civilian defense and on the integration of it with the military defense. All activity was subordinated to executive control as the best constitutional safeguard of the civilian as well as the military life.

That in such a case there must be restoration of civilian control is clear. It is equally clear that there must be limits to the extent to which the executive discretion constitutionally may delay such restoration. In the first instance, however, there is a period, bearing a reasonable relation to the original emergency, during which it must be within the discretion of the executive agencies of the Government to decide when and how to restore the battle field to its peace time controls.

In view of the responsibility placed upon the executive branch of the Government and especially upon its armed forces in time of invasion and threatened invasion, it is essential that that branch of the Government have freedom of action equal to its needs. At the center of invasion, military control is the proper control to be applied, subject to provisions of the Constitution, treaties and laws of the United States applicable to a battle field. On December 7, 1941, I believe that the facts of the invasion and threatened further invasion amply established such a condition and justified at the time the military control established on that basis throughout the Islands.

Whether or not from the vantage post of the present this Court may disagree with the judgment exercised by the military authorities in their schedule of relaxation of control is not material unless this Court finds that the schedule was so delayed as to exceed the range of discretion which such conditions properly vest in the military authorities.

It is all too easy in this postwar period to assume that the success which our forces attained was inevitable and that military control should have been relaxed on a schedule based upon such actual developments. In fact, however, even now our Chief of Staff in his report to the Secretary of War as of June 30, 1945, reminds us that in "the black days of 1942 when the Japanese conquered all of Malaysia, occupied Burma, and threatened India while the German armies approached the Volga and the Suez. . . . Germany and Japan came so close to complete domination of the world that we do not yet realize how thin the thread of Allied survival had been stretched." Biennial Report of the Chief of Staff of the United States Army (1945) 1.[5] Those were critical days when the

[5] See also the letters of General George C. Marshall, Chief of Staff, of September 25 and 27, 1944, to Governor Thomas E. Dewey, emphasizing the tragic military consequences which at that date would

United States could afford no military mistakes and when the safety and control of the Hawaiian key to the Pacific was essential. It was the responsibility of our military commanders not only to do the right thing in the interests of safety but to take no chances of error or surprise. It was the obligation of our military commanders to insure safety rather than to risk it. Acting as they were in the "fog of war," they were entitled to a wide range of discretion if they were to meet the obligations imposed upon them. It is not justifiable to tear Hawaii out from the context of the war as a whole. Our military policy there, as elsewhere, had to be guided by its relation to the global war.

Under these circumstances it is conceivable that the military authorities might have tried to continue complete military control in effect for a substantial period with a view to later relaxation of all such control when conditions made it obvious that there was no longer a need for any control. Such a course was not attempted here. The Commanding General of the Hawaiian Department followed from the beginning the policy foreshadowed in his original proclamation. He restored civilian control of civilian activities wherever and whenever he felt that a partial restoration of it was in the public interest. In the meantime he had the primary duty of maintaining law and order and of fostering civilian activities as much as possible. Perhaps he could have arrested and detained individuals charged with violation of laws or regulations and held them for later trial by civilian courts. However, in view of the size of the population and the necessarily limited facilities for large scale detentions, he owed an equal duty to dispose promptly of violations of the law.

---

follow disclosure that the United States had "broken" the Japanese secret message code. Hearings before Joint Committee of Congress to Investigate the Pearl Harbor Attack, 79th Cong., 2d Sess., Part III, 1128–1133.

To this end, law and order was enforced and justice was administered in the first instance through military tribunals. With evident care and with substantial rapidity the military control was relaxed gradually, in instance after instance, until the administration of justice over civilians was restored completely to civilian administration when, on October 19, 1944, the President issued a proclamation effective October 24, terminating martial law and directing the Governor to issue a proclamation accordingly.

There is set forth in the margin [6] a summary of the steps by which this relaxation was accomplished. As early

[6] Dec. 7, 1941. Governor Poindexter invoked § 67 of the Hawaiian Organic Act and by proclamation placed the Territory under martial law; suspended the privilege of the writ of habeas corpus; and delegated to the Commanding General of the Hawaiian Department of the United States Army not only all of his powers as Governor but also all of the "powers normally exercised by judicial officers . . . of this territory . . . during the present emergency and until the danger of invasion is removed . . ."

Dec. 7, 1941. By radio the Governor of Hawaii notified the President of the United States that he had placed the Territory under martial law and suspended the writ of habeas corpus.

Dec. 7, 1941. The Commanding General, Walter C. Short, referring specifically to Governor Poindexter's proclamation of the same date, himself issued a proclamation notifying the people of Hawaii that he had assumed the position of "Military Governor of Hawaii" and had taken over the government of Hawaii.

Dec. 7, 1941. The Military Governor of Hawaii issued General Orders No. 4 by which he set up a system of military courts to try civilians for violations of the laws of the United States, the laws of the Territory, and "rules, regulations, orders or policies" of the military authorities. The procedure prescribed for these military courts was that of special and summary courts martial.

Dec. 8, 1941. The courts of the Territory were closed by the Chief Justice of the Supreme Court of Hawaii under the direction of the Commanding General.

Dec. 9, 1941. The President approved by radio, the action of the Governor suspending the writ and placing the Territory under martial law in accordance with the Organic Act of Hawaii.

Dec. 16, 1941. By General Orders No. 29 the complete closing of

as December 16, 1941, the courts were reopened in so far as they applied to civil matters not involving jury trials. On January 27, 1942, the restrictions on court procedure were further modified. On August 31, 1942, a general order extended the jurisdiction of the courts to jury trials. Further relaxation occurred from time to time in 1942 and 1943.

It was on August 20, 1942, that the petitioner White was arrested for embezzlement in violation of Chapter 183 of the Revised Laws of Hawaii. On August 25 he was tried and convicted before a provost court, and sentenced

---

the courts was partly relaxed. The relaxation affected only civil matters not involving jury trials.

Dec. 17, 1941. General Short transferred to General Emmons his powers as Military Governor of Hawaii.

Jan. 27, 1942. The Military Governor, by General Orders No. 57, modified further the restrictions on court proceedings. By this order the courts of the Territory were authorized to exercise certain of the powers normally exercised by them during the existence of civil government. With certain exceptions, the courts were restored to their respective functions prior to martial law, "as agents of the Military Governor." The criminal courts could not, under the order, summon a grand jury; and neither the criminal nor civil courts could grant a jury trial, or at any time grant a writ of habeas corpus.

Aug. 31, 1942. General Orders No. 133 extended the jurisdiction of the courts to jury trials. This order stated in § I: ". . . Martial law has been declared and the emergency which called it forth still prevails. . . . It is to be understood that the relaxation herein specified is intended to return to the courts criminal prosecutions and civil litigation to the extent that war conditions permit. However, this action is experimental in nature and the Military Governor reserves the right further to limit the jurisdiction of the courts or to close them entirely, if that course shall be necessary."

Sept. 4, 1942. General Orders No. 135 enumerated the criminal offenses involving crimes against the Government or related to the war effort, in respect to which the courts were not authorized to exercise jurisdiction.

Feb. 8, 1943. Governor Stainback, who succeeded Governor Poindexter, issued a public proclamation providing that, although martial

to five years' imprisonment, later reduced to four. In so far as the issue relates to his case, and in the light of the evident consideration that the Commanding General was giving to the restoration of civil control to the courts, I am unable to hold as a matter of law that, through not acting more quickly and less cautiously, he violated his constitutional discretion when on December 16, 1941, he authorized the civil courts to open to a limited extent for the trial of limited classes of cases not requiring jury trials or the subpoenaing of witnesses, or when on January 27, 1942, he authorized the civil courts, as agents of the Mili-

---

law and suspension of the privilege of the writ of habeas corpus were to remain in effect, the Governor and other civil agencies would resume their respective jurisdictions, including criminal and civil proceedings, except for criminal proceedings against members of the armed forces and civil suits against them for acts or omissions in the line of duty and criminal prosecutions for violations of military orders, except as these exceptions might be waived by the Commanding General in any particular case or class of cases.

Feb. 8, 1943. General Emmons, the Military Governor, issued a public proclamation relinquishing to the Governor and other civilian officers of the Territory the functions set forth in the Governor's proclamation.

Mar. 10, 1943. General Emmons issued a revised set of General Orders Nos. 1 to 14, and rescinded General Orders Nos. 1 to 181, issued under prior proclamations. General Orders No. 2 vested provost courts and military commissions with jurisdiction to try any case involving violations by a civilian of "rules, regulations, proclamations, or Orders of the Military or Naval authorities, or of the Military Governor of the Territory of Hawaii, or of the laws of war," and to impose a fine, imprisonment or both. Maximum punishment was to be confinement at hard labor for five years, or a fine of five thousand dollars or both.

Oct. 19, 1944. The President issued Proclamation No. 2627 providing that, effective Oct. 24, 1944, the privilege of the writ of habeas corpus was restored and martial law terminated and directing the Governor to issue a proclamation accordingly.

Oct. 24, 1944. The Governor issued a proclamation which proclaimed that "the privilege of the writ of habeas corpus is restored and that martial law is terminated in the Territory of Hawaii."

tary Government, to exercise their normal functions except for jury trials, writs of habeas corpus and other specified classes of cases, and when, on August 31, 1942, he extended their jurisdiction to jury trials such as would have applied to the petitioner White. Even on that date, in General Orders No. 133,[7] he found expressly that "martial law has been declared and the emergency which called it forth still prevails."

The petitioner Duncan was convicted on March 2, 1944, of maliciously assaulting and beating two marines on February 24, 1944, with intent to prevent their performance of their duties as sentries at the main gate of the Pearl Harbor Navy Yard. For this offense he was sentenced to six months in jail. At this time civilian agencies had resumed most of their peace time jurisdiction, including criminal and civil proceedings, except for criminal proceedings against members of the armed forces, civil suits against them for acts or omissions in line of duty and criminal prosecutions of violations of military orders. The close relationship of these items to the military functions of the armed forces on the Islands indicates the reasonableness of their exception. Even these exceptions were removed in October, 1944, when martial law was terminated. I find it impossible under these circumstances to hold that the President and the military authorities violated the discretion vested in them to insure the safety of the Islands in time of war, invasion and threatened invasion, in that they failed to terminate martial law so completely before March 2, 1944, that a civilian, who attacked marines on duty as sentries at the main gate of the Pearl Harbor Navy Yard, could insist upon a trial in the local criminal courts as distinguished from the local provost court which had exercised jurisdiction over such cases throughout the Japanese war which was still actively in progress.

[7] See Footnotes 2 and 6.

Now that the war has been won and the safety of the Islands has been again assured, there is opportunity, in the calm light of peace, for the readjustment of sentences imposed upon civilians and military personnel during the emergency of war and which have not yet expired. It is important, however, that in reviewing the constitutionality of the conduct of our agencies of government in time of war, invasion and threatened invasion, we do not now make precedents which in other emergencies may handicap the executive branch of the Government in the performance of duties allotted to it by the Constitution and by the exercise of which it successfully defended the nation against the greatest attack ever made upon it.

One way to test the soundness of a decision today that the trial of petitioner White on August 25, 1942, before a provost court on a charge of embezzlement and the trial of petitioner Duncan on March 2, 1944, before a similar court on a charge of maliciously assaulting marine sentries were unconstitutional procedures, is to ask ourselves whether or not on those dates, with the war against Japan in full swing, this Court would have, or should have, granted a writ of habeas corpus, an injunction or a writ of prohibition to release the petitioners or otherwise to oust the provost courts of their claimed jurisdiction. Such a test emphasizes the issue. I believe that this Court would not have been justified in granting the relief suggested at such times. Also I believe that this Court might well have found itself embarrassed had it ordered such relief and then had attempted to enforce its order in the theatre of military operations, at a time when the area was under martial law and the writ of habeas corpus was still suspended, all in accordance with the orders of the President of the United States and the Governor of Hawaii issued under their interpretation of the discretion and responsibility vested in them by the Constitution of the United States and by the Organic Act of Hawaii enacted by Congress.

691100°—47——27

In order to have the benefit of the full strength of our Constitution, both in time of peace and in time of war, it is necessary to protect the authority of our legislative and executive officials, as well as that of our courts, in the performance of their respective obligations to help to "establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."

SOCIAL SECURITY BOARD *v.* NIEROTKO.

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

No. 318. Argued December 12, 1945.—Decided February 25, 1946.

1. "Back pay" awarded under the National Labor Relations Act to an employee who was found to have been wrongfully discharged is to be treated under the Social Security Act as "wages" for which the employee is entitled to credit on his Old Age and Survivors Insurance Account. Pp. 359, 364.

   (a) The treatment of such back pay as wages under the Social Security Act is required by that Act's definitions of wages as "remuneration for employment" and of employment as "any service, of whatever nature, performed . . . by any employee for his employer." P. 364.

   (b) The word "service," as used in the Act's definition of employment, means not only work actually performed but the entire employer-employee relationship for which compensation is paid to the employee by the employer. Pp. 365–366.

   (c) The construction of the Social Security Act by the Social Security Board, whereby "back pay" is excluded from "wages," is unsound and goes beyond the permissible limits of administrative interpretation. P. 367.

   (d) Administrative determinations must have a basis in law and be within the authority granted the administrative agency. P. 369.

   (e) An administrative agency may not finally determine the scope of its statutory power; that is a judicial function. P. 369.

2. "Back pay" treated as "wages" under the Social Security Act should be allocated to the periods for which the wages ordinarily would have been paid. P. 370.

3. The back pay having been awarded for a period prior to the 1939 amendments of the Social Security Act although actually paid thereafter, the decision here is controlled by the Act in its earlier form. However, there is no suggestion of any significant difference in the amended Act so far as the question here involved is concerned. P. 360.

149 F. 2d 273, affirmed.

The Social Security Board refused to credit respondent's Old Age and Survivors Insurance Account with the amount of "back pay" awarded him by the National Labor Relations Board. The district court upheld the Social Security Board. The circuit court of appeals reversed. 149 F. 2d 273. This Court granted certiorari. 326 U. S. 700. *Affirmed,* p. 370.

Paul A. Sweeney argued the cause for petitioner. With him on the brief were *Solicitor General McGrath, Assistant Attorney General Sonnett* and *Joseph B. Goldman.*

Ernest Goodman argued the cause for respondent. With him on the brief was *Morton A. Eden.*

MR. JUSTICE REED delivered the opinion of the Court.

A problem as to whether "back pay," which is granted to an employee under the National Labor Relations Act, shall be treated as "wages" under the Social Security Act comes before us on this record. If such "back pay" is a wage payment, there is also at issue the proper allocation of such sums to the quarters of coverage for which the "back pay" was allowed.

The respondent, Joseph Nierotko, was found by the National Labor Relations Board to have been wrongfully discharged for union activity by his employer, the Ford Motor Company, and was reinstated by that Board in his employment with directions for "back pay" for the period February 2, 1937, to September 25, 1939.[1] The "back

[1] National Labor Relations Act, § 10 (c), 49 Stat. 454.

pay" was paid by the employer on July 18, 1941. Thereafter Nierotko requested the Social Security Board to credit him in the sum of the "back pay" on his Old Age and Survivor's Insurance account with the Board.[2] In conformity with its minute of formal general action of March 27, 1942, the Board refused to credit Nierotko's "back pay" as wages. On review of the Board's decision,[3] the district court upheld the Board. The circuit court of appeals reversed. 149 F. 2d 273. On account of the importance of the issues in the administration of the Social Security Act, we granted certiorari.[4] 326 U. S. 700; Judicial Code § 240.

During the period for which "back pay" was awarded respondent the federal old age benefits were governed by Title II of the Social Security Act of 1935. 49 Stat. 622. As Title II of the Social Security Act Amendments of 1939 became effective January 1, 1940 (53 Stat. 1362), the actual payment of the "back wages" occurred thereafter. In our view the governing provisions which determine whether this "back pay" is wages are those of the earlier enactment.[5]

---

[2] Social Security Act, § 205 (c) (3), 53 Stat. 1369.

[3] § 205 (g).

[4] The briefs of the Government advise us that more than thirty thousand individual employees were allowed "back pay" in "closed" cases by the National Labor Relations Board under § 10 (c), 49 Stat. 454, in the period 1939–1945. See *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 187, *Second*. The aggregate in money exceeded $7,700,000 in the fiscal years 1939 to 1944, as shown by the reports of the N. L. R. B. for those years.

[5] By the foregoing statement it is not intended to imply that the variations in the definitions of wages between the two enactments are significant on the issues herein considered. Sec. 209 (b) of the Amendment recognizes possible differences in the meaning of employment: "(b) The term 'employment' means any service performed after December 31, 1936, and prior to January 1, 1940, which was employment

Wages are the basis for the administration of federal old age benefits. 49 Stat. 622. Only those who earn wages are eligible for benefits.[6] The periods of time during which wages were earned are important and may be crucial on eligibility under either the original act or the Amendments of 1939. See § 210 (c) and compare § 209

---

as defined in section 210 (b) of the Social Security Act prior to January 1, 1940 (except service performed by an individual after he attained the age of sixty-five if performed prior to January 1, 1939), and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him . . ."

[6] "SEC. 202. (a) Every qualified individual (as defined in section 210) shall be entitled to receive, with respect to the period beginning on the date he attains the age of sixty-five, or on January 1, 1942, whichever is the later, and ending on the date of his death, an old-age benefit (payable as nearly as practicable in equal monthly installments) as follows:

(1) If the total wages (as defined in section 210) determined by the Board to have been paid to him, with respect to employment (as defined in section 210) after December 31, 1936, and before he attained the age of sixty-five, were not more than $3,000, the old-age benefit shall be at a monthly rate of one-half of 1 per centum of such total wages;

(2) If such total wages were more than $3,000, the old-age benefit shall be at a monthly rate equal to the sum of the following:

(A) One-half of 1 per centum of $3,000; plus

(B) One-twelfth of 1 per centum of the amount by which such total wages exceeded $3,000 and did not exceed $45,000; plus

(C) One-twenty-fourth of 1 per centum of the amount by which such total wages exceeded $45,000."

SEC. 210. "(c) The term 'qualified individual' means any individual with respect to whom it appears to the satisfaction of the Board that—

(1) He is at least sixty-five years of age; and

(2) The total amount of wages paid to him, with respect to employment after December 31, 1936, and before he attained the age of sixty-five, was not less than $2,000; and

(3) Wages were paid to him, with respect to employment on some five days after December 31, 1936, and before he attained the age of sixty-five, each day being in a different calendar year."

(g), 53 Stat. 1376.[7] The benefits are financed by payments from employees and employers which are calculated on wages.[8] The Act defines "wages" for old age benefits as follows:

> "SEC. 210. When used in this title—
>
> (a) The term 'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; . . ."

---

[7] SEC. 209. "(g) The term 'fully insured individual' means any individual with respect to whom it appears to the satisfaction of the Board that—

(1) He had not less than one quarter of coverage for each two of the quarters elapsing after 1936, or after the quarter in which he attained the age of twenty-one, whichever quarter is later, and up to but excluding the quarter in which he attained the age of sixty-five, or died, whichever first occurred, and in no case less than six quarters of coverage; or

(2) He had at least forty quarters of coverage.

As used in this subsection, and in subsection (h) of this section, the term 'quarter' and the term 'calendar quarter' mean a period of three calendar months ending on March 31, June 30, September 30, or December 31; and the term 'quarter of coverage' means a calendar quarter in which the individual has been paid not less than $50 in wages. . . ."

[8] 49 Stat. 636–37:

"SECTION 801. In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 811) received by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum. . . ."

"SEC. 804. In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 811) paid by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum. . . ."

Employment is defined thus:

> "(b) The term 'employment' means any service, of whatever nature, performed within the United States by an employee for his employer, except—"

The tax titles of the Social Security Act have identical definitions of wages and employment.[9] An employee under the Social Security Act is not specifically defined but the individual to whom the Act's benefits are to be paid is one receiving "wages" for "employment" in accordance with § 210 (c) and employment is service by an "employee" to an "employer." Obviously a sharply defined line between payments to employees which are wages and which are not is essential to proper administration.[10]

Under the National Labor Relations Act an employee is described as "any individual whose work has ceased . . . because of any unfair labor practice." § 2 (3), 49 Stat. 450. The enforcement provisions of this Act under which Nierotko received his "back pay" allow the Labor Board to reinstate "employees with or without back pay." § 10 (c). The purpose of the "back pay" allowance is to effectuate the policies of the Labor Act for the preservation of industrial peace.[11]

---

[9] §§ 811 (a) and (b), and 907 (b) and (c).

[10] Provisions similar to those quoted are found in the Social Security Act Amendments of 1939. See §§ 202 (a), 202 (e), 203 (d), 209 (a), (b), (e), (g), (h), and 601, 604, and 606 at 53 Stat. 1363 *et seq.*

[11] 49 Stat. 449:

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

The purpose of the federal old age benefits of the Social Security Act is to provide funds through contributions by employer and employee for the decent support of elderly workmen who have ceased to labor.[12] Eligibility for these benefits and their amount depends upon the total wages which the employee has received and the periods in which wages were paid.[13] While the legislative history of the Social Security Act and its amendments or the language of the enactments themselves does not specifically deal with whether or not "back pay" under the Labor Act is to be treated as wages under the Social Security Act, we think it plain that an individual, who is an employee under the Labor Act and who receives "back pay" for a period of time during which he was wrongfully separated from his job, is entitled to have that award of back pay treated as wages under the Social Security Act definitions which define wages as "remuneration for employment" and employment as "any service . . . performed . . . by an employee for his employer . . ."

Surely the "back pay" is "remuneration." Under § 10 (c) of the Labor Act, the Labor Board acts for the public to vindicate the prohibitions of the Labor Act against unfair labor practices (§ 8) and to protect the right of employees to self-organization which is declared by § 7.[14] It is also true that, in requiring reparation to the employee through "back pay," reparation is based upon the loss of wages which the employee has suffered from the employer's wrong. "Back pay" is not a fine or penalty imposed upon the employer by the Board. Reinstate-

---

[12] See *Helvering* v. *Davis,* 301 U. S. 619, 641; H. Rep. No. 728, 76th Cong., 1st Sess., 3–4; S. Rep. No. 734, 76th Cong., 1st Sess., 3–4.

[13] Under the Social Security Act of 1935, see §§ 202 (a) and 210 (c), *supra,* note 6. Under the 1939 Amendments, see §§ 202 and 209 (e), (f) and (g), 53 Stat. 1363, *et seq.*

[14] *Virginia Electric Co.* v. *Labor Board,* 319 U. S. 533, 543.

ment and "back pay" are for the "protection of the employees and the redress of their grievances" to make them "whole." *Republic Steel Corp.* v. *Labor Board,* 311 U. S. 7, 11, 12. ". . . a worker's loss in wages and in general working conditions must be made whole." *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 196. A worker is not given "back pay" by the Board equal to what he would have earned with the employer but for the unlawful discharge, but is given that sum less any net earnings during the time between discharge and reinstatement.[15]

Since Nierotko remained an employee under the definition of the Labor Act, although his employer had attempted to terminate the relationship, he had "employment" under that Act and we need consider further only whether under the Social Security Act its definition of employment, as "any service . . . performed . . . by an employee for his employer," covers what Nierotko did for the Ford Motor Company. The petitioner urges that Nierotko did not perform any service. It points out that Congress in considering the Social Security Act thought of benefits as related to "wages earned" for "work done." [16] We are unable, however, to follow the Social Security Board in such a limited circumscription of the word "service." The very words "any service . . . performed . . . for his employer," with the purpose of the Social Security Act in mind, import breadth of coverage. They admonish us against holding that "service" can be only productive activity. We think that "service" as used by Congress in this definitive phrase means not only work

[15] *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 196, 198. See Third Annual Report, National Labor Relations Board, 202, n. 11; Eighth Annual Report 41; Ninth Annual Report 49. Nierotko's order was in this form, 14 N. L. R. B. 346, 410.

[16] H. Rep. No. 615, 74th Cong., 1st Sess., pp. 6, 21, 32, and S. Rep. No. 628, 74th Cong., 1st Sess., pp. 7, 32.

actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer.[17]

An argument against the interpretation which we give to "service performed" is the contrary ruling of the governmental agencies which are charged with the administration of the Social Security Act. Their competence

---

[17] For example the Social Security Board's Regulations No. 3 in considering "wages" treats vacation allowances as wages. 26 CFR, 1940 Supp., 402.227 (b).

Compare *Armour & Co.* v. *Wantock*, 323 U. S. 126, 133.

Treasury Department Regulations No. 91 relating to the Employees' Tax and the Employer's Tax under Title VIII of the Social Security Act, 1936, Art. 16, classifies dismissal pay, vacation allowances or sick pay as wages. Regulations 106 under the Federal Insurance Contributions Act, 1940, pp. 48, 51, continues to consider vacation allowances as wages. It differentiates voluntary dismissal pay.

I. R. B., 1940, 1–22–10271, S. S. T. 389, an Office Decision, holds that amounts paid employees during absence on jury service to make their pay equivalent to regular salary are wages.

Though formal action was taken by the Social Security Board on March 27, 1942, our attention has not been called to any regulation of any governmental agency excluding "back pay" from wages. The Treasury Department has authority to issue regulations for Social Security taxes. §§ 808 and 908, 49 Stat. 638, *et seq.*; I. R. C., § 1429, 53 Stat. 178. So has the Social Security Board, § 1102, 49 Stat. 647, and § 205 (a), 53 Stat. 1368. All authority for the promulgation of regulations limits the action to rules and regulations not inconsistent with the provisions of the various sections.

In regulations governing the collection of income taxes at source on or after January 1, 1945, 58 Stat. 247, the Bureau of Internal Revenue classified vacation allowances and dismissal pay as wages under the following statutory definition of wages:

"Sec. 1621. Definitions. As used in this subchapter—

(a) Wages.—The term 'wages' means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include remuneration paid—" See 26 CFR, 1944 Supp., 405.101 (d) and (e).

and experience in this field command us to reflect before we decide contrary to their conclusion. The first administrative determination was apparently made in 1939 by an Office Decision of the Bureau of Internal Revenue on the problem of whether "back pay" under a Labor Board order was wages subject to tax under Titles VIII and IX of the Social Security Act which the Bureau collects.[18] The back pay was held not to be subject as wages to the tax because no service was performed, the employer had tried to terminate the employment relationship and the allowance of back pay was discretionary with the Labor Board. Reliance for the conclusions was placed upon *Agwilines, Inc.* v. *Labor Board,* 87 F. 2d 146, which had held "back pay" a public reparation order and therefore not triable by jury as a private right for wages would have been. This position is maintained by the Social Security Board by minute of March 27, 1942. It is followed by the National Labor Relations Board which at one time approved the retention by the employer of the tax on the employees' back pay for transmission to the Treasury Department as a tax on wages but later reversed its position on the authority of the Office Decision to which reference has just been made. *Re Pennsylvania Furnace & Iron Co.,* 13 N. L. R. B. 49, 53 (5), 54, 58.[19]

The Office Decision seems to us unsound. The portion of the *Agwilines* decision, which the Office Decision relied upon, was directed at the constitutional claim to a right of trial by jury. It stated that "back pay" was not a penalty or damages which a private individual might

[18] I. R. B., 1939, 1–14–9776, S. S. T. 359. No regulations covering "back pay" under the Social Security Act have been found. They are authorized by §§ 808 and 908, 49 Stat. 638, 643.

[19] The States have largely followed the Bureau of Internal Revenue in their classification of "back pay." Some have disagreed. Unemployment Insurance Service, All State Treatise, C. C. H., Paragraph 1201. See *Matter of Tonra,* 258 App. Div. 835, 15 N. Y. S. 2d 755; 283 N. Y. 676, 28 N. E. 2d 402.

claim. But there is nothing in the opinion which supports the idea that the "back pay" award differs from other pay. Indeed the opinion said that "Congress has the right to eradicate them [unfair practices] as from the beginning." 87 F. 2d at 151, l. c. We think the true relation of awards of "back pay" to compensation appears in the *Republic Steel* and *Phelps-Dodge* cases, hereinbefore discussed.[20]

But it is urged by petitioner that the administrative construction on the question of whether "back pay" is to be treated as wages should lead us to follow the agencies' determination. There is a suggestion that the administrative decision should be treated as conclusive, and reliance for that argument is placed upon *Labor Board* v. *Hearst Publications,* 322 U. S. 111, 130, and *Gray* v. *Powell,* 314 U. S. 402, 411. In the acts which were construed in the cases just cited, as in the Social Security Act, the administrators of those acts were given power to reach preliminary conclusions as to coverage in the application of the respective acts. Each act contains a standardized phrase that Board findings supported by substantial evidence shall be conclusive.[21] The validity of regulations is specifically reserved for judicial determination by the Social Security Act Amendments of 1939, § 205 (g).

The Social Security Board and the Treasury were compelled to decide, administratively, whether or not to treat "back pay" as wages; and their expert judgment is entitled, as we have said, to great weight.[22] The very fact

---

[20] This was the view of the Eighth Circuit when a "back pay" claim was presented in bankruptcy. *Labor Board* v. *Killoren,* 122 F. 2d 609, 614.

[21] National Labor Relations Act, 49 Stat. 454, § 10 (e); Bituminous Coal Act of 1937, 50 Stat. 72, 85, § 4–A; Social Security Act Amendments of 1939, § 205 (c) (3) and (g).

[22] See *Sanford* v. *Commissioner,* 308 U. S. 39, 52; *Skidmore* v. *Swift & Co.,* 323 U. S. 134, 139–40.

that judicial review has been accorded, however, makes evident that such decisions are only conclusive as to properly supported findings of fact. Both *Hearst Publications,* p. 131, and *Gray* v. *Powell,* p. 411, advert to the limitations of administrative interpretations. Administrative determinations must have a basis in law and must be within the granted authority. Administration, when it interprets a statute so as to make it apply to particular circumstances, acts as a delegate to the legislative power. Congress might have declared that "back pay" awards under the Labor Act should or should not be treated as wages. Congress might have delegated to the Social Security Board to determine what compensation paid by employers to employees should be treated as wages. Except as such interpretive power may be included in the agencies' administrative functions, Congress did neither. An agency may not finally decide the limits of its statutory power. That is a judicial function.[23] Congress used a well understood word—"wages"—to indicate the receipts which were to govern taxes and benefits under the Social Security Act. There may be borderline payments to employees on which courts would follow administrative determination as to whether such payments were or were not wages under the act.

We conclude, however, that the Board's interpretation of this statute to exclude back pay goes beyond the boundaries of administrative routine and the statutory limits. This is a ruling which excludes from the ambit

[23] *American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94, 110; *International R. Co.* v. *Davidson,* 257 U. S. 506, 514; *Iselin* v. *United States,* 270 U. S. 245; *Koshland* v. *Helvering,* 298 U. S. 441; *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 144–145; *United States* v. *Carolina Carriers Corp.,* 315 U. S. 475, 489; *Helvering* v. *Credit Alliance Co.,* 316 U. S. 107, 113; *Helvering* v. *Sabine Transportation Co.,* 318 U. S. 306, 311–12; *Addison* v. *Holly Hill Co.,* 322 U. S. 607, 611, *et seq.;* cf. *Steuart & Bro.* v. *Bowles,* 322 U. S. 398, 403.

of the Social Security Act payments which we think were included by Congress. It is beyond the permissible limits of administrative interpretation.

Petitioner further questions the validity of the decision of the circuit court of appeals on the ground that it must be inferred from the opinion that the "back pay" must be allocated as wages by the Board to the "calendar quarters" of the year in which the money would have been earned, if the employee had not been wrongfully discharged. We think this inference is correct.[24] This conclusion, petitioner argues, tends to show that "back pay" cannot be wages because the Amendments of 1939 use "quarters" as the basis for eligibility as well as the measure of benefits and require "wages" to be "paid" in certain "quarters." [25]

If, as we have held above, "back pay" is to be treated as wages, we have no doubt that it should be allocated to the periods when the regular wages were not paid as usual. Admittedly there are accounting difficulties which the Board will be called upon to solve but we do not believe they are insuperable.[26]

Affirmed.

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

MR. JUSTICE FRANKFURTER, concurring.

The decisions of this Court leave no doubt that a man's time may, as a matter of law, be in the service of another

---

[24] See *Nierotko* v. *Social Security Board,* 149 F. 2d 273, 274, r. c.

[25] See note 7, *supra.* The same problem would arise under the Social Security Act, 49 Stat. 625, § 210 (c).

[26] The Social Security Board itself has recommended the inclusion of "back pay" in wages. Annual Report of the Federal Security Agency, Social Security Board (1945), § 5, p. 398:

"Certain items of income which are now not considered 'wages' under the definition in the act, should be included as wages, so that the

though he be inactive. *E. g., Armour & Co.* v. *Wantock,* 323 U. S. 126. This is, practically speaking, the ordinary situation of employment in a "stand-by" capacity. *United States* v. *Local 807,* 315 U. S. 521, 535. The basis of a back-pay order under the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. § 151, is precisely that. When the employer is liable for back pay, he is so liable because under the circumstances, though he has illegally discharged the employee, he still absorbs his time. *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177. In short, an employer must pay wages although, in violation of law, he has subjected his employee to enforced idleness. Since such compensation is in fact paid as wages, it is a plain disregard of the law for the Social Security Board not to include such payments among the employees' wages. Neither the terms of the Social Security Act, 49 Stat. 620, 53 Stat. 1360, 42 U. S. C. § 301, nor the implications of policy, comparable to some aspects of the Railway Labor Act, 44 Stat. 577, 48 Stat. 926, 48 Stat. 1185, 49 Stat. 1921, 54 Stat. 785, 45 U. S. C. § 151, give the Board judicially unreviewable authority to exclude from wages what as a matter of law are wages. And so I concur in the decision of the Court.

---

base for benefits would represent the worker's actual remuneration from employment. These include tips, dismissal payments which the employer is not legally required to make but nevertheless does make, and payments made under orders of the National Labor Relations Board or a similar State board."

A pending bill, S. 1050, 79th Cong., 1st Sess., Part F, § 275, makes provision for the inclusion in wages under the Social Security Act of sums paid pursuant to the National Labor Relations Act.

"Back pay" is now treated distributively under the Internal Revenue Code. § 119, Revenue Act of 1943, 58 Stat. 39.

UNITED STATES *v.* PETTY MOTOR CO.

NO. 77. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.*

Argued December 6, 1945.—Decided February 25, 1946.

The United States in 1942 acquired by condemnation for public use a building then occupied by tenants holding under leases for various terms. The use taken was for a period ending June 30, 1945, with the right of surrender in 1943 or 1944 on 60 days notice to the owner. An order for immediate possession was entered, and tenants were given notices varying from six to twenty days to vacate. *Held*:

1. Since termination earlier of the period for which the property was taken was wholly at the election of the United States, the taking must be deemed a taking for public use until June 30, 1945. P. 374.

2. The measure of damages is the value of the use and occupancy of the leasehold for the remainder of the tenant's term, less the amount of the rent which the tenant agreed to pay for such use and occupancy. P. 381.

3. A tenant whose lease contained a "termination by condemnation" clause was without any right of recovery. P. 375.

4. Tenants whose leases were for terms shorter than the period for which the property was taken for public use were not entitled to have costs of removal or relocation considered as elements of "value" of their rights under the unexpired portions of their leases. *United States* v. *General Motors Corp.*, 323 U. S. 373, distinguished. P. 378.

5. In the case of tenancies at will, determination of the remainder of the term will depend upon the requirements of state law as to notice for the termination of such tenancies. P. 380.

6. In the case of a tenant whose lease contained a right of renewal for a year, the value of that right (if it continued under

*Together with No. 78, *United States* v. *Brockbank, doing business as Brockbank Apparel Co.;* No. 79, *United States* v. *Grimsdell, doing business as Grocer Printing Co.;* No. 80, *United States* v. *Wiggs, doing business as Chicago Flexible Shaft Co.;* No. 81, *United States* v. *Independent Pneumatic Tool Co.;* No. 82, *United States* v. *Galigher Co.;* and No. 83, *United States* v. *Gray-Cannon Lumber Co.*, on certiorari to the same court, argued and decided on the same dates.

the state law) must be added to the value of the unexpired term of the lease. P. 380.
147 F. 2d 912, reversed.

Proceedings instituted by the United States for the condemnation of a building for temporary public use resulted in verdicts for the tenants. On appeal by the United States the circuit court of appeals affirmed. 147 F. 2d 912. This Court granted certiorari. 325 U. S. 848. *Reversed,* p. 381.

Arnold Raum argued the cause for the United States. With him on the brief were *Acting Solicitor General Judson, J. Edward Williams, Roger P. Marquis* and *Wilma C. Martin.*

Shirley P. Jones argued the cause for respondents. With him on the brief was *Charles D. Moore.*

Philip S. Ehrlich filed a brief for the Zellerbach Paper Company, as *amicus curiae,* urging affirmance.

MR. JUSTICE REED delivered the opinion of the Court.

This writ of certiorari under Judicial Code § 240 brings here for review certain problems relating to the just compensation for tenants in condemnation proceedings to take their entire leaseholds when the United States had already taken over the lessors' interest in the property which the tenants occupy. Certiorari was granted to consider the holding of the circuit court of appeals, 147 F. 2d 912, affirming the judgments of the district court, that evidence by a tenant of the costs of moving and reinstallation of equipment was admissible to establish the value of his leasehold under the rule announced in *United States* v. *General Motors Corp.,* 323 U. S. 373. As this issue presents an important phase of the law of eminent domain,[1] we granted certiorari. 325 U. S. 848.

[1] See *United States* v. *10,620 Square Feet in Canadian Pacific Bldg.,* 62 F. Supp. 115.

These cases arise out of a petition for condemnation of the temporary use for public purposes of a building in Salt Lake City, Utah, filed November 9, 1942, which sought to take the use of the building for the Government through June 30, 1945, with the right of election upon the part of the United States to surrender the premises on June 30, 1943, or June 30, 1944, upon sixty days written notice to the owner.[2] The owner and tenants were parties defendant. An order for immediate possession was entered on November 11, 1942, subject to authorization to the tenants to continue their occupation of their premises for short periods which varied from six to twenty days.

While the condemnation proceedings were pending the owner of the property made arrangements with the United States which resulted in the dismissal of the action against the owner. There is no claim by the United States that this arrangement released it from liability to the tenants for its taking of their leaseholds. As the value of the use of the totality of property, which was taken, thus lost all meaning, the Government accepts a separate responsibility to compensate the tenants for any legally recognized interest which they may have in the property. See *Duckett & Co.* v. *United States,* 266 U. S. 149.

Although an earlier surrender might occur by the election of the United States, the estate sought did not necessarily expire until June 30, 1945. Prompt possession was required from the tenants and all of them were required by the order of possession to vacate the premises which they occupied within various short periods of which twenty days was the longest. The judgments stated the issue was the amount due the tenants for the taking of their occupancy of their premises and found in dollars the just compensation for the rights taken. These facts,

[2] No one questions the authority of the United States to condemn this temporary interest. Second War Powers Act, 56 Stat. 177, § 201. *United States* v. *General Motors Corp.,* 323 U. S. 373.

we conclude, resulted in the taking by the United States of the temporary use of the building until June 30, 1945. When the shortening of the term is wholly at the election of the lessee, the term of the leasehold for the purpose of determining the extent of the taking must be considered to be its longest limit.[3] All rights of all the tenants, except the Independent Pneumatic Tool Company, which is one of the respondents here, terminated before the end of the Government's lease by the lapse of time or, in the case of the Tool Company, by a "termination on condemnation" clause. With the exception of the Petty Motor Company and the Independent Pneumatic Tool Company, the tenants were tenants under oral contracts on a month to month basis. This entitled them only to notice of termination fifteen days prior to the end of a rental period. Utah Code Ann. (1943), Title 104–60–3 (2). The Petty Motor Company held a lease which expired October 31, 1943, with an option for an additional year. Consequently its rights under its lease ended before those which the Government sought by its petition.

The lease of the Independent Pneumatic Tool Company included a clause for its termination on the Federal Government's entry into possession of the leased property for public use.[4] The events connected with the Government's entry just set out appear to meet the requirements

---

[3] In *United States* v. *General Motors Corp.*, 323 U. S. 373, note 3, a different situation existed. While the estate there sought did not necessarily expire during the existing national emergency, the order for possession, the verdict and the judgment were for that part of the leasehold interest in the property extending from June 19, 1942, to June 30, 1943. We said: "The case now presented involves only the original taking for one year. If, on remand, the case be treated as involving the Government's option of renewal, the additional value of that interest must be included in the compensation awarded."

[4] The clause reads as follows:

"If the whole or any part of the demised premises shall be taken by Federal, State, county, city, or other authority for public use, or

for termination. This does not seem to be controverted. The contention of the Tool Company, as we understand it, is that the tenant is barred from claiming any "of the award of the landlord" but that the condemnor is not relieved of liability to the lessee. This position seems inconsistent. If the Tool Company, with its termination on condemnation clause, was the only tenant and condemnation of all interests in the property was decreed, the landlord would take the entire compensation because the lessee would have no rights against the fund. There would appear to be no greater right where the landlord has been otherwise satisfied. Condemnation proceedings are *in rem, Duckett & Co.* v. *United States,* 266 U. S. 149; *United States* v. *Dunnington,* 146 U. S. 338, 350–54, and compensation is made for the value of the rights which are taken. *United States* v. *General Motors Corp.,* 323 U. S. 373, 379. The Tool Company had contracted away any rights that it might otherwise have had. We are dealing here with a clause for automatic termination of the lease on a taking of property for public use by governmental authority. With this type of clause, at least in the absence of a contrary state rule, the tenant has no right which persists beyond the taking and can be entitled to nothing.[5]

---

under any statute, or by right of eminent domain, then when possession shall be taken thereunder of said premises, or any part thereof, the term hereby granted and all rights of the Lessee hereunder shall immediately cease and terminate, and the Lessee shall not be entitled to any part of any award that may be made for such taking, nor to any damages therefor except that the rent shall be adjusted as of the date of such termination of the Lease."

[5] See *United States* v. *10,620 Square Feet in Canadian Pacific Bldg.,* 62 F. Supp. 115; *United States* v. *8286 Sq. Ft. of Space,* 61 F. Supp. 737, 740–43; *United States* v. *21,815 Square Feet of Land,* 59 F. Supp. 219; *United States* v. *3.5 Acres of Land,* 57 F. Supp. 548; *United States* v. *Improved Premises,* 54 F. Supp. 469, 472; *Goodyear Shoe Machinery Co.* v. *Boston Terminal Co.,* 176 Mass. 115, 57 N. E. 214. Cf. *United States* v. *Entire Fifth Floor in Butterick Bldg.,* 54 F. Supp. 258.

In order to inform the jury as to the value of the tenants' interests where there was a right to continue the occupation of their respective premises, the trial court permitted the introduction of evidence, over the Government's objections, not only as to the value on the market of the use and occupancy, over and above the agreed rent, for any remainder of a term which may have existed in the respective tenants after they were dispossessed, but also allowed evidence of the expenses incurred in moving and the reinstallation of equipment. The trial court's instructions made clear that the evidence was submitted to the jury not for a finding on the cost to the tenants of relocating their businesses but as an element in determining the "value" of their tenancies for that portion of their term which was left upon the termination of the lease. The admission of the evidence and its submission to the jury was approved by the circuit court of appeals on the theory that consideration of such elements of cost was compelled by the *General Motors* case. 323 U. S. 373. The court of appeals recognized that here the Government took the entire term of all the lessees except the Tool Company and possibly the Petty Motor Company but was of the opinion that the principles of the *General Motors* case applied when any leasehold was taken. 147 F. 2d 912, 914. In so holding, the court of appeals was in error.

The Constitution and the statutes do not define the meaning of just compensation. But it has come to be recognized that just compensation is the value of the interest taken. This is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called "market value." It is recognized that an owner often receives less than the value of the property to him but experience has shown that the rule is reasonably satisfactory. Since "market value" does not fluctuate with the needs of condemnor or condemnee but with general demand for the property, evidence of loss of

profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings. *Mitchell* v. *United States,* 267 U. S. 341, 344; *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 281; *Potomac Electric Power Co.* v. *United States,* 66 App. D. C. 77, 85 F. 2d 243; Orgel, Valuation under Eminent Domain, chap. V. For the purposes of these cases, it is immaterial whether the Government actually took the leaseholds of the tenants in addition to taking the temporary use of the fee or only destroyed the tenants' right of occupancy. If any property is taken, compensation is required. Cf. *United States* v. *Welch,* 217 U. S. 333.

There was a complete taking of the entire interest of the tenants in the property. It has been urged that to measure just compensation for the taking of a leasehold by its value on the market or by the difference between a fair rental as of the time of taking and the agreed rent, is unfair. It is said the unfairness comes from the fact that there is really no market for leaseholds; that their value is something peculiarly personal to the lessee.[6] The same thing is true as to incidental and consequential damages to the owner of a fee. We think the sounder rule under the federal statutes is to treat the condemnation of all interests in a leasehold like the condemnation of all interests in the fee. In neither situation should evidence of the cost of removal or relocation be admitted. Such costs are apart from the value of the thing taken. They are personal to the lessee.[7] The lessee would have to

[6] See *Metropolitan West Side Elevated R. Co.* v. *Siegel,* 161 Ill. 638, 44 N. E. 276; *McMillin Printing Co.* v. *Pittsburg, C. & W. R. Co.,* 216 Pa. 504, 65 A. 1091.

[7] Compare *United States* v. *Improved Premises,* 54 F. Supp. 469, 472; *United States* v. *Entire Fifth Floor in Butterick Bldg., idem,* 261; *United States* v. *Certain Parcels of Land, idem,* 562; *Wm. Wrigley, Jr., Co.* v. *United States,* 75 Ct. Cls. 569; *Thermal Syndicate, Ltd.* v. *United States,* 81 Ct. Cls. 446, 454.

move at the end of his term unless the lease was renewed. The compensation for the value of his leasehold covers the loss from the premature termination except in the unusual situation where there is a higher cost for present relocation than for a future.

United States v. *General Motors Corp.* was a different case. In it only a portion of the lease was taken. We there said, p. 382:

> "When it takes the property, that is, the fee, the lease, whatever he may own, terminating altogether his interest, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of 'consequential damage' as that conception has been defined in such cases. Even so the consequences often are harsh. For these whatever remedy may exist lies with Congress."

There is a fundamental difference between the taking of a part of a lease and the taking of the whole lease. That difference is that the lessee must return to the leasehold at the end of the Government's use or at least the responsibility for the period of the lease which is not taken rests upon the lessee. This was brought out in the *General Motors* decision.[8] Because of that continuing obligation

---

[8] 323 U. S. 373, 380, 383:

"The question posed in this case then is, shall a different measure of compensation apply where that which is taken is a right of temporary occupancy of a building equipped for the condemnee's business, filled with his commodities, and presumably to be reoccupied and used, as before, to the end of the lease term on the termination of the Government's use?"

"Some of the elements which would certainly and directly affect the market price agreed upon by a tenant and a sublessee in such an extraordinary and unusual transaction would be the reasonable cost of moving out the property stored and preparing the space for occupancy by the subtenant. That cost would include labor, materials, and transportation. And it might also include the storage

in all takings of temporary occupancy of leaseholds, the value of the rights of the lessees which are taken may be affected by evidence of the cost of temporary removal.

Upon a new trial, each tenant, other than the Independent Pneumatic Tool Company, should be permitted to prove damages for the condemnation of its rights for any remainder of its term which existed after its ouster by the order of possession but not costs of moving or relocation.[9] The remainder which may exist will depend upon the Utah law on the requirement for notice to terminate the tenancies at will.[10] Some tenants of this group will not be entitled to anything because the notice given them by the order of possession is more than the Utah statutory requirement. The value of the remainder of the term of the Petty Motor Company's lease includes the value of

---

of goods against their sale or the cost of their return to the leased premises. Such items may be proved, not as independent items of damage but to aid in the determination of what would be the usual—the market—price which would be asked and paid for such temporary occupancy of the building then in use under a long-term lease."

[9] The fact that some tenants had occupied their leaseholds by mutual consent for long periods of years does not add to their rights. *Emery* v. *Boston Terminal Co.*, 178 Mass. 172, 185, 59 N. E. 763:

"It appeared that the owners had been in the habit of renewing the petitioners' lease from time to time, and an attempt was made to give this fact the aspect of an English customary tenant right. The evidence merely showed that the landlords and the tenants were mutually satisfied and were likely to keep on together. It added nothing except by way of corroboration to the testimony that they both intended to keep on. Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of the petitioners' holding, they could not be taken into account in determining what the respondent should pay. They added nothing to the tenants' legal rights, and legal rights are all that must be paid for. Even if such intentions added to the saleable value of the lease, the addition would represent a speculation on a chance, not a legal right. The court was right in excluding expert evidence as to an increase in value from that source."

[10] *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 279.

the right to a renewal for a year, if such right continues under Utah law, as well as the value of the period ending October 31, 1943. The measure of damages is the value of the use and occupancy of the leasehold for the remainder of the tenant's term, plus the value of the right to renew in the lease of Petty, less the agreed rent which the tenant would pay for such use and occupancy.

Reversed.

MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON took no part in the consideration or decision of these cases.

MR. JUSTICE RUTLEDGE, concurring.

I agree with the result and with the Court's opinion, but with an important reservation which I think should be made expressly.

In *United States* v. *General Motors Corp.*, 323 U. S. 373, the problem was stated as one of first impression, namely, to ascertain the just compensation the Fifth Amendment requires where, under power of eminent domain, temporary occupancy of part of a leased building is taken from a tenant holding under a long-term lease. The Court distinguished the case from others where the taking is of the owner's entire interest, whether a fee, a term of years or some other interest. Sensing the danger of applying to such a situation the strict rules limiting the amount of compensation in the latter types of cases, the Court said this would open a way for the Government to devise its condemnation, by chopping the owner's interest into bits, taking some and leaving him with others in suspended animation, so that the Amendment's guaranty might become an instrument of confiscation, not one of just compensation for what was taken. Such a procedure, the Court further stated, would be "neither the 'taking' nor the 'just compensation' the Fifth Amendment contemplates." 323 U. S. at 382.

The novelty of such a form of taking, together with the obviously confiscatory consequences, in a practical sense, for the owner, led the Court to hold that the usual measure of just compensation applicable when all the owner's leasehold is condemned, namely, payment of only the long-term rental of an empty building fixed by the terms of his lease or by market value, or less, would not suffice to compensate for carving out of the lease a right of "temporary use." Other elements were required to be taken into account as evidence of the value of what was taken.

These included (1) "what would be the market rental value of such a building on a lease by the long-term tenant to the temporary occupier," 323 U. S. at 382, which in addition to the bearing of the long-term rental as one element would include as other elements affecting "certainly and directly . . . the market price agreed upon by a tenant and a sublessee in such an extraordinary and unusual transaction," 323 U. S. at 383, (2) the reasonable cost of moving out the property stored on the premises and of preparing the space for occupancy by the subtenant, including the cost of labor, materials and transportation; and possibly also the cost of storage of goods removed against their sale or the cost of their return to the premises. In addition, for fixtures and permanent equipment destroyed or depreciated in value by reason of the taking, the Court held that the tenant whose lease was so cut up was entitled to compensation as for property taken, under the settled rule of cited authorities. 323 U. S. at 383.

Finally, in a footnote the Court pointed out that after judgment the Government had been allowed to amend its petition so as to include in the interest taken a yearly right of renewal, after which the trial court entered a new judgment for the original figure. Stating that these facts were not taken to alter the question presented here, which involved only the original taking for one year, the Court

went on expressly to rule: "If, on remand, the case be treated as involving the Government's option of renewal, the additional value of that interest must be included in the compensation awarded." 323 U. S. at 376, note 3.

Thus the Court applied a rule of compensation to the case of carving out a temporary or short-term use from a longer term very different from that generally applicable when the owner's entire interest is taken. The purpose and the basis for this were to give substance, in practical effect, to the Amendment's explicit mandate for payment of "*just* compensation" in cases of such extraordinary "takings" and to prevent those words from being whittled down by legalistic construction into means for practical confiscation.

In this case the Court has construed all of the takings as being of the tenant-owners' entire interests. This is clearly the case, on the record, with respect to all except Petty Motor Co. As to it I have doubt but I accept the Court's construction that the Government has condemned its entire leasehold interest in the premises and therefore must pay the full value of that term according to the usual rules in such cases.

My reservation, however, has to do with a possibility this record does not present as an accomplished fact in the case of the Petty Co., but does present as a contingency which might be realized and, in that event, would have a direct and inescapable relation to the ruling concerning the quantum of compensation in the *General Motors* case.

In that case the interest taken was for one year out of a twenty-year term which had six years to run from the time of the original condemnation. There was also added by the later amendment the right of renewal from year to year which, if exercised, might have extended the term taken to the end of the leasehold interest.

In this case a converse sort of taking is presented by the Petty Motor situation. That company held a lease expiring October 31, 1943, with an option for an additional

year which if exercised would extend the term to October 31, 1944. The condemnation petition was filed November 9, 1942, when the Petty lease had almost one year to run in any event and two if the option should be exercised. The Government sought to take the use of the building through June 30, 1945, but with the option to surrender the premises on June 30, 1943, or June 30, 1944, on giving sixty days advance notice in writing.

It is this option which I think makes dubious the ruling that all of the Petty Motor Company's interest was "taken." In my opinion it was only "taken" contingently. For, if the option is valid, quite obviously the Government was free to surrender, by giving notice, on June 30, 1943, in which event Petty's lease would have been in force until the following October 31 in any event, or on June 30, 1944, in which case Petty's lease might have continued in force until October 31, 1944. In either event the case would have fallen squarely within the *General Motors* situation and ruling.

In my opinion that ruling and the requirement of paying compensation according to the measure it prescribes apply whether the Government carves out part of the tenant-owner's term by one method of stating what it takes or another. That is, for this purpose, it makes no difference whether the Government "takes" the temporary use for part of the term but adds to this a right of renewal periodically which if exercised will extend the term taken beyond the term of the lease; or, on the other hand, purports to take a term which extends beyond that of the leasehold interest, but reserves the right to cut this down periodically so that in fact it may surrender the premises before the leasehold expires and thus carve out of it a shorter term, just as in the *General Motors* taking.

Whether the chopping up is accomplished one way or the other, the effects for the owner are the same, the "taking" is in substance the same, and the compensation

is required, under the *General Motors* decision, to be the same. That ruling cannot be avoided by inverting the length of the term specified and, correlatively, the character of the option added. Nor can it be avoided by construing the term taken, in view of the contingent option, in cases of the Petty type as including all of the interest of the lessee, if in fact the Government exercises the option and surrenders the premises before the lessee's term expires. Upon such a showing the *General Motors* rule would apply and the owner-lessee would be entitled to recover compensation including all of the elements specified in that rule, subject only to making proof of them.

This question I think sufficiently important to be explicitly reserved for decision when a case arises requiring application of the *General Motors* rule to such a situation. I do not understand the Court to rule to the contrary, since there is no showing on this record that the Government has exercised its option. I therefore concur in the decision as it is rendered upon the record which has been presented.

NATIONAL LABOR RELATIONS BOARD *v.* CHENEY CALIFORNIA LUMBER CO.

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

No. 319. Argued January 9, 10, 1946.—Decided February 25, 1946.

1. Upon findings that an employer had engaged in unfair labor practices in violation of § 8 of the National Labor Relations Act, the National Labor Relations Board ordered the employer to cease and desist from (a) prohibited discrimination against employees in regard to hire or tenure, and "(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of 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 concerted activities, for the purpose of collective bargaining or other mutual aid or protection,

as guaranteed in Section 7 of the Act." Upon the Board's petition for enforcement of the order, the circuit court of appeals struck out paragraph (b). *Held* that, since no objection to the paragraph was raised before the Board or any agent thereof, and since the failure or neglect was unexcused, the circuit court of appeals, by virtue of § 10 (e) of the Act, was without authority to strike the paragraph from the order. P. 387.

2. *Labor Board* v. *Express Publishing Co.*, 312 U. S. 426, differentiated. P. 387.

149 F. 2d 333, reversed.

Upon a petition to the circuit court of appeals for enforcement of an order of the Labor Board, the court modified the order and decreed enforcement as modified. 149 F. 2d 333. This Court granted certiorari. 326 U. S. 706. *Reversed,* p. 389.

Ruth Weyand argued the cause for petitioner. With her on the brief were *Solicitor General McGrath* and *Isadore Greenberg.*

No appearance for respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Cheney California Lumber Company, the respondent, operated a sawmill at Greenville, California. Some employees of the Company were members of Lumber and Sawmill Workers, Local 2647, affiliated with the American Federation of Labor. The union complained to the National Labor Relations Board that the Company had engaged in unfair labor practices, in violation of § 8 of the Wagner Act, 49 Stat. 449, 452, 29 U. S. C. § 158. Following the usual procedure, there was a hearing before a trial examiner who made an intermediate report, including specific recommendations for a cease-and-desist order. The Company filed no exceptions to this report, nor did it request an oral argument before the Board. Upon due consideration, the Board adopted the findings, conclusions, and recommendations of the trial examiner. 54 N. L. R. B.

205. Thereupon the Board asked the Circuit Court of Appeals for the Ninth Circuit to enter a decree upon its order. The Company then proposed modifications of the Board's order, which were granted by the court below. 149 F. 2d 333. The Government petitioned for *certiorari* urging that one of the changes made by the Circuit Court of Appeals was based on a misconception of *Labor Board* v. *Express Publishing Co.*, 312 U. S. 426, as to the allowable scope of the Board's power "to effectuate the policies" of the Act. § 10 (c), 49 Stat. 454, 29 U. S. C. § 160 (c). So we brought the case here. 326 U. S. 706. Upon the argument, this was the only modification to which the Government objected. We shall not consider the others. The court below struck out from the Board's order paragraph 1 (b) whereby the Company was ordered, after appropriate treatment of the unfair labor practice arising from prohibited discharge of employees, to cease and desist from

> "(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of 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 concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act."

The court found warrant for its excision of this provision in *Labor Board* v. *Express Publishing Co., supra.* That case, however, recognized that it was within the power of the Board to make an order precisely like 1 (b). It merely held that whether such an inclusive provision as 1 (b) is justified in a particular case depends upon the circumstances of the particular case before the Board. See 312 U. S. at 433, 437–38. Here the trial examiner recommended the inclusion of 1 (b) on the basis of his review of past hostilities by the Company against efforts at unionization; no exception was made either to the findings or to this recommendation; upon full consideration of the record the Board adopted the trial examiner's

recommendation; no objection was raised by the Company until after the Board sought judicial enforcement of its order. The objection came too late.

When judicial review is available and under what circumstances, are questions (apart from whatever requirements the Constitution may make in certain situations) that depend on the particular Congressional enactment under which judicial review is authorized. Orders of the National Labor Relations Board are enforceable by decrees of circuit courts of appeals. In such an enforcement proceeding, a court of appeals may enforce or modify or set aside the Board's order. § 10 (e), 49 Stat. 454, 29 U. S. C. § 160 (e). Since the court is ordering entry of a decree, it need not render such a decree if the Board has patently traveled outside the orbit of its authority so that there is, legally speaking, no order to enforce. But the proper scope of a Board order upon finding unfair labor practices calls for ample discretion in adapting remedy to violation. We have said that "in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review." *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 194.

A limitation which Congress has placed upon the power of courts to review orders of the Labor Board is decisive of this case. Section 10 (e) of the Act commands that "No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." We have heretofore had occasion to respect this explicit direction of Congress. *Marshall Field & Co.* v. *Labor*

Board, 318 U. S. 253; and see *May Department Stores Co.* v. *Labor Board,* 326 U. S. 376, 386, n. 5. By this provision, Congress has said in effect that in a proceeding for enforcement of the Board's order the court is to render judgment on consent as to all issues that were contestable before the Board but were in fact not contested. Cf. *Pope* v. *United States,* 323 U. S. 1. We can say of this case, as was said of the *Marshall Field* case, *supra,* that it "gives emphasis to the salutary policy adopted by § 10 (e) of affording the Board opportunity to consider on the merits questions to be urged upon review of its order." *Marshall Field & Co.* v. *Labor Board, supra,* at 256. The appropriateness of such a prohibition as the Board's order contains depends, as the *Express Publishing Company* case, *supra,* abundantly shows, upon evidence found by the Board disclosing a course of conduct against which such an order may be the only proper remedy. The Board here so found. Justification of such an order, which necessarily involves consideration of the facts which are the foundation of the order, is not open for review by a court if no prior objection has been urged before the case gets into court and there is a total want of extraordinary circumstances to excuse "the failure or neglect to urge such objection . . ." Congress desired that all controversies of fact, and the allowable inferences from the facts, be threshed out, certainly in the first instance, before the Board. That is what the Board is for. It was therefore not within the power of the court below to make the deletion it made.

Judgment reversed.

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

MR. CHIEF JUSTICE STONE, concurring.

I concur on a ground which the Court's opinion points out and which is alone sufficient to sustain its decision,

namely, that the court below erroneously applied *Labor Board* v. *Express Publishing Co.*, 312 U. S. 426. But I cannot say that when the court below was appealed to as a court of equity to enforce by its injunction the Board's order, § 10 (e) of the National Labor Relations Act rendered the court powerless to frame its own injunction consistently with the record, on which that section requires it to act, and in conformity to accepted principles governing the scope of the injunction; or that if the tables were turned the section would require the reviewing court to repeat, by the excessive scope of its injunction, the very abuse of power condemned by the *Express Publishing Company* case.

The prohibition by § 10 (e) of the court's consideration of objections which the parties did not urge before the Board is a limitation upon the court's review of the grounds for granting or denying relief. This Court has treated it as such. See *Marshall Field & Co.* v. *Labor Board*, 318 U. S. 253. But we have not held that § 10 (e) could, and I think it cannot rightly, be construed to be also a limitation on the court's power to conform its own process to accepted legal standards applied to the "entire record" which § 10 (e) requires to be filed with it. Nor is that prohibition a command to the court to act as a mere ministerial agency to execute the order of the Board, without regard to those standards which control the court's use of its own process, even though the Board and the parties have ignored them.

Only recently we have held that the imposition of a mandatory duty on a federal court of equity to restrain violations of a statute is not to be taken as depriving the court of its traditional power to administer its remedies according to its own governing principles and in conformity to the standards of public interest. See *Hecht Co.* v. *Bowles*, 321 U. S. 321, 331. In that case we held that a command explicitly addressed to a court of equity,

by § 205 (a) of the Emergency Price Control Act of 1942, to grant an injunction enforcing the act when violation of it is shown, did not deprive the court of its equitable discretion to grant or withhold an injunction. It has been well said that § 205 (a), which directs that the court upon showing of violation "shall" grant the injunction, "does not change the historic conditions for the exercise by courts of equity of their power to issue injunctions . . ." 321 U. S. 331.

It should likewise be held that the present statute does not alter the power of a court of equity to frame its injunction according to equitable principles applied in the light of the record on which it must act. Here the statute is not mandatory. It does not purport to curtail the court's power to define the scope of its process. The section only confers on the court the power to make "a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." This emphasizes what was implicit in the statute involved in the *Hecht* case, and made explicit by the opinion, that when a statute authorizes an appeal to equity to enforce a liability created by statute, the exercise is invoked of those powers which pertain to it as a court of equity. This at least includes the power to fix, on its own motion, the scope of the decree which it may be required to enforce by contempt proceedings, in conformity to recognized equitable standards applied to the record before it.

HOLMBERG ET AL. *v.* ARMBRECHT ET AL.

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

No. 505. Argued February 1, 1946.—Decided February 25, 1946.

1. Decision of a suit in a federal court to enforce a federally created equitable right is not controlled by the statute of limitations of the State of the forum. *Guaranty Trust Co.* v. *York,* 326 U. S. 99, distinguished. Accordingly, a class suit by creditors of a joint stock land bank to enforce the liability imposed upon shareholders of the bank by § 16 of the Federal Farm Loan Act is not barred by the state statute of limitations. P. 394.
2. Statutes of limitations are not controlling measures of equitable relief, but have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor's intervention, namely, whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair. P. 396.

150 F. 2d 829, reversed.

From a judgment for the plaintiffs in a suit to enforce a statutory liability of stockholders of a farm loan bank, the defendants appealed. The circuit court of appeals reversed. 150 F. 2d 829. This Court granted certiorari. 326 U. S. 712. *Reversed and remanded,* p. 398.

Clarence Fried argued the cause for petitioners. With him on the brief was *Edmund Burke, Jr.*

Edgar M. Sousa argued the cause and filed a brief for respondents.

Briefs were filed as *amici curiae* by *Solicitor General McGrath, Robert L. Stern, Roger S. Foster, Milton V. Freeman* and *Arnold R. Ginsburg* for the United States, and by *Saul J. Lantz* and *Isadore H. Cohen* for the Trustees of Central States Electric Corporation, urging reversal.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a suit in equity by petitioners on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis to enforce the liability imposed upon shareholders of the Bank by § 16 of the Federal Farm Loan Act, equal to one hundred percent of their holdings. 39 Stat. 360, 374, 12 U. S. C. § 812.[1] The Bank closed its doors in May, 1932. Its debts exceeded its assets by more than $3,000,000, the amount of its outstanding stock. Suit was accordingly brought in the United States District Court for the District of Minnesota for determining and collecting the assessment due under § 16. *Holmberg* v. *Southern Minnesota Joint Stock Land Bank,* 10 F. Supp. 795. Armbrecht, a New York stockholder, was sued there. The suit failed on procedural grounds and was dismissed without prejudice to further action. *Holmberg* v. *Anchell,* 24 F. Supp. 594, 598. Not until 1942, so it is alleged, did petitioners learn that Jules S. Bache had concealed his ownership of one hundred shares of the Bank stock under the name of Charles Armbrecht. The present action against Armbrecht and Bache was begun in the Southern District of New York in November, 1943. Bache died during pendency of the suit and his executors were substituted as parties.

The respondents made two defenses: (1) they invoked a New York statute of limitation barring such an action after ten years, New York Civil Practice Act, § 53; (2) they urged laches, claiming that petitioners had unduly

[1] "Shareholders of every joint stock land bank organized under this Act shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares."

delayed commencement of the suit. Neither defense was sustained in the District Court, and judgment went against the respondents. The judgment was reversed by the Circuit Court of Appeals. 150 F. 2d 829. That court did not reach the defense of laches because it held, relying on *Guaranty Trust Co.* v. *York,* 326 U. S. 99, that the New York statute of limitation was controlling and that the mere lapse of ten years barred the action. Since the case raises a question of considerable importance in enforcing liability under federal equitable enactments, we brought it here for review. 326 U. S. 712.

In *Guaranty Trust Co.* v. *York, supra,* we ruled that when a State statute bars recovery of a suit in a State court on a State-created right, it likewise bars recovery of such a suit on the equity side of a federal court brought there merely because it was "between Citizens of different States" under Art. III, § 2 of the Constitution. The amenability of such a federal suit to a State statute of limitation cannot be regarded as a problem in terminology, whereby the practical effect of a statute of limitation would turn on the content which abstract analysis may attribute to "substance" and "procedure." We held, on the contrary, that a statute of limitation is a significant part of the legal rules which determine the outcome of a litigation. As such, it is as significant in enforcing a State-created right by an exclusively equitable remedy as it is in an action at law. But in the *York* case we pointed out with almost wearisome reiteration, in reaching this result, that we were there concerned solely with State-created rights. For purposes of diversity suits a federal court is, in effect, "only another court of the State." *Guaranty Trust Co.* v. *York, supra,* at 108. The considerations that urge adjudication by the same law in all courts within a State when enforcing a right created by that State are hardly relevant for determining the rules which bar enforcement of an equitable right created not by a State legislature but by Congress.

If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive. See, *e. g., Herget* v. *Central Bank Co.*, 324 U. S. 4. The rub comes when Congress is silent. Apart from penal enactments, Congress has usually left the limitation of time for commencing actions under national legislation to judicial implications. As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation. See *Campbell* v. *Haverhill*, 155 U. S. 610; *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390; *Rawlings* v. *Ray*, 312 U. S. 96. The implied absorption of State statutes of limitation within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles. See *Board of Comm'rs* v. *United States*, 308 U. S. 343, 349–50, 351–52.

The present case concerns not only a federally-created right but a federal right for which the sole remedy is in equity. *Wheeler* v. *Greene*, 280 U. S. 49; *Christopher* v. *Brusselback*, 302 U. S. 500; *Russell* v. *Todd*, 309 U. S. 280, 285. And so we have the reverse of the situation in *Guaranty Trust Co.* v. *York, supra.* We do not have the duty of a federal court, sitting as it were as a court of a State, to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State. We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress. When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights.

Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor's intervention, namely, whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair. See *Russell* v. *Todd, supra,* at 289. "There must be conscience, good faith, and reasonable diligence, to call into action the powers of the court." *McKnight* v. *Taylor,* 1 How. 161, 168. A federal court may not be bound by a State statute of limitation and yet that court may dismiss a suit where the plaintiffs' "lack of diligence is wholly unexcused; and both the nature of the claim and the situation of the parties was such as to call for diligence . . ." *Benedict* v. *City of New York,* 250 U. S. 321, 328. A suit in equity may fail though "not barred by the act of limitations . . ." *McKnight* v. *Taylor, supra; Alsop* v. *Riker,* 155 U. S. 448.

Equity eschews mechanical rules; it depends on flexibility. Equity has acted on the principle that "laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties." *Galliher* v. *Cadwell,* 145 U. S. 368, 373; see *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483, 488–89. And so, a suit in equity may lie though a comparable cause of action at law would be barred. If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time.

Equity will not lend itself to such fraud and historically has relieved from it. It bars a defendant from setting up

such a fraudulent defense, as it interposes against other forms of fraud. And so this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." *Bailey* v. *Glover,* 21 Wall. 342, 348; and see *Exploration Co.* v. *United States,* 247 U. S. 435; *Sherwood* v. *Sutton,* 5 Mason 143.

This equitable doctrine is read into every federal statute of limitation. If the Federal Farm Loan Act had an explicit statute of limitation for bringing suit under § 16, the time would not have begun to run until after petitioners had discovered, or had failed in reasonable diligence to discover, the alleged deception by Bache which is the basis of this suit. *Bailey* v. *Glover, supra; Exploration Co.* v. *United States, supra; United States* v. *Diamond Coal Co.,* 255 U. S. 323, 333. It would be too incongruous to confine a federal right within the bare terms of a State statute of limitation unrelieved by the settled federal equitable doctrine as to fraud, when even a federal statute in the same terms would be given the mitigating construction required by that doctrine.

We conclude that the decision in the *York* case is inapplicable to the enforcement of federal equitable rights. The federal doctrine applied in *Bailey* v. *Glover, supra,* and in the series of cases following it, governs. When the liability, if any, accrued in this case, *cf. Rawlings* v. *Ray, supra,* at 98, and whether the petitioners are chargeable with laches, see *Foster* v. *Mansfield, C. & L. M. R. Co.,* 146 U. S. 88, 99; *Southern Pacific Co.* v *Bogert, supra,* at 488, are questions as to which we imply no views. We

leave them for determination by the Circuit Court of Appeals to which the case is remanded.

Reversed and remanded.

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

MR. JUSTICE RUTLEDGE, concurring.

I agree with the result and with the opinion, reserving however any intimation, explicit or implied, as to the full scope to which the doctrine of *Guaranty Trust Co.* v. *York*, 326 U. S. 99, may be applied in diversity cases. Many of the considerations now stated by the Court for refusing to extend that doctrine to cases concerning federally created rights, relating to the flexibility of remedies in equity either to cut down or to extend the state statutory period of limitations, seemed to me to be applicable whenever a federal court might be asked to extend the aid of its equity arm, whether in its diversity jurisdiction or other. The ruling in the *York* case however may be accepted generally for diversity cases and, moreover, rejected for extension to cases of this sort, without indicating that there may not be some cases even of diversity jurisdiction to which federal courts may not be required to apply it. With this reservation I join in the Court's action.

POFF, EXECUTRIX, *v.* PENNSYLVANIA RAILROAD CO.

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

No. 484. Argued February 1, 1946.—Decided February 25, 1946.

The Federal Employers' Liability Act provides that the liability of the carrier under the Act shall extend, in case of the death of the employee, "to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee." *Held,* where a decedent left no spouse, children or parents, a cousin who was dependent on the decedent had a right of recovery, even though the decedent was survived also by nearer next of kin who were not dependent and could not recover. P. 401.

150 F. 2d 902, reversed.

In a suit under the Federal Employers' Liability Act, the district court gave judgment for the plaintiff. 57 F. Supp. 625. The circuit court of appeals reversed. 150 F. 2d 902. This Court granted certiorari. 326 U. S. 712. *Reversed,* p. 402.

Morris A. Wainger argued the cause and filed a brief for petitioner.

Ray Rood Allen argued the cause and filed a brief for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Congress provided in the Federal Employers' Liability Act (35 Stat. 65, 45 U. S. C. § 51) that the carrier's liability in case of the death of an employee runs

> "to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's

parents; and, if none, then of the next of kin dependent upon such employee . . ."

The deceased, residing in Pennsylvania, was a railroad engineer employed by respondent and was killed while engaged in its service in interstate commerce. Respondent's negligence was conceded. The deceased left no widow, children, or parents. His nearest surviving relatives were two sisters and a nephew, none of whom was in any way financially dependent on him. But petitioner, who was his cousin, was a member of his household and wholly dependent on him for support. The district court rendered judgment for petitioner. 57 F. Supp. 625. The circuit court of appeals reversed, holding that petitioner was not entitled to recover since there were nearer relatives, though not dependent ones, who survived the deceased. 150 F. 2d 902. The case is here on a petition for a writ of certiorari which we granted because of the importance of the question.

We assume, without deciding, that the circuit court of appeals correctly concluded that members of the second or third class, irrespective of their need, are not entitled to recover if there survives a member of the prior class. Cf. *Notti* v. *Great Northern R. Co.*, 110 Mont. 464, 104 P. 2d 7. The liability is not "to the several classes collectively" but in the alternative to one of the three classes. *Chicago, B. & Q. R. Co.* v. *Wells-Dickey Trust Co.*, 275 U. S. 161, 163. Thus to an extent, at least, the order of priority is determined by relationship, not by dependency. See *New Orleans & N. E. R. Co.* v. *Harris*, 247 U. S. 367. Cf. *Lytle* v. *Southern R. Co.*, 152 S. C. 161, 149 S. E. 692. But the circuit court of appeals went further and applied that principle to determine which members of the third class (next of kin) were entitled to recover. It said that since parents or grandchildren, dependent on the deceased, are left without remedy if a widow or child survives, Congress could not have meant to recognize remote

members of the deceased's other kin, similarly situated. It read "next of kin dependent upon such employee" to mean "next of kin, *if* dependent upon such employee." Since the two sisters and nephew were the "next of kin" who would take to the exclusion of petitioner under Pennsylvania's law of descent and distribution [1] if the deceased died intestate, petitioner was barred here.

We read the statute differently.

It is clear that "next of kin" is determined by state law. *Seaboard Air Line* v. *Kenney,* 240 U. S. 489. State law governs whether it is necessary to determine if one relative is closer than another, or if a claimant falls within or without the class. But under this Act, unlike the state statutes of descent and distribution, a member of the third class must be not only next of kin but also dependent on the deceased in order to recover. The emphasis on dependency suggests that Congress granted the right of recovery to such next of kin as were dependent on the deceased. And that interpretation seems to us to be more in harmony with the Act than the construction adopted by the circuit court of appeals.

We are not warranted in treating as an antecedent class the nearer next of kin who are not dependent. That would be to rewrite the statute. Congress has created three classes, not four or more. Yet to hold that the existence of nearer next of kin who are not dependent bars recovery by more remote next of kin who are dependent is to assume that the former constitute a preferred class. Congress, however, placed all next of kin in one class. To use dependency as the selective factor in determining which members of a particular class may recover is no innovation under this Act. For the Court held in *Gulf, C. & S. F. R. Co.* v. *McGinnis,* 228 U. S. 173, that in a suit brought by a widow as administratrix for the benefit of herself and four children, a judgment in favor of an adult child who

[1] See 20 Purdon's Pa. Stats. Ann. §§ 62, 63, 66, 67.

was married and resided with and was maintained by her husband would not be sustained in absence of a showing of pecuniary loss. Moreover, when Congress made the widow preferred over the parents and both the widow and parents preferred over the next of kin, it barred the deferred classes from recovering by creating a preferred class which could recover. Yet if respondent's theory is adopted, the nearer next of kin who are not dependent are treated as a preferred class not for the purpose of allowing them to recover but to defeat a recovery by all next of kin.[2] It may be true, as was the case in *Chicago, B. & Q. R. Co.* v. *Wells-Dickey Trust Co., supra,* that the cause of action may be lost to the preferred class and to the deferred class as well. But that result, though possible, flows not from the nature of the preference but from such circumstances as the failure promptly to pursue the claim. Yet it would be a radical departure from the statutory scheme to do within the third class what Congress has not done between the classes and defeat all recovery by holding that the cause of action vested in one who could not under any circumstances sue. Under this Act deferment of a class is based on the existence of members of a preferred class to whom Congress has granted the right of recovery. We find no compulsion in the policy or language of the Act to adopt a more stringent interpretation when we come to determining what members of the third class may sue.

Reversed.

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

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

Congress might well have allowed recovery as a matter of course to any near relative of a railroad employee

[2] It is clear that the two sisters and the nephew, the nearest surviving relatives, could not recover. *Lindgren* v. *United States,* 281 U. S. 38.

whose death was due to a carrier's negligence. Congress chose not to do so. Congress merely gave a right of action "to certain relatives dependent upon an employé wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death." *Michigan Central R. Co.* v. *Vreeland,* 227 U. S. 59, 68; and see *Gulf, C. & S. F. R. Co.* v. *McGinnis,* 228 U. S. 173, 175; *Garrett* v. *Louisville & Nashville R. Co.,* 235 U. S. 308, 313. Congress might have extended the benefits of its legislation to any dependent relative by using a colloquial description such as "the nearest dependent surviving relative." It chose not to do that. On the contrary, it used the phrase "next of kin," a term of precise meaning in the law. In sum, Congress carefully limited the relatives eligible for compensation for an employee's death and strictly designated the basis of eligibility.[1]

What Congress did was thus analyzed by the court below:

> "Congress, which was willing to leave unremedied loss suffered by parents, or grandchildren, who might be totally dependent upon the deceased, could not have meant to recognize remote members of the deceased's other kin, similarly situated. The plaintiff's interpretation does not fulfill any rational purpose; it merely introduces an exception at the precise place where an exception is least to be desired or expected; it mutilates the statute, as much in its purpose as in its language. As in the case of the first two preferred classes, 'next of kin' is defined by its hereditary, not by its pecuniary, relation to the deceased;

[1] "That every common carrier by railroad . . . [in interstate and foreign commerce] shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death . . ." 35 Stat. 65, 53 Stat. 1404, 45 U. S. C. § 51.

it means the next of kin as the law has always meant it; and dependency is only a selective factor, a condition upon recovery by any members of that class, as it is among members of the first two classes. The case is not therefore one in which Congress has failed to express its obvious purpose, and in which courts are free to supply the necessary omission; it is a case where—whatever that purpose—it certainly did not include what the plaintiff asserts." *Poff* v. *Pennsylvania R. Co.*, 150 F. 2d 902, 905.

I do not find a persuasive answer to this analysis and am therefore of opinion that the judgment below should be affirmed.

COMMISSIONER OF INTERNAL REVENUE *v.* WILCOX ET AL.

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

No. 163. Argued January 8, 1946.—Decided February 25, 1946.

1. Embezzled money does not constitute taxable income to the embezzler under § 22 (a) of the Internal Revenue Code, which defines "gross income" as including "gains or profits and income derived from any source whatever." P. 408.
2. A taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain and (2) the absence of a definite, unconditional obligation to repay or return that which would otherwise constitute a gain. P. 408.
3. Where an embezzler receives the embezzled money without any semblance of a bona fide claim of right and remains under an unqualified duty and obligation to repay, the embezzled money does not constitute taxable income. P. 408.
4. This conclusion is not altered by the fact that the taxpayer dissipated all of the embezzled funds, since the loss or dissipation of embezzled money can not create taxable income to an embezzler any more than the insolvency or bankruptcy of a borrower causes the loans to be treated as taxable income to the borrower. P. 409.
5. The fact that a theft or loan may give rise to a deductible loss to the owner of the money does not create taxable income to the embezzler or the borrower. P. 409.

6. The Tax Court's determination that the embezzled money constituted taxable income to the embezzler involved a clear-cut mistake of law, and the circuit court of appeals was justified in reversing the Tax Court's decision. P. 410.

148 F. 2d 933, affirmed.

The Commissioner of Internal Revenue determined that respondent was required to report as income certain money which he had embezzled and assessed an income tax deficiency against him. The Tax Court sustained the Commissioner. The circuit court of appeals reversed. 148 F. 2d 933. This Court granted certiorari. 326 U. S. 701. *Affirmed,* p. 410.

Ralph F. Fuchs argued the cause for petitioner. With him on the brief were *Solicitor General McGrath, Assistant Attorney General Samuel O. Clark, Jr., Sewall Key, Robert N. Anderson* and *Muriel S. Paul.*

William E. Davis argued the cause for respondents. With him on the brief was *George B. Thatcher.*

Opinion of the Court by MR. JUSTICE MURPHY, announced by MR. JUSTICE RUTLEDGE.

The sole issue here is whether embezzled money constitutes taxable income to the embezzler under § 22 (a) of the Internal Revenue Code.[1]

The facts are stipulated. The taxpayer was employed as a bookkeeper by a transfer and warehouse company in Reno, Nevada, from 1937 to 1942. He was paid his salary promptly each month when due, it not being the custom to allow him to draw his salary in advance. In June, 1942, the company's books were audited and it was discovered for the first time that the taxpayer had converted $12,748.60 to his own use during 1941.[2] This amount was

[1] 26 U. S. C. § 22 (a).

[2] The sum of $10,147.41 was embezzled during 1942 but that amount is not in issue in this case.

composed of miscellaneous sums of money belonging to the company which he had received and collected at various times in his capacity as bookkeeper. He failed to deposit this money to the credit of the company. Instead he pocketed and withdrew payments in cash made to him by customers, neglecting to credit the customers' accounts or the company's accounts receivable with the funds received.

The taxpayer lost practically all of this money in various gambling houses in Reno. The company never condoned or forgave the taking of the money and still holds him liable to restore it. The taxpayer was convicted in a Nevada state court in 1942 of the crime of embezzlement. He was sentenced to serve from 2 to 14 years in prison and was paroled in December, 1943.

The Commissioner determined that the taxpayer was required to report the $12,748.60 embezzled in 1941 as income received in that year and asserted a tax deficiency of $2,978.09. The Tax Court sustained the Commissioner but the court below reversed. 148 F. 2d 933. We granted certiorari because of a conflict among circuits as to the taxability of embezzled money.[3]

Section 22 (a) of the Internal Revenue Code defines "gross income" to include "gains, profits, and income derived from . . . dealings in property . . . growing out of the ownership or use of or interest in such property; also from . . . the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever." The question thus is whether the wrongful acquisition of funds by an embezzler should be included in the statutory phrase "gains or profits and

---

[3] The decision below is in accord with *McKnight* v. *Commissioner*, 127 F. 2d 572 (C. C. A. 5), but is in conflict with *Kurrle* v. *Helvering*, 126 F. 2d 723 (C. C. A. 8). See also *Boston Consolidated Gas Co.* v. *Commissioner*, 128 F. 2d 473, 476–477 (C. C. A. 1, concurring opinion).

income derived from any source whatever," thereby constituting taxable income to the embezzler.

The Commissioner relies upon the established principle that orthodox concepts of ownership fail to reflect the outer boundaries of taxation. As this Court has stated, tax liability "may rest upon the enjoyment by the taxpayer of privileges and benefits so substantial and important as to make it reasonable and just to deal with him as if he were the owner, and to tax him on that basis." *Burnet* v. *Wells,* 289 U. S. 670, 678. See *Helvering* v. *Clifford,* 309 U. S. 331; *Helvering* v. *Horst,* 311 U. S. 112. Applying that rule to this case, the Commissioner urges that the act of appropriating the property of another to one's own use is an exercise of a major power of ownership even though the act is consciously and entirely wrongful. As against all the world except the true owner the embezzler is the legal owner, at least while he remains in possession. The money or property acquired in this unlawful manner, it is said, should therefore be treated as taxable income to the wrongdoer under § 22 (a). We cannot agree.

Section 22 (a) is cast in broad, sweeping terms. It "indicates the purpose of Congress to use the full measure of its taxing power within those definable categories." *Helvering* v. *Clifford, supra,* 334. The very essence of taxable income, as that concept is used in § 22 (a), is the accrual of some gain, profit or benefit to the taxpayer. This requirement of gain, of course, must be read in its statutory context. Not every benefit received by a taxpayer from his labor or investment necessarily renders him taxable. Nor is mere dominion over money or property decisive in all cases. In fact, no single, conclusive criterion has yet been found to determine in all situations what is a sufficient gain to support the imposition of an income tax. No more can be said in general than that all relevant facts and circumstances must be considered. See Magill, Taxable Income (1945).

For present purposes, however, it is enough to note that a taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain and (2) the absence of a definite, unconditional obligation to repay or return that which would otherwise constitute a gain. Without some bona fide legal or equitable claim, even though it be contingent or contested in nature, the taxpayer cannot be said to have received any gain or profit within the reach of § 22 (a). See *North American Oil* v. *Burnet,* 286 U. S. 417, 424. Nor can taxable income accrue from the mere receipt of property or money which one is obliged to return or repay to the rightful owner, as in the case of a loan or credit. Taxable income may arise, to be sure, from the use or in connection with the use of such property. Thus if the taxpayer uses the property himself so as to secure a gain or profit therefrom, he may be taxable to that extent. And if the unconditional indebtedness is cancelled or retired, taxable income may adhere, under certain circumstances, to the taxpayer. But apart from such factors the bare receipt of property or money wholly belonging to another lacks the essential characteristics of a gain or profit within the meaning of § 22 (a).

We fail to perceive any reason for applying different principles to a situation where one embezzles or steals money from another. Moral turpitude is not a touchstone of taxability. The question, rather, is whether the taxpayer in fact received a statutory gain, profit or benefit. That the taxpayer's motive may have been reprehensible or the mode of receipt illegal has no bearing upon the application of § 22 (a).

It is obvious that the taxpayer in this instance, in embezzling the $12,748.60, received the money without any semblance of a bona fide claim of right. And he was at all times under an unqualified duty and obligation to repay the money to his employer. Under Nevada law the crime of embezzlement was complete whenever an appro-

priation was made; [4] the employer was entitled to replevy the money as soon as it was appropriated [5] or to have it summarily restored by a magistrate.[6] The employer, moreover, at all times held the taxpayer liable to return the full amount. The debtor-creditor relationship was definite and unconditional. All right, title and interest in the money rested with the employer. The taxpayer thus received no taxable income from the embezzlement.

This conclusion is unaltered by the fact that the taxpayer subsequently dissipated all of the embezzled funds in gambling houses. The loss or dissipation of money cannot create taxable income here any more than the insolvency or bankruptcy of an ordinary borrower causes the loans to be treated as taxable income to the borrower. See *McKnight* v. *Commissioner,* 127 F. 2d 572, 573–574. In each instance the taxability is determined from the circumstances surrounding the receipt and holding of the money rather than by the disastrous use to which it is put. Likewise, the fact that a theft or loan may give rise to a deductible loss to the owner of the money does not create income to the embezzler or the borrower. Such deductions, lacking any necessarily corresponding relationship to gains and being a matter of legislative grace, fail to demonstrate the existence of taxable income.

Had the taxpayer used the embezzled money and obtained profits therefrom such profits might have been taxable regardless of the illegality involved.[7] Or had his

---

[4] *State* v. *Trolson,* 21 Nev. 419, 32 P. 930.

[5] Nevada Compiled Laws (1929) § 8681; *Perkins* v. *Barnes,* 3 Nev. 557; *Studebaker Co.* v. *Witcher,* 44 Nev. 468, 199 P. 477.

[6] Nevada Compiled Laws (1929) §§ 11243–11246.

[7] See *Johnson* v. *United States,* 318 U. S. 189; *United States* v. *Sullivan,* 274 U. S. 259; *Caldwell* v. *Commissioner,* 135 F. 2d 488; *Chadick* v. *United States,* 77 F. 2d 961; *National City Bank* v. *Helvering,* 98 F. 2d 93. See also *Mann* v. *Nash,* [1932] 1 K. B. 752; *Southern* v. *A. B.,* [1933] 1 K. B. 713.

employer condoned or forgiven any part of the unlawful appropriation, the taxpayer might have been subject to tax liability to that extent. But neither situation is present in this proceeding and we need not explore such possibilities. Sanctioning a tax under the circumstances before us would serve only to give the United States an unjustified preference as to part of the money which rightfully and completely belongs to the taxpayer's employer.

The Tax Court's determination that the embezzled money constituted taxable income to the embezzler, a result in accord with its prior decisions on the issue,[8] involved a clear-cut mistake of law. The court below was therefore justified in reversing that judgment. Cf. *Commissioner* v. *Scottish American Co.*, 323 U. S. 119; *Dobson* v. *Commissioner*, 320 U. S. 489; *Trust of Bingham* v. *Commissioner*, 325 U. S. 365.

Affirmed.

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

MR. JUSTICE BURTON, dissenting.

By holding in this case that embezzled funds do not constitute a taxable gain to the embezzler under the Internal Revenue Code, I believe the Court misinterprets the Code. That interpretation is contrary to the established administrative construction of the Code and to what appears to be the intent of § 22 (a) as disclosed by its legislative history. Section 22 (a) expressly includes in the net income of a taxable person "gains or profits and

[8] See *Estate of Spruance* v. *Commissioner*, 43 B. T. A. 221, reversed *sub nom. McKnight* v. *Commissioner*, 127 F. 2d 572; *Kurrle* v. *Commissioner*, Prentice-Hall 1941 B. T. A. Memorandum Decisions, par. 41,085, affirmed 126 F. 2d 723. The administrative interpretation is to the same effect as the Tax Court's decisions. G. C. M. 16572, XV–1 Cum. Bull. 82 (1936).

income derived from any source whatever." 26 U. S. C., § 22 (a). It is difficult to imagine a broader definition. This Court has said of this section, "The broad sweep of this language indicates the purpose of Congress to use the full measure of its taxing power within those definable categories." *Helvering* v. *Clifford,* 309 U. S. 331, 334.

The legislative history of the section demonstrates the congressional intent to tax not merely "lawful" gains but all gains lawful or unlawful. Section II B of the Income Tax Act of 1913, 38 Stat. 167, provided originally that—

> ". . . the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any *lawful* business carried on for gain or profit, *or gains or profits and income derived from any source whatever, . . .*" (Italics supplied.)

The Revenue Act of 1916 (39 Stat. 757), § 2 (a), reenacted this provision omitting only the word "lawful" before the word "business" so that now the final clause, as incorporated in § 22 (a), reads, "also from interest, rent, dividends, securities, or the transaction of *any business* carried on for gain or profit, *or gains or profits and income derived from any source whatever . . .*" (Italics supplied.) The 1916 amendment demonstrated an intent to include gains, profits and income from any unlawful business as well as from any lawful business. It is inescapable evidence of a like intent to include unlawful as well as lawful "gains . . . from any source whatever . . ." See *United States* v. *Sullivan,* 274 U. S. 259.

There have been many decisions to the effect that this section includes such unlawful gains as those from illicit

traffic in liquor,[1] race-track bookmaking,[2] card playing,[3] unlawful insurance policies,[4] illegal prize fighting pictures,[5] lotteries,[6] graft,[7] fraudulently misapplied moneys of a client by an attorney,[8] "protection payments" to racketeers and ransom money paid to a kidnapper.[9]

The majority opinion in the present case recognizes that had "the taxpayer used the embezzled money and obtained profits therefrom such profits might have been taxable regardless of the illegality involved." The majority opinion therefore does not exempt the embezzled funds from taxation merely because there is "illegality involved." The opinion reaches its result by reading into § 22 (a) a legislative distinction I do not find there. The opinion limits the section to such gains, unlawful or not, as are accompanied with "a claim of right" by the taxpayer and as are not accompanied with "a definite, unconditional obligation to repay or return that which would otherwise constitute a gain." Believing, as I do, that Congress in this section has sought "to use the full measure of its taxing power," and in doing so has sought to tax all "gains . . . from any source whatever," I am unable to recognize an adequate basis for reading into the broad sweep of the language the unexpressed limitation proposed in the majority opinion.

---

[1] *United States* v. *Sullivan,* 274 U. S. 259. See also, *Steinberg* v. *United States,* 14 F. 2d 564; *Maddas* v. *Commissioner,* 40 B. T. A. 572, affirmed, 114 F. 2d 548; *Poznak* v. *Commissioner,* 14 B. T. A. 727.

[2] *M'Kenna* v. *Commissioner,* 1 B. T. A. 326.

[3] *Weiner* v. *Commissioner,* 10 B. T. A. 905.

[4] *Patterson* v. *Anderson,* 20 F. Supp. 799.

[5] *Rickard* v. *Commissioner,* 15 B. T. A. 316.

[6] *Droge* v. *Commissioner,* 35 B. T. A. 829; *Huntington* v. *Commissioner,* 35 B. T. A. 835; *Voyer* v. *Commissioner,* 4 B. T. A. 1192.

[7] *Chadick* v. *United States,* 77 F. 2d 961, cert. denied, 296 U. S. 609.

[8] *United States* v. *Wampler,* 5 F. Supp. 796.

[9] *Humphreys* v. *Commissioner,* 42 B. T. A. 857, affirmed, 125 F. 2d 340.

The embezzler's complete possession of the embezzled funds, his exercise of dominion over them to the extent of disposing of every cent of them and his transfer of possession of them to others in such a manner as to give the recipients title to them, amounts to such an ample enjoyment of them, use of them, dominion over them, disposition of them and receipt of benefits from them as to make them of obvious economic value to the embezzler. Such a readily realizable value presents no reasonable basis for exempting these funds from taxation that would be applied to them if earned in a lawful manner. The "Government . . . may tax not only ownership, but any right or privilege that is a constituent of ownership. . . . Liability may rest upon the enjoyment by the taxpayer of privileges and benefits so substantial and important as to make it reasonable and just to deal with him as if he were the owner, and to tax him on that basis." *Burnet* v. *Wells,* 289 U. S. 670, 678.

In *National City Bank* v. *Helvering,* 98 F. 2d 93, 96, L. Hand, J., writing for the court, said:

> "Although taxes are public duties attached to the ownership of property, the state should be able to exact their performance without being compelled to take sides in private controversies. Possession is in general prima facie evidence of ownership, and is perhaps indeed the source of the concept itself, though the time is long past when it was synonymous with it. It would be intolerable that the tax must be assessed against both the putative tortfeasor and the claimant; collection of the revenue cannot be delayed, nor should the Treasury be compelled to decide when a possessor's claims are without legal warrant."

In the present case, the embezzler concealed the embezzlement long enough to enable him to gamble away all of the embezzled funds. He asserted, falsely to be sure, but nonetheless positively, his right to dispose of the funds and he did dispose of them beyond all chance

of their recovery. This was a use of them by him for his own enjoyment just as fully as though he had legal title to them. If he had made gambling or other profits from them, he would have claimed those profits as his own and would have been taxed on those profits. If he had gained possession of the original funds by extortion, fraud or usurious practices, those gains would be taxable to him under the general language of § 22 (a). The majority opinion, however, holds that if he gained possession of the original funds by embezzlement then such gains are not to be taxed to him under that language. This reads into the section a sharp distinction between the embezzler and defrauder, exempting the former but not the latter. In the absence of an express declaration of such an intent by Congress, I believe that the courts are not justified in reading such a distinction into this section.

Furthermore, where an embezzler uses embezzled funds for his own purposes and, by concealment of the embezzlement or otherwise, deprives his victim of a corresponding opportunity to enjoy those funds, the Code permits his victim to deduct as a "loss," from the victim's taxable income, the sums so embezzled.[10] See *Burnet* v. *Huff*, 288 U. S. 156. The allowance of such a deduction suggests the intent of Congress to transfer the liability for the tax on those funds to the embezzler. The majority opinion prevents such a transfer.

A point has been made of the fact that the Government's tax lien upon property of the embezzler would have priority over the claim of the victim of the embezzlement to recover from such property the losses which the victim suffered by the embezzlement. This priority of the tax lien is hardly an adequate argument to eliminate the tax itself. At most it is an argument for Congress to modify the tax lien in favor of the victim.

---

[10] 26 U. S. C. § 23 (e).

There is nothing in the Code that expressly requires, as a condition of the existence of a taxable gain, that there also be an absence of "a definite, unconditional obligation to repay or return that which would otherwise constitute a gain." In the case of *National City Bank* v. *Helvering, supra,* p. 95, the taxpayer was taxed on bonds which he had unlawfully withheld from the corporation of which he was an officer. These bonds were the property of the corporation in the sense that it could have reclaimed them and the court said—

> "But there are several cases in which persons have been taxed upon property which could be recovered from them. For example, the lender upon usurious interest—if on an accrual basis—must include his apparent profit in his return, though possibly he may be allowed to deduct it as a loss if the borrower reclaims it. Barker v. Magruder, 68 App. D. C. 211, 95 F. 2d 122. Again, when a railroad collects too large fares, the excess is income, though the passengers have a theoretical right of restitution. Chicago, R. I. & P. R. Co. v. Commissioner, 7 Cir., 47 F. 2d 990."

The administrative interpretation of § 22 (a) long has been to tax the embezzled funds. It dates at least from G. C. M. 16572, XV–1 Cum. Bull. (1936) 82, in which it was expressly recommended that the profits of an embezzler "constitute taxable income in the hands of the embezzler for Federal income tax purposes." This interpretation was followed by the Tax Court in this case and it has been regularly followed by the Board of Tax Appeals in the past. *Kurrle* v. *Commissioner,* 1941 Prentice-Hall B. T. A. Mem. Decisions, ¶ 41,085, affirmed, 126 F. 2d 723; *Estate of Spruance* v. *Commissioner,* 43 B. T. A. 221, reversed *sub nom. McKnight* v. *Commissioner,* 127 F. 2d 572.

Because of the legislative history of § 22 (a), the breadth of the language used by Congress in that section, the attempt of Congress to use the full measure of its taxing

power in that section, the long established administrative practice of holding embezzled funds to be taxable income of the embezzler, and finally because of the arbitrary distinctions in favor of the embezzler which arise from an opposite interpretation of the Code, I believe that embezzled funds are taxable gains as defined by Congress.

NIPPERT *v.* CITY OF RICHMOND.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 72. Argued November 8, 1945.—Decided February 25, 1946.

1. A municipal ordinance imposed upon persons "engaged in business as solicitors" an annual license tax of "$50.00 and one-half of one per centum of the gross earnings, receipts, fees or commissions for the preceding license year in excess of $1,000." A permit from the Director of Public Safety was a prerequisite to issuance of the license, and violators were subject to criminal penalties. Upon a record which showed that appellant had been soliciting in the city for five days, without a license, orders for out-of-state confirmation and shipment into the State, appellant was convicted and fined. *Held* that the ordinance as so applied violated the commerce clause of the Federal Constitution. Pp. 417, 434.
2. *Robbins* v. *Shelby County Taxing Dist.*, 120 U. S. 489, and later cases, followed; *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, distinguished. Pp. 417–418, 420.
3. The tax here can not be sustained as one upon the "local incident" of "solicitation." Whether a "local incident" related to or affecting interstate commerce may be made the subject of state taxation depends upon considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening commerce unduly. Pp. 422–424.
4. The effects of the tax here in question are not only prohibitive in an absolute sense, in many applications, but are discriminatory in favor of the local merchant as against the out-of-state one. P. 431.

   (a) The ordinance is not saved by the fact that it is neither prohibitive nor discriminatory on its face; nor by the fact that it is applicable also to all local distributors operating similarly. P. 431.

(b) The very difference between interstate and local trade, taken in conjunction with the inherent character of the tax, makes equality of application as between those two classes of commerce, generally speaking, impossible. P. 432.

5. Local governments may not impose a tax which, though applicable to all commerce, strikes down or discriminates against large volumes of that commerce, in order to reach other portions as to which the application of the tax would produce no such consequences or only negligible ones. P. 433.

6. The tax here in question involves too many probabilities, and actualities, for exclusion of or discrimination against interstate commerce in favor of local competing business, to be sustained in any such application as that given it in this case. P. 434.

183 Va. 689, 33 S. E. 2d 206, reversed.

Appeal from a judgment which affirmed a conviction for violation of a municipal ordinance imposing a license tax. *Reversed,* p. 435.

Cornelius H. Doherty argued the cause for appellant. With him on the brief was *Stanley H. Kamerow.*

Horace H. Edwards argued the cause for appellee. With him on the brief was *Henry R. Miller, Jr.*

Mr. Justice Rutledge delivered the opinion of the Court.

The question is whether a license tax laid by an ordinance of the City of Richmond, Virginia, upon engaging in business as solicitor can be applied in the facts of this case consistently with the commerce clause of the Federal Constitution, Article I, § 8. As the case has been made, the issue is substantially whether the long line of so-called "drummer cases" [1] beginning with *Robbins* v. *Shelby*

[1] See the authorities cited in *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33, 55–57, and the Court's discussion, particularly in note 11. As there stated, in the *Shelby County* case the Court was cognizant of the rapidly growing tendency of states and municipalities to lay license taxes upon drummers "for the purpose of embarrassing this

County Taxing District, 120 U. S. 489, shall be adhered to in result or shall now be overruled in the light of what attorneys for the city say are recent trends requiring that outcome.

The ordinance lays an annual license tax in the following terms:

> "[Upon] . . .— Agents — Solicitors — Persons, Firms or Corporations engaged in business as solicitors . . . $50.00 and one-half of one per centum of the gross earnings, receipts, fees or commissions for the preceding license year in excess of $1,000.00. Permit of Director of Public Safety required before license will be issued. . . ." [2]

---

competition with local merchants," and following the *Shelby County* decision nineteen such taxes were held invalid.

For a discussion of distinction between drummers and peddlers, see Comment, 40 Yale L. J. 1094.

[2] Chapter 10, § 23, Richmond City Code (1939).

Chapter 10, § 166½ (a) reads: "Every person, firm and corporation desiring a license under sections 14, 16, 23, 94, 120 and 143, of this chapter shall first apply to the Director of Public Safety for a permit on behalf of said individual, firm or corporation, as the case may be, to conduct the business which is desired to be conducted and shall produce to that Director evidence of the good character of the individual, the members of the firm, or the chief officers of the corporation, as the case may be, and it shall thereupon be the duty of the Director of Public Safety to make a reasonable investigation of the character of said individual, each of the members of the firm, or each of the chief officers of the corporation, as the case may be, and if he be satisfied that the individual, the members of the firm or the principal officers of the Corporation, as the case may be, be of good moral character and a person or persons fit to engage in the proposed business, he shall issue the permit. The form of the application for such permit and the form of the permit itself shall be prepared and furnished by the Director of Public Safety."

Appellant has argued in this Court that the ordinance's requirements relating to permits, particularly in so far as they may vest in the Director of Public Safety discretionary power to grant or withhold the permit, of their own force and without reference to the char-

Appellant was arrested in Richmond for having engaged in the business of a solicitor there without previously procuring the required license. After hearing before a police court justice she was fined $25.00 and costs and ordered to secure a license. An appeal was noted to the Hustings Court of the City of Richmond, where a trial de novo was had upon the agreed statement of facts set forth in the margin.[3] The Hustings Court held the ordinance appli-

---

acter of the tax in other respects render it invalid in the present application. Appellee insists that the point was not presented in the state courts and therefore is not open for consideration here. In view of the disposition we make of the cause on other grounds, it is not necessary to consider these questions.

[3] "The American Garment Company, which is owned and operated by John V. Rosser, with its main office at 3617 12th Street, N. E., Washington, D. C., is engaged in the manufacture and sale of certain ladies' garments. The American Garment Company employs solicitors who travel from City to City throughout the country and obtain orders for this particular garment, which is sold for $2.98, and the solicitor receives from the purchaser a down payment usually sufficient to pay the commission of the solicitor, and the order is then sent to the home office of the American Garment Company and the garment is then sent through the United States mails C. O. D. for the balance to the purchaser. The solicitors at no time make a delivery of the article.

"The defendant herein was not and is not carried on the rolls of the American Garment Company as an employee and her sole compensation is the commission received from the sale of each article.

"The defendant, Dorothy Nippert, on January 20, 1944, was soliciting orders for the American Garment Company, as above set forth, in the City of Richmond, and that Dorothy Nippert had been engaged for four days prior to January 20, 1944, in going from place to place in the City of Richmond and in soliciting orders for the sale of merchandise on behalf of the American Garment Company and had, during that time, been engaged in going from place to place within the places of business of Miller & Rhoads, Incorporated, a large department store in the City of Richmond and within the place of business of one of the Five and Ten Cent Stores in the City of Richmond, and therein soliciting the Clerks in those stores so as to procure from

cable to appellant in the circumstances disclosed by the facts and was of the opinion that, so applied, it was not in conflict with the commerce clause. Accordingly the court found the appellant guilty and fined her five dollars and costs. The Supreme Court of Appeals of Virginia affirmed. 183 Va. 689, 33 S. E. 2d 206. From that judgment of the State's highest court the case comes here by appeal.

If the matter is to be settled solely on the basis of authority, nothing more is required than bare reference to the long list of drummer decisions, which have held unvaryingly that such a tax as Richmond has exacted cannot be applied constitutionally to situations identical with or substantially similar to the facts of this case. Among the latest of these is *Real Silk Hosiery Mills* v. *Portland,* 268 U. S. 325, in which a municipal ordinance requiring solicitors to pay a license fee was held unconstitutional as a forbidden burden upon interstate commerce when applied to an out-of-state corporation whose representatives solicited orders for subsequent interstate shipment. Cf. *Best & Co.* v. *Maxwell,* 311 U. S. 454.

Counsel for Richmond, however, insist that other cases decided here have seriously impaired the "drummer" line of authority, so much so that those rulings no longer can stand consistently with the later ones. Their principal reliance is on *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33, in which the Court sustained the application of New York City's sales tax to the delivery there, at the end of its interstate journey, of coal shipped from Pennsylvania pursuant to contracts of sale previously made in New

---

those Clerks orders for the sale of merchandise on behalf of the American Garment Company, and that such solicitation occurred on the 20th of January, 1944, and that she, the said Dorothy Nippert, had not there[to]fore procured a City revenue license from the City of Richmond."

York.[4] It is urged that the case is indistinguishable from the present one on any tenable basis relating to the bearing or effect of the tax upon interstate commerce, although the opinion reviewed at some length the drummer cases, among others, and expressly distinguished them.[5]

Unless therefore this latest pronouncement upon their continuing authority is to be put aside with the cases themselves, the application made of the ordinance in this case must be stricken down. For the tax thus laid is precisely the "fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped

---

[4] Some reliance appears to be placed also upon other more recent cases, including *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340, and *General Trading Co.* v. *State Tax Commission*, 322 U. S. 335.

[5] Pointing out, with a reference to the *Shelby County* case itself, that in some of the cases the tax appeared to be aimed at the suppression of this type of business or putting it at disadvantage with competing intrastate sales, the opinion continued:

"In all [the cited cases], the statute, in its practical operation, was capable of use, through increase in the tax, and in fact operated to some extent to place the merchant thus doing business interstate at a disadvantage in competition with untaxed sales at retail stores within the state. While a state, in some circumstances, may by taxation suppress or curtail one type of intrastate business to the advantage of another type of competing business which is left untaxed, . . . it does not follow that interstate commerce may be similarly affected by the practical operation of a state taxing statute. . . . It is enough for present purposes that the rule of *Robbins* v. *Shelby County Taxing District, supra,* has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate . . .; and that the actual and potential effect on the commerce of such a tax is wholly wanting in the present case." 309 U. S. at 56–57. In *Best & Co.* v. *Maxwell* the Court said: "In *McGoldrick* v. *Berwind-White Co.* . . . we pointed out that the line of decisions following *Robbins* v. *Shelby County* . . . rested on the actual and potential discrimination inherent in certain fixed-sum license taxes." 311 U. S. 454, 455, note 3.

interstate" which the *Berwind-White* opinion distinguished from the New York tax.[6]

But we are told that the rationale of the decision requires the distinction to be discarded. As counsel state it, this was "that the tax was imposed upon events which occurred within the taxing jurisdiction which events are separate and distinct from the transportation or intercourse which is interstate commerce." [7] The logic is completed by noting that the New York tax was upon the "local incident" of "delivery" while in this case it is on the like incident of "solicitation"; and by adding the contention, given more substance since the argument by our decision in *International Shoe Co.* v. *Washington,* 326 U. S. 310, that "mere solicitation" when it is regular, continuous and persistent, rather than merely casual, constitutes "doing business," contrary to formerly prevailing notions. Hence it is concluded, since the delivery in the *Berwind-White* case could be taxed, so can the solicitation in this case.

---

[6] See note 5. Whether or not the "fixed sum" reference would apply to a tax measured in part by gross receipts (cf. the language of the ordinance in this case relating to earnings, etc., in excess of $1000), the tax as applied here presumably would not involve that feature, since by the explicit wording it applies only to earnings, etc., "for the preceding license year" and there is no showing relating to such earnings in this case. See also note 7.

[7] Counsel cite the Court's statement made in differentiating *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307, "The rationale of the *Adams Manufacturing Co.* case does not call for condemnation of the present tax. Here the tax *is conditioned upon a local activity,* delivery of goods within the state upon their purchase for consumption." 309 U. S. at 58. (Emphasis added.) However, the Court went on immediately to say, "It is an activity which, apart from its effect on the commerce, is subject to the state taxing power. The effect of the tax, even though measured by the sales price [cf. note 6 *supra*], as has been shown, neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which have repeatedly been sustained as involving no prohibited regulation of interstate commerce." *Ibid.*

Appellee's rationalization takes only partial account of the reasoning and policy underlying the *Berwind-White* decision and its differentiation of the drummer authorities. If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from "the transportation or intercourse which is" the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a State could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the States and necessarily involves "incidents" occurring within each State through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as "separate and distinct" or "local," and thus achieve its desired result.

It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable "local incident" may be found and made the focus of the tax. This is not to say that the presence of so-called local incidents is irrelevant. On the contrary the absence of any connection in fact between the commerce and the state would be sufficient in itself for striking down the tax on due process grounds alone; and even substantial connections, in an economic sense, have been held inadequate to support the local tax.[8] But beyond the presence of a sufficient con-

[8] The latest instance decided here being *McLeod* v. *Dilworth Co.*, 322 U. S. 327.

nection in a due process or "jurisdictional" sense, whether or not a "local incident" related to or affecting commerce may be made the subject of state taxation depends upon other considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce.[9] Some of these at least were emphasized in the *Berwind-White* opinion.

Thus the Court, referring to the *Shelby County* line of decisions, stressed that "read in their proper historical setting these cases may be said to support the view that this kind of a tax is likely to be used 'as an instrument of discrimination against interstate or foreign commerce' . . ." [10] and that the tax "in its practical operation, was capable of use, through increase in the tax, and in fact operated to some extent to place the merchant thus doing business interstate at a disadvantage in competition with untaxed sales at retail stores within the state." [11] Noting that the State in some instances can suppress or curtail one kind of local business for the advantage of another type of competing business, the opinion denied that interstate commerce "may be similarly affected by the practical operation of a state taxing statute," and also denied that the New York tax had any such actual or potential effect.

Thus the essence of the distinction taken in the *Berwind-White* case was that the taxes outlawed in the drummer

[9] It is old doctrine, notwithstanding many early deviations, that the practical operation of the tax, actual or potential, rather than its descriptive label or formal character is determinative. See the authorities cited in note 23. The *Berwind-White* and other recent cases, including *Best & Co.* v. *Maxwell,* 311 U. S. 454, only bring that doctrine down to date. Cf. Lockhart, The Sales Tax in Interstate Commerce (1939) 52 Harv. L. Rev. 617, 621.

[10] 309 U. S. at 56, note 11; see note 5, *supra.*

[11] See note 6.

cases in their practical operation worked discriminatorily against interstate commerce to impose upon it a burden, either in fact or by the very threat of its incidence, which they did not place upon competing local business and which the New York sales tax did not create.[12] See *Best & Co.* v. *Maxwell,* 311 U. S. 454; cf. *Nelson* v. *Sears, Roebuck & Co.,* 312 U. S. 359.

As has been so often stated but nevertheless seems to require constant repetition, not all burdens upon commerce, but only undue or discriminatory ones, are forbidden.[13] For, though "interstate business must pay its way," [14] a State consistently with the commerce clause cannot put a barrier around its borders to bar out trade from other States and thus bring to naught the great constitutional purpose of the fathers in giving to Congress the power "To regulate Commerce with foreign Nations, and among the several States . . ." [15] Nor may the pro-

[12] See Lockhart, The Sales Tax in Interstate Commerce (1939) 52 Harv. L. Rev. 617, 621.

[13] Cf. *Postal Telegraph-Cable Co.* v. *Richmond,* 249 U. S. 252, 259; *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 254; *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33, 46; *Nelson* v. *Sears, Roebuck & Co.,* 312 U. S. 359.

[14] *Postal Telegraph-Cable Co.* v. *Richmond,* 249 U. S. 252, 259; *New Jersey Bell Telephone Co.* v. *State Board of Taxes,* 280 U. S. 338, 351.

[15] *Walling* v. *Michigan,* 116 U. S. 446, 455–458. Thus, even the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the States the highest degree of control, is not altogether beyond the reach of the federal commerce power, at any rate when the State's regulation squarely conflicts with regulation imposed by Congress governing interstate trade or traffic, *United States* v. *Frankfort Distilleries,* 324 U. S. 293, whether or not also in some instances in addition to complete exclusion from passing through the State, *Collins* v. *Yosemite Park Co.,* 304 U. S. 518, in the absence of such congressional action. Cf. *Carter* v. *Virginia,* 321 U. S. 131, 137; *Ziffrin* v. *Reeves,* 308 U. S. 132, 140.

hibition be accomplished in the guise of taxation which produces the excluding or discriminatory effect.[16]

Appellee argues, as the Virginia Supreme Court of Appeals held,[17] that the Richmond tax is not discriminatory or unduly burdensome in effect. In support of this view it relies mainly on two contentions, first, that the tax is no more discriminatory or burdensome than was the tax in the *Berwind-White* case; and, second, that it applies alike to all solicitors whether they are engaged in soliciting for local or for interstate business. Apart from the fact that the tax as applied here is laid directly upon sales arising only under contracts requiring interstate shipment of goods, cf. 309 U. S. 48 ff., the contentions entirely misconceive what is meant by discrimination or undue burden in the sense applicable to these problems.

In view of the ruling in *International Shoe Co.* v. *Washington, supra,* we put aside any suggestion that "solicitation," when conducted regularly and continuously within the State, so as to constitute a course of business, may not be "doing business" just as is the making of delivery, at any rate for the purpose of focusing a tax which in other respects would be sustainable. But we do not think the tax as it was applied in this case either conforms to those conditions of regularity and continuity or avoids other prohibited effects.

The sales and the deliveries in the *Berwind-White* case were regular, continuous and persistent. They constituted a "course of business." There was no suggestion, nor any basis in the facts for one, that they were only casual, spasmodic or irregular. On the present record the

---

[16] Cf. *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 256; *Baldwin* v. *G. A. F. Seelig, Inc.,* 294 U. S. 511, 522–523; *Best & Co.* v. *Maxwell,* 311 U. S. 454, 455, and authorities cited in note 3 therein.

[17] See, in addition to the instant case, *Dunston* v. *Norfolk,* 177 Va. 689, 15 S. E. 2d 86.

only showing is that appellant "on January 20, 1944, was soliciting orders" in Richmond, for later out-of-state confirmation and fulfillment, and that for four days prior to that date she had been engaged in such solicitation "from place to place in the City of Richmond," including particularly solicitation of the clerks in the department store of Miller & Rhoads, Incorporated, and in a five and ten cent store. There was no showing that, apart from these five days, appellant had solicited previously in Richmond, that she intended to return later for the same purpose or, if so, whether regularly and indefinitely or only occasionally and spasmodically.

This difference in the facts would be sufficient in itself to distinguish the cases. But there are other differences. The tax here was a fixed substantial sum for the first year, to which in subsequent years would be added one-half of one per cent of the gross returns in excess of $1000. And, regardless of the discretionary element in the issuing function of the Director of Public Safety, his permit was required with payment of the tax before the license could issue or the act of solicitation could lawfully take place, criminal sanction being prescribed for violation. So far as appears a single act of unlicensed solicitation would bring the sanction into play. The tax thus inherently bore no relation to the volume of business done or of returns from it. The New York sales tax, on the other hand, was limited to a percentage of the gross returns, being thus directly proportioned to the volume of business transacted and of returns from it. Although the seller was put under duty to pay the tax within a specified time from the sale, he was not required to obtain a permit or license beforehand in order to initiate or complete the transaction. Moreover the economic incidence of the tax fell only upon completed transactions, not as in this case on the very initial step toward bringing one about.

Obviously different therefore are the two taxes, first, in their exclusionary effects, especially upon small out-of-state operators, whether casual or regular; and also, it would seem clear, in discriminatory effects as between such operators and local ones of the same type or other competing local merchants. The New York tax bore equally upon all, whether local or out-of-state and whether making a single sale or casual ones or engaging continuously in them throughout the year. As the Court said, it is difficult to see how the New York tax could bear in any case more heavily upon out-of-state operators than upon local ones, apart from possible multiple state taxation or the threat of it such as, among other considerations,[18] was thought to forbid the levy and collection of the tax in *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307. The incidence of the tax was the same upon both types of transactions, as was its amount; and if in any instance there was exclusionary effect or tendency, this did not appear from the record or from the inherent character of the tax. Neither did any possibility appear that it would strike more heavily upon out-of-state sellers than on local ones, apart from that of multiple state taxation.[19]

[18] The Court said: "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, § 8 of the Constitution. The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction, but it is settled that this will not save the tax if it directly burdens interstate commerce." 304 U. S. at 311–312.

[19] It should be noted that no question has been raised in this case concerning any issue of so-called "multiple state taxation." Cf. note 7.

In addition to that possibility, the Richmond tax imposes substantial excluding and discriminatory effects of its own. As has been said, the small operator particularly and more especially the casual or occasional one from out of the State will find the tax not only burdensome but prohibitive, with the result that the commerce is stopped before it is begun. And this effect will be extended to more substantial and regular operators, particularly those whose product is of highly limited or special character and whose market in any single locality for that reason or others cannot be mined more than once in every so often.[20]

The potential excluding effects for itinerant salesmen become more apparent when the consequences of increasing the amount of the tax are considered. Cf. *McGoldrick* v. *Berwind-White Co., supra,* at 58. And they are magnified many times by recalling that the tax is a municipal tax, not one imposed by the state legislature for uniform application throughout the State.

It is true that in legal theory the municipality exercises by delegation the State's legislative power and that prior decisions here have not rested squarely upon any difference between a tax municipally imposed and one laid by the legislature. But the cumulative effect, prac-

---

But if a nondiscriminatory state tax may become discriminatory or unduly burdensome by virtue of the fact that other States also may impose a similar tax bearing upon the transaction, the possibilities for such multiplication would seem obviously to be magnified many times by the application of municipal taxes like that involved here.

[20] The established merchant maintaining a local place of business where he deals in a variety of commodities, for instance, is much more favorably placed to absorb the cost of the tax than the itinerant vendor who deals in or takes orders for a single specialized commodity or only a few.

The record does not show whether appellant would have been compensated by the company for whom she solicits, had she paid the tax.

tically speaking, of flat municipal taxes laid in succession upon the itinerant merchant as he passes from town to town is obviously greater than that of any tax of statewide application likely to be laid by the legislature itself. And it is almost as obvious that the cumulative burden will be felt more strongly by the out-of-state itinerant than by the one who confines his movement within the State or the salesman who operates within a single community or only a few.[21] The drummer or salesman whose business requires him to move from place to place, exhausting his market at each periodic visit or conducting his business in more sporadic fashion with reference to particular localities, would find the cumulative burden of the Richmond type of tax eating away all possible return from his selling. A day here, a day there, five days now and five days a year or several months later, with a flat license tax annually imposed lacking any proportion to the number or length of visits or the volume of the busi-

[21] The discriminations against solicitors constitute only part of the more general problem of interstate trade barriers. See Hearings before the Temporary National Economic Committee, 76th Cong., 2d Sess., Pt. 29; Melder, State and Local Barriers to Interstate Commerce in the United States (1937). But as to the different types of statutes and ordinances designed to favor local business as against itinerant solicitors and peddlers and "gypsy truckers," see Hearings, *supra*, 15965–15987 and Exhibit No. 2394 (not included in the printed Hearings); Gould, Legislative Intervention in the Conflict between Orthodox and Direct-Selling Distribution Channels (1941) 8 Law & Contemp. Prob. 318. One method used to discourage solicitors has been to require elaborate information. It is said that "In some New Jersey cities this method has reduced the number of canvassers by 35 per cent." 18 Public Management 83. And in Arizona at one time an itinerant trucker, who went through all the counties of the State, would have been obliged to pay $4,400 in fees in addition to posting a $5,000 bond. Hearings, *supra*, Ex. 2353. In addition, licensing statutes, otherwise fair on their face, are said to have been discriminatorily enforced against itinerant merchants. See Note (1940) 16 Ind. L. J. 247, 251.

ness or return, can only mean the stoppage of a large amount of commerce which would be carried on either in the absence of the tax or under the incidence of one taking account of these variations.

These effects, not present in the *Berwind-White* type of tax,[22] are inherent in the Richmond type in relation to a wide variety of selling activities. They are not only prohibitive in an absolute sense, for many applications. They are discriminatory in favor of the local merchant as against the out-of-state one.

It is no answer, as appellee contends, that the tax is neither prohibitive nor discriminatory on the face of the ordinance; or that it applies to all local distributors doing business as appellant has done. Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern.[23] To ignore the variations in effect which follow from application of the tax, uniform on the face of the ordinance, to highly different fact situations is only to ignore those practical consequences. In that blindness lies the vice of the tax and of appellee's position.

---

[22] The *Berwind-White* case furnishes an illustration that the difference between municipal and state-wide taxes may not be controlling or even relevant in relation to a tax which, apart from the possibility of multiple state taxation, presents neither the prohibitive consequences inherent in Richmond's tax nor any element of discrimination in favor of local business. The itinerant out-of-state merchant could pay the New York sales tax and survive, according to its general effect, without any disadvantage as compared with local merchants, itinerant or established, resulting from the tax, excepting only the possibility of multiple state taxation.

[23] Cf. *Galveston, H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217, 224, 227; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 280; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 177; *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444, 445; *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 363, 366.

The tax, by reason of those variations, cannot be taken to apply generally to local distributors in the same manner and with like effects as in application to out-of-state distributors. The very difference in locations of their business headquarters, if any, and of their activities makes this impossible. This, of course, is but another way of saying that the very difference between interstate and local trade, taken in conjunction with the inherent character of the tax, makes equality of application as between those two classes of commerce, generally speaking, impossible.

It is true that the tax may strike as heavily upon some Virginia solicitors, and even upon some who confine themselves to Richmond, as it does upon others who come periodically or otherwise from Washington, New York or Cedar Rapids. And it may bear upon a few of the former more heavily than upon most of the latter. But neither consequence is the more probable one for the larger number of cases. The strong likelihood is the other way. And to point to either of those possibilities is only to say, in a different way, that the tax is highly variable in its incidence and effects with reference to the manner in which one organizes his business and especially in respect to its location and spread in relation to state lines. It was exactly these variations, when they bear with undue burden upon commerce that crosses state lines, which the commerce clause was intended to prevent.

We are not unmindful that large enterprise which "does business" by sending solicitors regularly and continuously into several States, cf. *International Shoe Co.* v. *Washington, supra,* may have the financial resources and established course of business enabling it to absorb the tax and justifying its doing so in an economic sense; or that, therefore, if the ruling should extend to such a situation, the business so situated would escape to that extent bearing the burden of the tax borne by local businesses similarly

situated, absent some other form of tax to equalize the burden. But, in the first place, no such case is presented by the facts here.[24] And even if such a result should be thought necessary in order to avoid the forbidden consequences in so many other applications, that fact would not justify sustaining the tax and permitting those consequences to occur.

There is no lack of power in the State or its municipalities to see that interstate commerce bears with local trade its fair share of the cost of local government, more especially in view of recent trends in this field. *McGoldrick* v. *Berwind-White Co., supra.* But this does not mean, and the trends do not signify, that the state or municipal governments may devise a tax applicable to all commerce alike, which strikes down or discriminates against large volumes of that commerce in order to reach other portions as to which the application of the tax

---

[24] Since appellant works for an out-of-state firm and the record contains nothing to show her presence in Richmond at any time other than during the one five-day period, or any intention to return, whether periodically or casually, no presumption can arise that she was a resident of Richmond or was regularly engaged in solicitation there. The presumption on the facts before us is the other way.

Moreover, here as in *Best & Co.* v. *Maxwell,* 311 U. S. 454, the "real competitors" of petitioner are, among others, the local retail merchants. The Richmond ordinance, unlike the North Carolina statute, does not discriminate on its face between such merchants and transient solicitors; nor does it fix a lower rate for the former. But the opinion in the *Best* case expressly pointed out that nominally the statute treated local and out-of-state transients alike. Nevertheless, since the latters' principal competition obviously came from "regular retail merchants" and the tax bore "no relation to actual or probable sales," the Court found the North Carolina atmosphere too hostile to allow survival of interstate commerce. The discrimination resulting from the present application of the Richmond ordinance, as between out-of-state solicitors and regular retail merchants, is only less obvious. It is not less real. Cf. note 5.

would produce no such consequences or only negligible ones. Other types of tax are available for reaching both portions which do not involve the forbidden evils or the necessity for putting them upon some commerce in order to reach other. The problem comes down therefore to whether the state or municipal legislative bodies in framing their taxing measures to reach interstate commerce shall be at pains to do so in a manner which avoids the evils forbidden by the commerce clause and puts that commerce actually upon a plane of equality with local trade in local taxation, not as is said to a question of whether interstate trade shall bear its fair share of the cost of local government, the benefit and protection of which it enjoys on a par with local business.

The tax here in question inherently involves too many probabilities, and we think actualities, for exclusion [25] of or discrimination against interstate commerce, in favor of local competing business, to be sustained in any application substantially similar to the present one. Whether or not it was so intended, those are its necessary effects. Indeed, in view of that fact and others of common knowledge, we cannot be unmindful, as our predecessors were not when they struck down the drummer taxes, that these ordinances lend themselves peculiarly to creating those very consequences or that in fact this is often if not always the object of the local commercial influences which induce their adoption. Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against. It may be, as the Court said in the *Berwind-*

[25] Obviously a total exclusion of commerce is itself the most effective form of discrimination in favor of the local merchant who is so situated that he can continue in the business.

White case, that the State is free to allow its municipal subdivisions to erect such barriers against each other, to some extent, as to the commerce over which the State has exclusive control. It cannot so outlaw or burden the commerce of the United States.

The drummer is a figure representative of a by-gone day.[26] But his modern prototype persists under more euphonious appellations. So endure the basic reasons which brought about his protection from the kind of local favoritism the facts of this case typify.

We have considered appellee's other contentions and find them without merit.

The judgment is

Reversed.

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

MR. JUSTICE BLACK dissents.

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

The Court has not shared the doubts which some of us have had concerning the propriety of the judiciary acting to nullify state legislation on the ground that it burdens interstate commerce. See *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 784, 795, dissenting opinions. But the policy of the Court is firmly established to the contrary.

Even in that view, however, this judgment should not be reversed. The Court has held drummer taxes unconstitutional where they were discriminatory on their face or where it appeared that necessarily or in practical op-

[26] See, for the part played by itinerants in our history, Wright, Hawkers and Walkers in Early America (1927). Peddlers were discriminated against in favor of town merchants as early as 1700. Wright, *supra*, at 90.

eration they worked to the disadvantage of interstate commerce. See *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 45–46, note 2. But the present ordinance on its face seems to reflect no more than a *bona fide* effort to make interstate commerce pay its way. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 254. It treats a solicitor for a Virginia manufacturer exactly the same as it treats solicitors for manufacturers located in other States. Under this type of tax, the solicitor for a Virginia manufacturer pays as much as Nippert, whether he confines himself to one locality or works his way through the State.

In that view a grant of immunity to Nippert is the grant of a preference to interstate commerce.

The problem, however, does not end there. *Best & Co.* v. *Maxwell*, 311 U. S. 454. In that case, a North Carolina tax on those who displayed goods in any hotel room or temporary office in order to obtain retail orders was applicable to solicitors representing local as well as out-of-state distributors. We held that that parity of treatment did not save the tax. We said that the tax must be compared with the tax on the local retail merchants—the "real competitors" of the out-of-state solicitor. Finding that the tax on the local retail merchants was lighter, we held that the tax discriminated against the out-of-state solicitor and was therefore invalid.

In the present case the tax on Nippert may or may not, in practical operation, work to the disadvantage of this interstate business. It would be one thing if Nippert's business took her from town to town throughout the State. But, so far as we know, Nippert may be a resident of Richmond working exclusively there, full or part time. In that event, we could not determine the issue of discrimination without knowing what taxes the retail merchants in Richmond must pay. If the facts were known, it might appear

that the tax, now struck down, in fact resulted in parity of treatment between Nippert and her local competitors. The record does not enlighten us on any of these matters.

I think that one who complains that a state tax, though not discriminatory on its face, discriminates against interstate commerce in its actual operation should be required to come forward with proof to sustain the charge. See *Southern Railway Co.* v. *King,* 217 U. S. 524, 534–537. This does not, of course, require proof of the obvious. But, as Mr. Justice Brandeis pointed out, cases of this type should not be decided on the basis of speculation; the special facts and circumstances will often be decisive. *Hammond* v. *Schappi Bus Line,* 275 U. S. 164, 170–172. Without evidence and findings we frequently can have no "sure basis" for the informed judgment that is necessary for decision. *Terminal Railroad Assn.* v. *Brotherhood of Trainmen,* 318 U. S. 1, 8. That seems to me to be the case here. Proof should be required to overcome the presumptive validity of this local legislation as applied to Nippert.

UNITED STATES *v.* AMERICAN UNION TRANSPORT, INC. ET AL.

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

No. 44. Argued October 11, 1945.—Decided February 25, 1946.

1. A forwarder of freight for transshipment by common carriers by water in foreign commerce, although not contractually or corporately affiliated with a common carrier by water, *held* to be "carrying on the business of forwarding . . . in connection with a common carrier by water," hence an "other person subject to this Act" within the meaning of § 1 of the Shipping Act of 1916, and therefore subject to the regulatory provisions of that Act. Pp. 441, 443.
2. The conclusion that independent forwarders are subject to the Act's regulatory provisions is supported by the broad terms of

its definition of "other person subject to this Act"; by the policy implicit in the scheme of regulation; by the legislative history; and by the decision in *California* v. *United States,* 320 U. S. 577. P. 443.

3. A different conclusion is not required by the fact that the administrative agencies had not previously exercised jurisdiction over such forwarders; nor by the history of interstate commerce legislation affecting non-water transportation; nor by judicial decisions relating to that legislation. Pp. 454–455.
4. The fact that no question is involved of the use of forwarders by carriers to evade regulation gives no basis for relieving independent forwarders from the Act's provisions. P. 456.
5. The wisdom of regulating forwarders—with the corresponding restriction of competitive freedom in the business—is a question for Congress, not the courts. P. 457.

Reversed.

Appeal from a decree of a district court of three judges, enjoining enforcement of an order of the Maritime Commission. See 55 F. Supp. 682. *Reversed,* p. 457.

Walter J. Cummings, Jr. argued the cause for the United States. With him on the brief were *Acting Solicitor General Judson, John F. Sonnett* and *David L. Kreeger.*

Harold L. Allen argued the cause and filed a brief for appellees.

Mr. Justice Rutledge delivered the opinion of the Court.

The United States appeals from a decree entered by a District Court of three judges permanently enjoining enforcement of an order of the United States Maritime Commission. The order required the appellees and others to answer within thirty days a questionnaire concerning certain aspects of their business transacted during 1940, 1941 and 1942.[1] The central issue is whether

[1] See note 4. Jurisdiction rests on § 31 of the Shipping Act, 46 U. S. C. § 830; 28 U. S. C. §§ 47, 47a; 28 U. S. C. § 345 (4). See *California* v. *United States,* 320 U. S. 577, 579.

appellees are within the coverage of the Shipping Act, 46 U. S. C. § 801, for this purpose.

On August 21, 1942, the Commission, upon its own motion, ordered an investigation concerning the lawfulness of the rules, regulations, practices and operations of named persons and firms, described as carrying on "the business of forwarding in foreign commerce . . . ." The order stated that from information before the Commission it appeared that a certain forwarding firm was engaging in practices which seemed to be in violation of § 17 of the Shipping Act, 46 U. S. C. § 816, and further "that the public interest requires a general inquiry to determine the extent of the existence of the said practices among all other forwarders in the port of New York subject to said Act, and the lawfulness of said practices under section 17 thereof . . . ."

Accordingly, the Commission sent to the persons and firms named a questionnaire containing the inquiry, among others, "Do you carry on the business of forwarding in connection with common carriers by water in foreign commerce?" [2] Each of the appellees answered this in the affirmative.[3] But negative answers were given to the question, "Is your company owned or controlled by or affiliated with any shippers for whom you act as forwarder or with any common carrier?"

[2] The inquiry was framed with reference to the statutory provision immediately in issue, namely, the definition of "other person subject to this Act" contained in § 1 of the Shipping Act, 46 U. S. C. § 801, set forth hereinafter in the text.

[3] In their complaint the appellees allege that the affirmative answers given were erroneous and were made "without knowledge of the import of the said question or of the kind or nature of the business which it was necessary to carry on, or the character of relationship with a common carrier by water in foreign commerce, which it was necessary to maintain, in order to fall within the said definition . . . ."

In December, 1942, the Commission held public hearings before a trial examiner pursuant to the investigation order. On the second day the hearings were adjourned *sine die* so that the Commission might obtain additional information. They have not been resumed.

On January 14, 1943, the Commission entered an order, pursuant to § 21 of the Shipping Act, 46 U. S. C. § 820, directing appellees and others to answer a questionnaire relating to their forwarding operations in 1940, 1941 and 1942. The answers were to be filed within thirty days. Before this period expired appellees instituted this suit to enjoin the carrying out of that order and the general order of investigation. Thereafter the Commission extended the time for answering the questionnaire, and on May 18, 1943, withdrew its order of January 14, issuing instead another under § 21. This order, like the earlier one, required the appellees to answer a questionnaire concerning their forwarding operations. The only difference, apparently, was that the information sought was somewhat more extensive. The parties agreed that the suit should be continued as against the order of May 18 without formal amendment of the complaint.

On November 30, 1943, the District Court denied the Commission's motion for summary judgment and granted a temporary injunction restraining execution of the May 18, 1943, order. The injunction was made permanent on November 30, 1944.[4] The court held that the Maritime Commission had no jurisdiction over the appellees since, in its view, they did not come within the definition of the term "other person subject to this Act" given in § 1 of the statute, 46 U. S. C. § 801. It refused, however, to enjoin

[4] The opinion of the District Court on motion for interlocutory injunction and on motion for reargument is reported in 55 F. Supp. 682. The opinion on final judgment, which was simply an adherence to the court's previous opinion, is not reported.

the order of August 21, 1942, on the ground that it had no jurisdiction to annul an order which itself did not adversely affect the complaining parties.

The question we are to review is whether the appellees are included within the designation "other person subject to this Act" as that phrase is defined in § 1 of the Shipping Act. The definition reads: "The term 'other person subject to this Act' means any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities *in connection with* a common carrier by water." (Emphasis added.)

Substantially, the issue turns upon the meaning of "in connection with," that is, whether some relation of affiliation with the carrier is required, such as that exemplified in *Railroad Retirement Board* v. *Duquesne Warehouse Co.*, 326 U. S. 446; or, on the other hand, the statutory phrasing is satisfied by the type of relationship illustrated by the companion cases of *California* v. *United States* and *Oakland* v. *United States*, 320 U. S. 577.[5]

If, as appellees contend, "in connection with" covers only forwarding businesses actually affiliated with a common carrier by water in a corporate sense, or under the control of or pursuant to a continuing contract with such a carrier, then plainly the Maritime Commission is without jurisdiction over these appellees, since none of them is controlled by or affiliated with a common carrier by water in any such manner. All are so-called independent

[5] The agencies found subject to the Act in these cases were public authorities. Although some continuing contractual relationship may have existed between the state wharfinger and the carriers in the *California* case, no such relation existed, except as to one pier, in the *Oakland* case, a fact of which the District Court in this case obviously was not informed, in view of its contrary statement. See note 17.

forwarders and the case comes down to whether such forwarders are covered by the Act.

There is little or no dispute as to the nature of their business. They are primarily forwarders of freight, as that term is generally understood,[6] for transshipment in foreign commerce. The foreign freight forwarding business is a medium used by almost all export shippers. An exporter, intending to send goods abroad, consigns the merchandise to a forwarder who then makes all the arrangements for dispatching it to a foreign port. The forwarder must arrange for necessary space with the steamship companies, procure and prepare the many documents, obtain permits for the acceptance of freight at piers, and at times must find available storage space for the shipment until steamers are available. If requested to do so, a forwarder will secure whatever insurance is needed.

Forwarders also have many other incidental duties. They check the marks on shipping papers and containers

---

[6] See *Place* v. *Union Express Co.*, 2 Hilt. (N. Y.) 19, 25; *In re Emerson, Marlow & Co.*, 199 F. 95, 97; H. Rep. No. 1682, 77th Cong., 2d Sess., 5 *et seq.* Cf. the definition of "freight forwarder" in Part IV of the Interstate Commerce Act, 49 U. S. C. (Supp. V) § 1002 (a) (5), discussed at a later point in this opinion.

In addition to acting as freight forwarders, the appellees also act as freight brokers. And for their services as brokers they receive brokerage commissions or fees from the carrier with respect to the same shipments for which they act as forwarders.

In view of the disposition we make of the cause, we need not consider the argument made by the Government that in any case the appellees, because they also act as freight brokers and receive compensation from the carriers, come within the Maritime Commission's jurisdiction. Cf. *In re Gulf Brokerage and Forwarding Agreements*, 1 U. S. M. C. 533, 534, where it was said: "Brokers are not subject to the Shipping Act, 1916, and consequently agreements between carriers subject to that act and brokers are not of the character required to be filed under section 15 thereof."

in order to be certain that they are in accordance with the regulations of the country of destination. They convert weights and measurements into the metric system when necessary. They keep records, for the convenience of the exporter, of all shipments dispatched. They also prosecute such claims as may be required by the exporter against carriers, insurance companies, and any other parties in interest.

By engaging in these many activities of the forwarding business, independent forwarders—and particularly the appellees—act as agents of the shipper. They assume no responsibility for the transportation of goods.

We think the appellees are within the coverage of § 1. This conclusion is required not only by the broad and literal wording of the definition but also to make effective the scheme of regulation the statute established and by considerations of policy implicit in that scheme, as well as by the legislative history and the decision in the *California* and *Oakland* cases, *supra*. In order to place the discussion of our reasons in statutory as well as factual setting, we sketch below some of the more pertinent statutory provisions. In doing so we shall emphasize the consequences of including or excluding so-called independent forwarders, like the appellees, for effective administration of the Act and achievement of its policy. But first we turn to the definition in § 1 itself.

The language is broad and general. No intent is suggested to classify forwarders, covering some but not others, just as none appears to divide persons "furnishing wharfage, dock, warehouse, or other terminal facilities" into regulated and unregulated groups. *California* v. *United States; Oakland* v. *United States, supra*. The absence of any such suggestion becomes highly significant by contrast with similar definitions of other statutes more or less related to the Shipping Act. In these Congress,

when regulating carriers and "other persons," repeatedly has made plain the intent to cover only affiliates or other specially limited groups when this has been in fact its purpose.

Thus, in the legislation relating to railroads, forwarders were first covered expressly in 1942. 49 U. S. C. (Supp. V) § 1002 (a) (5). The definition in shortened paraphrase is limited to any "person," other than a carrier, holding itself out "to transport or provide transportation" which "in the ordinary and usual course *of its undertaking*" (A) performs the usual functions of a forwarder, "*and* (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, *and* (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers . . . ." (Emphasis added.) Not only would language so explicitly limited be difficult to apply to a person not performing any part of the "transportation service" proper, cf. *Lehigh Valley R. Co.* v. *United States,* 243 U. S. 444; but the very limitations, altogether absent from § 1 of the Shipping Act, forbid identical constructions of the two definitions. See also, in relation to the different treatment of rail forwarders, the correlated definition of "service subject to this chapter." 49 U. S. C. (Supp. V) § 1002 (a) (7).

The same difference applies with reference to the definitions of the term "employer" in the Railroad Retirement Act of 1937, 45 U. S. C. § 288a, and the Railroad Unemployment Insurance Act of 1938, 45 U. S. C. § 351, construed in *Railroad Retirement Board* v. *Duquesne Warehouse Co., supra.* In each instance the statute declares that "employer" shall mean "any carrier . . . and any company" carrier-owned or controlled "*and* which operates any equipment or facility or performs any service . . . in connection with the transportation of pas-

sengers or property . . .," thus plainly setting forth as to others covered than the carrier both the affiliation requirement and that of performing part of the transportation service.

In the face of such repeated demonstrations that Congress makes its purpose plain, when it actually intends to limit the coverage of others than carriers to affiliates or to persons performing part of the transportation service, the conclusion hardly is tenable that it means the same thing when it employs more broadly inclusive language and wholly omits all such limitations. This view is further emphasized, as will appear, by the fact that to cut down the meaning of § 1 as appellees suggest would be to single out the term "forwarding" from all others in the definition and give to it a narrow application none of them possesses.

In view of these facts, it is doubtful that the wording of the definition is sufficiently ambiguous to require construction, more especially in view of the decisions in the *California* and *Oakland* cases. But if room for doubt remains, it is altogether removed by the considerations of policy and history to which we have referred. We turn accordingly to the statutory setting.

In several sections, for example, §§ 15, 16, 17, 20 and 21 (pursuant to which this proceeding began), "other persons" as well as common carriers by water either are made subject to affirmative duties or are prohibited from engaging in certain activities.

Section 15 [7] requires filing of specified agreements or memoranda with the Commission and exempts from the

[7] "Every common carrier by water, *or other person subject to this Act*, shall file immediately with the board [commission] a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier *or other person subject to this Act*, or modification or cancellation thereof, *to which it may be a party or conform*

operation of the antitrust laws arrangements made by carriers and "other persons" among themselves or with one another which have been filed with *and approved by*

---

in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; *controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports* or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; *or in any manner providing for an exclusive, preferential, or cooperative working arrangement.* The term 'agreement' in this section includes understandings, conferences, and other arrangements.

"The board [commission] may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

"Agreements existing at the time of the organization of the board [commission] shall be lawful until disapproved by the board [commission]. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board [commission].

"All agreements, modifications, or cancellations made after the organization of the board [commission] *shall be lawful only when and as long as approved by the board* [*commission*], and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

"Every agreement, modification, or cancellation *lawful under this section* shall be excepted from the provisions of the Act approved July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' and amendments and Acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Gov-

the Commission.[8] The Commission is given the power to disapprove, cancel or modify, among others, any agreement which it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between United States exporters and their foreign competitors; or to operate to the detriment of the commerce of the United States; or to be in violation of the Act. Obviously agreements or understandings between forwarders or between forwarders and shippers or between forwarders and carriers may be discriminatory in such a way as to violate the provisions of § 15. Moreover, since forwarders arrange the terms of carriage for shippers with carriers, they may be the active agents who bring about the very types of agreement or arrangement the section contemplates the Commission shall have power and opportunity to outlaw. Consequently jurisdiction by the Commission over forwarders would seem essential to effectuate the policy of the Act and the absence of jurisdiction well might prevent giving full effect to that policy.

Section 16 [9] forbids various forms of discrimination, as well as other practices, on the part of any common car-

---

ernment, and for other purposes,' and amendments and Acts supplementary thereto.

"Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action." 39 Stat. 733; 46 U. S. C. § 814. (Emphasis added.)

[8] See the language of the statute, note 7 *supra;* and see Current Legislation, 17 Col. L. Rev. 357, 358. It should not be necessary to emphasize, in view of the statute's plain language, that, as is indicated, the exemption arises *not* upon the mere filing of the agreement, *but only after approval* by the Commission.

[9] "That it shall be unlawful for any *shipper,* consignor, consignee, *forwarder,* broker, or other person, *or any officer, agent, or employee thereof,* knowingly and willfully, directly or indirectly, *by means of false billing, false classification, false weighing, false report of weight,* or by any other unjust or unfair device or means *to obtain or at-*

rier by water "or other person," which an independent forwarder readily may commit or induce. It is suggested, however, that whatever discriminations might be practiced necessarily would be in pursuance of an agreement between a carrier and a forwarder who, it is well to point out again, acts as agent of the shipper; and that since Congress has given the Commission jurisdiction over the carriers, it is to be presumed that such jurisdiction was thought to be sufficient.

Whether or not the premise is correct, the conclusion does not follow. That the Commission may have jurisdiction over one of the two parties to a discriminatory agreement or arrangement hardly means that it shall not have jurisdiction over both. Indeed, unless the juris-

---

tempt to obtain transportation by water for property *at less than the rates or charges* which would otherwise *be applicable.*

"That it shall be unlawful for any common carrier by water, *or other person subject to this Act,* either alone *or in conjunction with any other person,* directly *or indirectly*—

"First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier *by means of false billing, false classification, false weighing, false report of weight,* or by any other unjust or unfair device or means.

"Third. To *induce, persuade,* or *otherwise influence any marine insurance company or underwriter,* or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier *or other person subject to this Act.*

"Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense." 39 Stat. 734, as amended by 49 Stat. 1518; 46 U. S. C. § 815. (Emphasis added.)

diction includes both, it may be ineffective as to the one covered; for the Commission then might lack the necessary means of obtaining or checking upon information (cf. § 21) necessary to ascertain the existence of a discrimination or to take other action commanded by the statute. Moreover, some of the practices forbidden appear to be peculiarly if not exclusively susceptible of commission or inducement by forwarders, brokers and shippers' agents, all specifically mentioned in the section.

The purpose of § 17,[10] in relevant part, is to provide for the establishment, observance and enforcement of just and reasonable regulations and practices relating to or in connection with the receiving, handling, storing or delivering of property. By the nature of their business, independent forwarders are intimately connected with these various activities. Here again, unless the Commission has jurisdiction over them, it may not be able effectively to carry out the policy of the Act.

Section 20,[11] which for the most part was copied from § 15 (11) of the Interstate Commerce Act, forbids the

---

[10] ". . . Every such carrier *and every other person subject to this Act shall* establish, *observe,* and enforce *just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property.* Whenever the board [commission] finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice." 39 Stat. 734; 46 U. S. C. § 816. (Emphasis added.)

[11] "That it shall be unlawful for any common carrier by water *or other person subject to this Act,* or any officer, receiver, trustee, lessee, agent, or employee of such carrier or person, *or for any other person authorized by such carrier or person to receive information, knowingly to disclose* to or permit to be acquired by any person other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier *or other person subject to this Act* for transportation

disclosure of confidential information by a common carrier by water or other person,[12] when the information might be used to the detriment or prejudice of a shipper or consignee, or of a carrier, or might improperly disclose his business transactions to a competitor.

Finally, § 21, which is immediately involved in this case, requires the filing of reports, records and documents relating to the business of persons subject to the Act.

The intimate relationship of the forwarder to both shipper and carrier, essentially that of go-between, gives him not only unique sources of information, perhaps in its totality available to no one else, but also unique opportunity to engage in practices which the Act contemplates shall be subject to regulation, some of which we have emphasized in quoting the statutory provisions. The statute throughout is drawn in very broad terms. It forbids direct or indirect accomplishment of the outlawed acts. It broadly covers specific practices, including false billing, classification, weighing, and the manner of placing insurance, § 16, as well as general practices resulting in forbidden evils, §§ 15, 17, which forwarders, affiliated or independent, are favorably placed to bring about. It mentions forwarders specifically, not only in § 1, but elsewhere, e. g., § 16, without suggestion of distinction be-

in interstate or foreign commerce, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor, or which may be used to the detriment or prejudice of any carrier; and it shall also be unlawful for any person to solicit or knowingly receive any such information which may be so used." 39 Stat. 735; 46 U. S. C. § 819. (Emphasis added.) Exceptions are made for disclosure in response to legal process, etc.

[12] Section 15 (11) of the Interstate Commerce Act, 49 U. S. C. § 15 (11), does not contain the "other person" provision. The coverage of the two sections, however, is so broad that it probably would include forwarders even though they were not within the coverage of other sections.

tween independent and affiliated operators. To include the latter but exclude the former would be incongruous, not only for want of any such explicit suggestion, but because inclusion of one without the other would create a statutory discrimination tending in time to force out the affiliated forwarder and, with that achieved, to remove forwarding entirely from the reach of the regulatory plan. We do not believe that Congress had in mind such a self-defeating scheme. Almost as well might it have exempted all forwarders in the first place. Nor do we think the design of the Act was merely by indirection to forbid carriers or their affiliates to act as forwarders.

The legislative history clearly supports this view, although for explicit statement it is scanty. No discussion concerning the meaning of "any person [not a carrier] carrying on the business of forwarding . . . in connection with a common carrier by water" appears except in the statement of the manager of the bill in the House of Representatives.[13] When dealing with the breadth of the term "other person subject to this act," he said: "Hence, if this board [the United States Shipping Board] effectually regulates water carriers, it must also have supervision of all those incidental facilities connected with the main carriers . . . ." 53 Cong. Rec. 8276. Certainly this language is not indicative of intent to give a narrowly restricted scope to the definition's coverage. Quite the opposite is its effect.

The more significant legislative history, however, appears in the metamorphosis which this provision of § 1 underwent during the process of enactment. A predecessor bill (H. R. 14337, 64th Cong.) worded the definition as follows:

> "The term 'other person subject to this Act' means any person not included in the term 'common carrier

[13] Representative Alexander, then Chairman of the Committee on the Merchant Marine and Fisheries.

> by water' and carrying on the business of forwarding, *ferrying, towing,* or furnishing *transfer, lighterage,* dock, warehouse, or other terminal facilities *in or in connection with the foreign or interstate commerce of the United States.*" (Emphasis added.)

As this was revised in the bill which was enacted (H. R. 15455, 64th Cong.), two changes occurred, apart from adding explicit mention of wharfage as among the terminal services. One was to eliminate the words "ferrying, towing . . . transfer, lighterage." The other was to substitute "*in connection with* a common carrier by water" for "*in or in connection with* the foreign or interstate commerce of the United States."

Had this latter wording been retained there could not have been the remotest basis for suggesting that independent forwarders were not covered, as there could have been none with reference to any of the other businesses or services mentioned. But, for a reason wholly unrelated to narrowing the class of forwarders and others not carriers who had been included, the original concluding phraseology was changed. That language was obviously inexact when applied, as the Shipping Act did apply, to carriage by water and incidental activities. Taken literally, the broad wording would have included forwarders and others furnishing terminal facilities in connection with shipments by rail. Obviously it was to eliminate this incongruity, and not to constrict the classes of "other persons" previously enumerated, that this change was made.

That it had no other purpose appears, moreover, from the elimination of "ferrying, towing . . . transfer, lighterage," which shows that when Congress wished to cut down the classes originally covered it did so attentively and explicitly. These eliminated persons were included originally, along with forwarders and others, not simply

to reach affiliates of carriers, but broadly to provide "for equal treatment to all shippers and water carriers by transfer and lighterage concerns *when forming a link in* interstate or foreign commerce." [14] (Emphasis added.) Nothing in the hearings, the committee reports, or the debates, upon the original or the substituted bills,[15] suggests either an original intention to restrict to carrier affiliates the coverage of forwarders or other furnishers of terminal or "link" service or a later intention to change the initial broad coverage by so restricting it. Silence so complete cannot be taken as the voice of change. The original congressional purpose clearly was to reach all who carry on the specified activities, whether in or out of affiliation with a carrier. That purpose remained unaltered by anything which took place in the course of transition from the first to the final form in which the bill was enacted.

Indeed, we held as much in the cases of *California* v. *United States* and *Oakland* v. *United States, supra.* The decision was that the Commission has jurisdiction over state and municipally owned businesses furnishing terminal facilities. The ruling would include *a fortiori* pri-

[14] H. Rep. No. 659, 64th Cong., 1st Sess., 32. It is true that no comparable explicit statement appears concerning forwarding or terminal activities. But in the absence of distinguishing language, the original coverage of "ferrying, towing . . . transfer, lighterage" hardly can be taken to have been broader, as respects affiliation, than "forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities . . . ."; and the elimination of the former cannot be said to have restricted the latter in this respect or, in view of the decision in the *California* and *Oakland* cases, to have singled out forwarding alone for such restriction.

[15] Hearings on H. R. 14337 before the House Committee on the Merchant Marine and Fisheries, 64th Cong., 1st Sess.; Hearings on H. R. 15455 before the Senate Subcommittee on Commerce, 64th Cong., 1st Sess.; H. Rep. No. 659, 64th Cong., 1st Sess.; S. Rep. No. 689, 64th Cong., 1st Sess.

691100°—47——33

vately owned independent businesses of the same type. It would be a strange reading of the "other person" provision if forwarders alone were required to be affiliated in order to come within its terms, all others covered in both the original and the final forms of the legislative proposals being either independent or affiliated. Yet this is, in effect, appellees' exact contention and the view taken by the District Court. As has been noted,[16] that court misconceived the facts in the *Oakland* case and thus perhaps, at the time of entry of its final order, the full scope and effect of our decision.[17] At any rate, since Congress has indicated no intention to single out forwarders for regulation only when they are affiliated with a carrier, while at the same time broadly covering terminal operators and others, we are not free to inject such a distinction.

What has been said disposes of the principal contentions and issues. Appellees however offer other arguments, founded chiefly in the absence of prior established administrative practice,[18] but also in the history

[16] See note 5.

[17] The District Court's opinion, 55 F. Supp. 682, was filed November 30, 1943, and refers to the *California* case, but it makes no reference to the *Oakland* case, although both were then pending here. The court's further opinion, filed March 8, 1944, upon the motion for reargument, makes no reference to either of these cases. The findings of fact and conclusions of law were filed November 30, 1944, and judgment was entered the same day, nearly eleven months after our decision in the *California* and *Oakland* cases had been announced on January 3, 1944. As has been stated, see note 5, in the *Oakland* case, except in one instance, there was no showing of affiliation with a carrier, whether by continuing agreement or otherwise.

[18] It is pointed out that until the present proceeding neither the United States Maritime Commission nor its predecessor, the United States Shipping Board, attempted to exercise jurisdiction over forwarders such as the appellees. See, however, Fifth Annual Report of the United States Shipping Board, p. 75; Seventeenth Annual Report of the United States Shipping Board, p. 10. It is not to be inferred however that either of those bodies held the view that they were with-

of interstate commerce legislation affecting nonwater transportation and in decisions relating to that legislation.[19] We regard these considerations as inapposite to the problem raised by this case in connection with the quite different wording, coverage, history and, to some extent, policy of the Shipping Act, for reasons already set forth in part and for others briefly indicated in the marginal notes attached to this paragraph.[20]

---

out such jurisdiction or that, if either did, that fact would be conclusive. An administrative agency is not ordinarily under an obligation immediately to test the limits of its jurisdiction. It may await an appropriate opportunity or clear need for doing so. It may also be mistaken as to the scope of its authority. Cf. *Social Security Board* v. *Nierotko*, 327 U. S. 358.

Although failure to exercise power may be significant as a factor shedding light on whether it has been conferred, see *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, that fact alone neither extinguishes power granted nor establishes that the agency to which it is given regards itself as impotent. The present case, by virtue of differences from that of *Bunte Bros.* relating to the clarity and definiteness of the statute's terms, the policy of the Act, and the legislative history, is one which falls within the pronouncement: "Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise." 312 U. S. at 352.

[19] Appellees strongly urge that this case is governed by the construction of the phrase "in connection with transportation" in the Interstate Commerce Act, cited and discussed in the text above (see *Lehigh Valley R. Co.* v. *United States*, 243 U. S. 444), and for this view rely upon *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 481, which held that the Shipping Act and the Interstate Commerce Act, "each in its own field, should have like interpretation, application and effect." As we have stated, the phrase "connected with transportation," in the entirely different setting of the Interstate Commerce Act, is so dissimilar in terms and setting to the phrase "in connection with a common carrier by water" as used in the Shipping Act that the interpretation of the former cannot be controlling in determining the meaning of the latter.

[20] Appellees' contentions that there was no evidence to support a finding by the Commission that they were engaged in the business of forwarding "in connection with" a common carrier by water and

It remains only to notice the further objections that the case does not involve the use of forwarders by carriers to evade regulations applicable to carriers; and that to hold independent forwarders "subject to this Act" will bring them under its regulatory provisions, in other words, will make them "subject to this Act."

Needless to repeat, it is precisely because we think the latter effect is required by the considerations already set forth that our conclusion has been reached. Moreover, support for it is given by the very terms of the specific regulatory provisions cited to contradict it, as we have pointed out.[21] The ground need not be traversed again. The cited provisions, like § 1, are broad and general. They strike at evils as likely to be perpetrated by independent forwarders as by any of the "other persons" admittedly covered by the Act. They afford no suggestion of application narrowed to affiliated forwarders or of other distinction between them and independent forwarders, such as invariably and in the clearest terms Congress has stated whenever it has dealt with forwarders by land.

The common sense of all this, of course, is that Congress knew what it was about in both instances. We cannot ignore its repeated demonstrations of that fact. To do so would be to rewrite the statute, injecting limitations of affiliation no more rightfully within our function than inserting others of physical participation in the transportation service proper or of financial responsibility for it. These admittedly cannot go in, although there would be as much warrant for adding them as for putting in affiliation.

---

that the District Court erroneously refused to set aside the order of August 21, 1942, are founded in their view that the Act requires affiliation. For this and other reasons it is not necessary to consider them further.

[21] See notes 7, 9, 10, and discussion in the text.

Statutes may be emasculated as readily and as much by unauthorized restricted reading as by one unduly expansive. And the wisdom of the regulation of forwarders with the corresponding restriction of competitive freedom in the business is the concern of Congress, not of this Court. We leave the statute as Congress enacted it.

It is inherent in the view we take of the statute that more is involved than merely a carrier's attempt to immunize itself against the Act's penalties by using a forwarder to evade the regulations made binding on carriers. In that respect forwarders are obviously no different from other persons, for the Act does not permit such evasion by a carrier whether through the use of forwarders or any other persons. What is more important is that the Act is designed and in terms undertakes not only to prevent such evasion by carriers through denying them immunity when they hide behind forwarders; it also denies immunity to the forwarders themselves when they commit the acts or practices carriers and others subject to the Act are forbidden to perform.

The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

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

MR. JUSTICE FRANKFURTER dissenting, with whom MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concur.

It is important to keep in mind what this case is not. It does not involve the power of the Maritime Commission to obtain from a forwarder all information relevant to any inquiry by the Commission, based on complaints of violations of the Shipping Act or on its own motion. Section 27 of that Act gives the Commission such subpoena powers and subjects every person, forwarder or

not, to testimonial compulsion. 39 Stat. 728, 737, 46 U. S. C. § 826. Nor does the case involve the attempt of a carrier to use a forwarder as a means of evading the regulations by which water carriers are controlled. By no such indirection can a carrier immunize itself against the Act's penalties. Compare *Lehigh Valley R. Co.* v. *United States*, 243 U. S. 444.

The case is this. The business of these appellees is to negotiate on behalf of shippers for shipping space and to make the necessary administrative arrangements for the carriage of goods. They have no part in the physical process of moving goods. They have no corporate, physical, or financial tie with the carriers. The sole question here is whether such business has been brought under the regulatory scheme of the Act. The Commission contends that they are "persons subject to the Act." If the Commission is correct, these forwarders would have to submit all sorts of agreements with carriers and with other forwarders to the Commission for approval (39 Stat. 733, 46 U. S. C. § 814), whereupon such agreements may be freed from the restrictions of the Sherman Law; they would be required to maintain uniform rates (39 Stat. 734, 46 U. S. C. § 815); they would be subject to the Commission's supervision insofar as their activities involved practices pertaining to the handling and care of shipments (39 Stat. 734, 46 U. S. C. § 816); they would have to file reports and business records called for by the Commission (39 Stat. 736, 46 U. S. C. § 820); they would be subject to the Commission's power to award reparations for violations of the Act (39 Stat. 736, 46 U. S. C. § 821); and they would be liable to heavy penalties (39 Stat. 734, 736, 738, 40 Stat. 900, 902, 46 U. S. C. §§ 815, 820, 831, 839).

The Shipping Act has been on the statute books since 1916. Yet not until 1942 did the agency charged with

the duty of enforcing the Act deem forwarders of this type to be covered by it. The scope of its legislation is, of course, for Congress to determine and not for the enforcing agency. Inaction, no matter how consistent and long-continued, cannot contract the reach of a statute. But much has properly been said about the important significance which attaches to the meaning given a statute by those whose duty it is to enforce it and who are deemed especially equipped to breathe life into inert language. Just as assumption of jurisdiction by an administrative agency for a long period of time goes a long way to prove that powers exercised were impliedly given, see *United States* v. *Midwest Oil Co.*, 236 U. S. 459, a consistent and unexplained failure to exercise power not obviously conferred by legislation may be equally persuasive that the power claimed was never conferred. It is not to be presumed that for decades officials were either ignorant of the duties with which Congress charged them or derelict in their enforcement.

A consideration of the language of the legislation in its proper setting makes it abundantly clear that the failure of the Commission and its predecessor for more than twenty-five years to exercise the authority which it now claims was due neither to ignorance nor to indifference. The explanation that would spontaneously occur to one for such administrative practice is, I believe, the right one: the power was not exercised because Congress did not grant it.

It is a fair generalization that Congress has never supplanted the forces of competition by administrative regulation until a real evil had, in the opinion of Congress, manifested the need for it. One turns in vain to the Congressional investigation which led to the Shipping Act, to the hearings on the bills which became that Act, to the reports on which it was based, to the experience under the

Act since its inception, as reflected in the reports of the Maritime Commission and its predecessor the Shipping Board, for any indication that the business of independent forwarders, like those in this case, was so conducted as to make their regulation appropriate either to curb practices themselves inimical to the public interest or to render effective the regulation of water carriers.

The Commission's claim of jurisdiction must rest on construction of the phrase "business of forwarding . . . in connection with a common carrier by water." 39 Stat. 728, 46 U. S. C. § 801. Whatever the "business of forwarding" may here mean, effect must be given to the qualifying phrase "in connection with a common carrier by water." If it is left without any appropriate function unless these independent forwarders are covered, it must be applied to them. But if ample scope can be given to the phrase without attributing to Congress such a sudden assumption of authority over independent forwarders although no need for taking such control had been revealed, we should avoid undue extension of language as part of our duty to give fair meaning to what Congress has said.

Abstractly it may be argued that "forwarding" was intended to cover only those activities which included the physical transportation or movement of goods from one place to another. *Cf. e. g.*, H. R. 9089, 9090, 9888, 76th Cong., 3d Sess. (1940); S. 3665, 3666, 4096, 76th Cong., 3d Sess. (1940). Support for such a restrictive meaning might be drawn from the fact that the "other persons" subject to the Act were those concerned with the physical handling of the goods. But such a construction would disregard the purpose of the statute. Again, the term may be said to cover only those businesses in which the forwarder assumes the liability for safe shipment of the goods from point of shipment to their desti-

nation. *Cf.* 56 Stat. 284, 49 U. S. C. Supp. V, § 1002 (a) (5) (B). Such a construction likewise does not harmonize with the aims of the statute. The most natural meaning of "forwarding" includes the business in which these appellees engage, namely, the rendering of administrative and brokerage services. *Cf.* H. R. Rep. No. 1682, 77th Cong., 2d Sess. (1942).

But Congress did not regulate "forwarders"; it regulated the "business of forwarding . . . in connection with a common carrier by water." When, then, is forwarding "in connection with a common carrier by water"? That term may mean a business or financial connection; it may mean a physical connection, *i. e.*, the mutual handling of goods; it may mean both. Or it may mean any share in the process of offering of goods for water shipment. This last construction would mean that the restriction could have been included only for the purpose of excluding forwarders like these but concerned with shipment by rail. Such is the Commission's essential argument, that the phrase is merely a saving clause against its application to forwarders dealing with land carriers. To suggest that such a roundabout method was used for the purpose of saying that this statute was not impliedly intended as an amendment to the familiar Interstate Commerce Act, 24 Stat. 379, 49 U. S. C. § 1, amendments to which have always been designated as such, the administration of which was vested with a different Commission, the Interstate Commerce Commission, and the subject matter of which was completely distinguishable in the very titles of the statutes, is to attribute a fanciful abundance of caution, and less than common sense to the draughtsman. If every forwarder dealing with water carriers was to be covered by the Act, the obvious way of covering them would have been simply to say "forwarders" without qualification. The Commission really asks us to disregard the duty of

courts to give effect to every phrase used by Congress. The construction which is now accepted means that "in connection with a common carrier by water" are perfectly superfluous words and are to be deleted.

Significance must be given to the qualification. What more reasonable than to hold that this phrase means those forwarders who are so closely tied to the business of the water carrier, by corporate, financial, or physical union, as to make regulation of them appropriate in order to control effectively the carriers with which they are affiliated? Such a forwarder is really a part of the process of carrying. Here the forwarders are closely connected not with the carrier but with the shipper.

That such construction respects Congressional purpose is reinforced by Congressional action regarding forwarders dealing with land carriers. When Congress, in 1942, first regulated such land-carrier forwarders, 56 Stat. 284, 49 U. S. C., Supp. V, § 1001, forwarders, having the same functions in relation to land traffic as these appellees do in relation to water-borne traffic, were not included. And yet it is argued that Congress thirty years ago asserted control over such forwarders concerned with water-borne traffic and forbade ordinary competition among them, though no basis in experience can account for such action by Congress.

California v. *United States*, 320 U. S. 577, involved a totally different situation. That case was concerned with wharves—facilities physically connected with water carriers. These were just as much the agents of the carrier as of the shipper; they formed an integral part of the carrier's business. As a matter of physical fact, the "connection" of these forwarders to a carrier is very different from the "connection" of wharf facilities to the carrier. Awareness of that fact was demonstrated by the specific omission, in the *California* opinion, of the term "for-

warder" in considering whether port facilities were "connected" with water carriers. See *California* v. *United States, supra,* at 586. The difference in fact and in business relation between the forwarders' "connection" in this case, constituting merely an aspect of the shipper-carrier relationship, and the "connection" in the *California* case, which normally involves a close business tie with the carrier, is vital and should be observed in applying a section in which Congress dealt compendiously with various enterprises outside of, but related to, the regulated functions of water carriers.

BOUTELL ET AL., DOING BUSINESS AS F. J. BOUTELL SERVICE CO., *v.* WALLING, WAGE AND HOUR ADMINISTRATOR.

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

No. 73. Argued October 9, 1945.—Decided February 25, 1946.

1. Employees of a garage who are engaged exclusively in repairing and maintaining vehicles of a single interstate motor carrier come within the coverage of the Fair Labor Standards Act. P. 466.
2. They are not engaged in a "service establishment the greater part of whose . . . servicing is in intrastate commerce" within the exemption provided by § 13 (a) (2) of the Fair Labor Standards Act. P. 467.
3. Nor do they come within § 13 (b) (1) of the Fair Labor Standards Act exempting "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act, 1935," since their employer is not a carrier. P. 467.
4. The power of the Interstate Commerce Commission to establish maximum hours of service pursuant to the provisions of § 204 of the Motor Carrier Act (Part II of the Interstate Commerce Act) is limited to employees of "carriers." P. 467.
5. Administrative interpretations of the Fair Labor Standards Act by the Administrator of the Wage and Hour Division of the De-

partment of Labor and the Interstate Commerce Act by the Interstate Commerce Commission are entitled to great weight. P. 471. 148 F. 2d 329, affirmed.

In a suit brought by the Administrator of the Wage and Hour Division of the Department of Labor, the District Court enjoined petitioners from violating the maximum hours provisions of § 7 of the Fair Labor Standards Act. The Circuit Court of Appeals affirmed. 148 F. 2d 329. This Court granted certiorari. 325 U. S. 849. *Affirmed*, p. 472.

Submitted on brief for petitioners by *Harry G. Gault* and *Glenn M. Coulter*.

Bessie Margolin argued the cause for respondent. With her on the brief were *Acting Solicitor General Judson*, *William S. Tyson* and *Albert A. Spiegel*.

MR. JUSTICE BURTON delivered the opinion of the Court.

This suit was brought in the District Court of the United States for the Eastern District of Michigan, by the Administrator of the Wage and Hour Division, United States Department of Labor, to enjoin petitioners from violating the maximum hours provisions[1] of the Fair Labor

[1] "SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 52 Stat. 1063, 29 U. S. C. § 207 (a).

Standards Act of 1938. 52 Stat. 1060, 29 U. S. C. § 201, *et seq.*

Petitioners are two of four partners doing business as F. J. Boutell Service Company, the other two not being subject to the jurisdiction of the District Court. The four partners are the sole stockholders of the F. J. Boutell Drive-Away Company, a Michigan corporation, engaged in the transportation of automobiles and army equipment in interstate commerce.

The employees of the Service Company involved in this suit are mechanics engaged in greasing, repairing, servicing and maintaining the transportation equipment owned and operated by the Drive-Away Company. The parties have stipulated and the trial court has found that the Service Company is engaged exclusively in rendering such service to the Drive-Away Company and such corporation "is an entity separate and distinct from" the Service Company.

The case presents two questions: (1) whether the employees of the Service Company are "engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce" within the meaning of the exemption clause, § 13 (a) (2);[2] and (2) whether they come within the exemption clause, § 13 (b) (1), which exempts from § 7[3] of the Act "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204[4]

[2] "SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to . . . (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; . . ." 52 Stat. 1067, 29 U. S. C. § 213 (a) (2).

[3] See note 1 *supra.*

[4] "SEC. 204 (a) It shall be the duty of the Commission—

"(1) *To regulate common carriers* by motor vehicle as provided in this part, *and to that end* the Commission may *establish* reasonable

of the Motor Carrier Act, 1935." 52 Stat. 1068, 29 U. S. C. § 213 (b) (1). The District Court ruled against petitioners on both questions and granted the injunction sought by the Administrator. The Circuit Court of Appeals affirmed on both grounds. 148 F. 2d 329. We agree with those conclusions.

The amended findings of fact agreed to by the parties include the statement that the petitioners' employees "involved in this proceeding are mechanics engaged in greasing, repairing, servicing and maintaining the transportation equipment owned and operated by the F. J. Boutell Drive-Away Company . . ." No claim is made that these employees are not engaged in interstate commerce within the meaning of § 7 of the Fair Labor Standards Act. They are well within the requirement that they be "actually in or so closely related to the movement of the commerce as to be a part of it." *McLeod* v. *Threlkeld*, 319 U. S. 491, 497.[5]

---

requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and *maximum hours of service of employees,* and safety of operation and equipment.

"(2) *To regulate contract carriers* by motor vehicle as provided in this part, *and to that end* the Commission may *establish* reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and *maximum hours of service of employees,* and safety of operation and equipment.

"(3) *To establish for private carriers* of property by motor vehicle, if need therefor is found, *reasonable requirements to promote safety of operation, and to that end prescribe* qualifications and *maximum hours of service of employees,* and standards of equipment. . . ." (Italics supplied.) 49 Stat. 546, 49 U. S. C. § 304 (a) (1) (2) (3).

[5] *Overstreet* v. *North Shore Corp.,* 318 U. S. 125, 130; *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 574. See also under the Federal Employers' Liability Act, *New York Central R. Co.* v. *Marcone,* 281 U. S. 345, 349; *Pedersen* v. *Delaware, L. & W. R. Co.,* 229 U. S. 146, 150; *New York, N. H. & H. R. Co.* v. *Walsh,* 223 U. S. 1, 6. Compare *Shanks* v. *Delaware, L. & W. R. Co.,* 239 U. S. 556, 560.

In answer to the first question, the record shows that these employees do not come within the exemption stated in § 13 (a) (2). This is so because their employer, the Service Company, supplies its services, including their services, exclusively to the Drive-Away Company which in turn uses those services in interstate commerce. The Drive-Away Company does not use their services for its own purposes as an ultimate consumer, beyond the end of the flow of goods in interstate commerce. Accordingly, the employees of the Service Company are not engaged in a retail or service establishment within the meaning of § 13 (a) (2) as interpreted in *Roland Electrical Co.* v. *Walling,* 326 U. S. 657, and *Martino* v. *Michigan Window Cleaning Co.,* 327 U. S. 173. Furthermore, substantially all of the servicing done by the Service Company is thus done in interstate commerce, whereas § 13 (a) (2) requires the greater part of it to be done in intrastate commerce if the employees rendering it are to be exempted under that provision.

The question whether the employees of the Service Company are to be exempted by virtue of § 13 (b) (1) turns upon whether the Interstate Commerce Commission has the "power to establish" maximum hours of service for them under § 204 (a) (1), (2) or (3) of the Motor Carrier Act, 1935,[6] now officially cited as Part II of the Interstate Commerce Act, 54 Stat. 919, 49 U. S. C. § 301, *et seq.* Whatever may be the precise scope of the Commission's "power to establish" hours of service, we hold that the Commission does not have that power over the men here concerned because the Commission's jurisdiction is limited to employees of "carriers" and the record here shows that the men in question are employees of the Service Company, which is not a carrier, rather than of the Drive-Away Company, which is a carrier. This is

[6] See note 4 *supra.*

true although the work these employees do is all supplied to the Drive-Away Company through the Service Company.

The Wage and Hour Division has found to its satisfaction the facts necessary to place these employees of the Service Company under its jurisdiction for the purposes of the Fair Labor Standards Act. The record contains no suggestion that the Interstate Commerce Commission or any other administrative body has found that these employees of the Service Company are or should be treated as employees of the Drive-Away Company for the purposes of the Interstate Commerce Act. This case, therefore, is decided upon the basis that the parties have stipulated and the trial court has found that these employees are employees of the partnership, the Service Company, which is the relationship established for them by the petitioners as their employers. See *Schenley Distillers Corp.* v. *United States,* 326 U. S. 432, for a case giving effect to certain other consequences under the Motor Carrier Act of a corporate arrangement chosen by the persons concerned as a means of carrying on their business. See also *Higgins* v. *Smith,* 308 U. S. 473, 477, for a different result under other circumstances.

In the absence of power in the Interstate Commerce Commission to establish the maximum hours of service of these employees, the provisions of the Fair Labor Standards Act as to their maximum hours of employment remain applicable to them.

It appears from the face of the Motor Carrier Act that § 204 refers only to the regulation of "carriers." Moreover, Section 226 of the Act (formerly numbered 225, 54 Stat. 929, 49 U. S. C. § 325), which authorizes investigations by the Commission as a basis for the regulation of the maximum hours of service of employees under § 204, refers only to investigations of the "maximum hours of

service of employees of all motor carriers and private carriers of property by motor vehicle . . ." [7] The legislative history of the section is reviewed in *United States* v. *American Trucking Assns.*, 310 U. S. 534, 544–550.

The Interstate Commerce Commission has written many decisions defining the limits of its authority to pre-

[7] "SEC. 225. The Commission is hereby authorized to investigate and report on the need for Federal regulation of the sizes and weight of motor vehicles and combinations of motor vehicles and of the qualifications and *maximum hours of service of employees of all motor carriers and private carriers of property by motor vehicle;* and in such investigation the Commission shall avail itself of the assistance of all departments or bureaus of the Government and of any organization of motor carriers having special knowledge of any such matter." (Italics supplied.) 49 Stat. 566, 49 U. S. C. § 325, renumbered as § 226 by 54 Stat. 929.

In discussing § 204 (a) (1), (2) and (3) and § 225 Senator Wheeler, sponsor of the Bill, said in explanation of it—

> ". . . the committee amended paragraphs (1) and (2) to confer power on the Commission to establish reasonable requirements with respect to the qualifications and maximum hours of service of *employees of common and contract carriers,* thus restoring provisions that were in the Rayburn bill, introduced in the Seventy-third Congress. . . .
>
> "In order to make the highways more safe, and so that common and contract carriers may not be unduly prejudiced in their competition with peddler trucks and other private operators of motor trucks, a provision was added in subparagraph 3 giving the Commission authority to establish similar requirements with respect to the qualifications and hours of service of the *employees of such operators.* The exercise of this power with respect to the three classes of carriers is intended to be contingent upon the results of the comprehensive investigation of the need for regulation of this kind provided for in section 225. . . ." (Italics supplied.) 79 Cong. Rec. 5652. See also, p. 5660.

In the House of Representatives, Representative Pettengill read the following observation made by Joseph B. Eastman of the Interstate Commerce Commission—

> "The bill . . . gives the Commission authority to prescribe maximum hours of service for the *employees of common carriers, contract carriers, and private carriers of property.* . . ." (Italics supplied.) 79 Cong. Rec. 12,229. See also, S. Rep. No. 482, 74th Cong., 1st Sess. (1935) p. 1.

691100°—47——34

scribe qualifications and maximum hours of service for employees of motor carriers under § 204 (a) (1), (2) and (3), but throughout these decisions it apparently has assumed that its jurisdiction is limited to employees of "carriers" which in turn are under the jurisdiction of the Commission. It has, for example, recognized its power to establish maximum hours of service for automobile maintenance mechanics of "carriers" [8] but at the same time has said—

> "By far the larger proportion of the carriers subject to our jurisdiction operate less than 10 vehicles and do not employ mechanics to repair their vehicles, but on the contrary have such work done in commercial garages. *We have, of course, no jurisdiction over employees working in commercial garages.*" (Italics supplied.) *Ex parte No. MC–2, In the Matter of Maximum Hours of Service of Motor Carrier Employees,* 28 M. C. C. 125, 132.

The Administrator of the Wage and Hour Division of the Department of Labor has interpreted § 13 (b) (1) of the Fair Labor Standards Act consistently with the interpretation given to it by the Interstate Commerce

---

[8] "Our findings of fact and conclusions of law are as follows:

"*Findings of fact.*—1. That mechanics employed by common and contract carriers and private carriers of property by motor vehicle, subject to part II of the Interstate Commerce Act, devote a large part of their time to activities which directly affect the safety of operation of motor vehicles in interstate or foreign commerce. . . .

"*Conclusions of law.*— . . .

"3. That we have power, under section 204 (a) of said part II, to establish qualifications and maximum hours of service for the classes of employees covered by findings of fact numbered 1, 2, and 3 above, [mechanics, loaders and helpers employed by carriers] and that we have no such power over any other classes of employees, except drivers." *Ex parte No. MC–2,* 28 M. C. C. 125, 138–139. See also *Ex parte No. MC–2,* 3 M. C. C. 665, 667; 6 M. C. C. 557; 11 M. C. C. 203; *Ex parte No. MC–28, Jurisdiction Over Employees of Motor Carriers,* 13 M. C. C. 481, 488; *Ex parte No. MC–3, Motor Carrier Safety Regulations—Private Carriers,* 23 M. C. C. 1, 8.

Commission.[9] The interpretation of this Act by each of these agencies is entitled to great weight. *United States* v. *American Trucking Assns.*, 310 U. S. 534, 549.

Throughout the discussion of these sections by this Court in *United States* v. *American Trucking Assns., supra,* and in *Southland Gasoline Co.* v. *Bayley,* 319 U. S. 44, it is assumed that they refer to employees of "carriers" and of "motor vehicle operators" which are themselves under the jurisdiction of the Interstate Commerce Commission, and there is nothing in either case to indicate an interpretation by this Court that the exemption prescribed in § 13 (b) (1) extends to workers whose services affect the safety of operations of motor vehicle carriers but who are not themselves employees of a carrier.

In this view of this case, it is not necessary to determine what kind of a carrier the Drive-Away Company is or even whether it is a carrier within the meaning of the Motor Carrier Act because the employees involved in this case are not its employees. Similarly, it is not necessary to determine which of the employees of the Service Company do work which affects the safety of the operation

---

[9] See Interpretative Bulletin No. 9, Wage and Hour Division, Office of the Administrator, originally issued March, 1939, 5th Rev., October, 1943. 2 C. C. H. Labor Law Service, ¶ 32,109. Where motor vehicle drivers or mechanics are employed by companies engaged in certain types of interstate transportation over which the Interstate Commerce Commission disclaims jurisdiction, they are held to be covered by the Fair Labor Standards Act. For example, if such employees are engaged in the transportation in interstate commerce of consumable goods, such as food, coal and ice, to railroads and docks for use in trains and steamships, jurisdiction over them is disclaimed by the Commission but is accepted by the Wage and Hour Division as covered by the Fair Labor Standards Act. Interpretative Bulletin No. 9, *supra,* Par. 6 (b). The Wage and Hour Division also accepts jurisdiction over employees engaged in the transportation of mail in interstate commerce who are employed, not by the carrier, but by a contractor dealing directly with the Post Office Department. *Id.,* Par. 7 (b).

of motor vehicles because that classification applies to employees whose hours are regulated by the Interstate Commerce Commission and not to those whose hours are regulated by the Fair Labor Standards Act.

For these reasons we find that petitioners' employees come within the coverage of the Fair Labor Standards Act of 1938 and not within the exemptions stated in either § 13 (a) (2) or § 13 (b) (1) of that Act, and the judgment of the Circuit Court of Appeals, therefore, is

Affirmed.

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

MR. JUSTICE DOUGLAS, dissenting.

I agree that these employees would be covered by the Fair Labor Standards Act but for the exemption contained in § 13 (b) (1). That subsection exempts from § 7 of the Act "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935 . . ."

There is no doubt that the Interstate Commerce Commission has the power to establish qualifications and maximum hours for employees of a carrier who are mechanics engaged in greasing, repairing, servicing, and maintaining its transportation equipment. *In the Matter of Maximum Hours of Service of Motor Carrier Employees,* 28 M. C. C. 125. I think that power would still exist if the carrier separately incorporated its garage. This affiliated garage is not like an independent commercial garage. It is still a part of the carrier's business—no more separate or distinct than any other department. The same people own it, operate it, and manage it. If the Interstate Commerce Commission, acting under § 204 of the Motor Carrier Act of 1935, had undertaken to establish the quali-

fications and maximum hours for these mechanics, I cannot believe that we would allow its jurisdiction to be defeated by that device, whatever may have been the reason for the separate incorporation of the garage. For these mechanics were, in the practical sense, employees of the carrier after, as well as before, incorporation. And the exemption contained in § 13 (b) (1) of the Fair Labor Standards Act is dependent, not on the exercise by the Interstate Commerce Commission of its power, but on the existence of that power.[1] The power which Congress granted the Interstate Commerce Commission to establish qualifications and maximum hours for mechanics should not be allowed to be defeated by arrangements between parties which, for certain purposes, may estop them from asserting that two corporations in form are one in substance.

This particular exemption may not be a wise one. But we must take the law as it is written. The policy behind the exemption is defeated, if mere legal forms are allowed to nullify the power of the Interstate Commerce Commission to deal with the problem of safety. As the Commission said, ". . . the carefully supervised work of skilled mechanics is a most important factor in the prevention of accidents, and therefore in the promotion of highway safety." *In the Matter of Maximum Hours of Service of Motor Carrier Employees, supra,* p. 133. We should refuse to whittle down that jurisdiction, even though we thought that the public interest would be better served by broadening the coverage of the Fair Labor Standards Act.

MR. JUSTICE FRANKFURTER and MR. JUSTICE RUTLEDGE join in this dissent.

[1] To date the Commission has prescribed qualifications and maximum hours only for drivers. See 49 Code Fed. Reg., Cum. Supp. (1944) Parts 191, 192.

WILSON ET AL., DOING BUSINESS AS WILSON LUMBER CO., *v.* COOK, COMMISSIONER OF REVENUES.

NO. 328. APPEAL FROM THE SUPREME COURT OF ARKANSAS.*

Argued January 11, 1946.—Decided March 4, 1946.

An Arkansas statute, Act 118 of 1923, Pope's Digest, Arkansas Statutes (1937), §§ 13371–13375, imposes a tax on the severance of timber from the soil; requires payment of the tax in the first instance by the person actually engaged in severing the timber from the soil, but, in general terms and without excepting the United States, requires the severer to collect or withhold the amount of the tax from the price paid to the owner of the timber at the time of the severance; and gives the State a lien upon all timber severed from the soil. A contractor contracted with the United States for the purchase and severance of timber on national forest reserves located within the State, some of which were public lands of the United States when Arkansas was admitted to statehood and some of which were acquired by the United States by purchase with consent of the State. The contract provided that "title to all timber . . . shall remain in the United States until it is paid for, and scaled, measured or counted." The contractor severed timber from the forest reserves in question; execution was issued for collection of the tax; and the contractor sued to enjoin collection. *Held:*

1. Since the record in No. 328 does not show that appellants presented for decision to the State Supreme Court any federal question, and since that court, in holding the tax constitutional, did not necessarily pass on the constitutional validity of the statute, this Court is without jurisdiction of the appeal under § 237 (a) of the Judicial Code; but the appeal is treated as a petition for certiorari, as required by § 237 (c), and certiorari is granted. Pp. 480–482.

2. Having treated the appeal in No. 328 as a petition for certiorari, as required by § 237 (c) of the Judicial Code, and having granted certiorari, this Court can pass only on the federal questions passed upon by the State Supreme Court. P. 482.

3. The contractor, being taxed by the State on his activities in severing timber from Government lands under contract with the

*Together with No. 329, *Cook, Commissioner of Revenues,* v. *Wilson et al., doing business as Wilson Lumber Co.,* on certiorari to the same court, argued and decided on the same dates.

Government, can not claim the benefit of implied constitutional immunity of the Federal Government from taxation by the State. Pp. 482, 483.

4. Since the point is made for the first time here, this Court is not free to consider an attack on the state statute on the ground that it requires the severer to collect the tax from the owner of the timber at the time of severance and gives the State a lien on the land from which the timber is severed and a lien upon the severed timber, even though title to the severed product has not passed to the taxpayer, and that the statute thus purports to place a forbidden tax directly on the United States. P. 483.

5. This Court is not now concerned with the Government's liability to the statutory lien or for the payment of the tax, since it will be time enough to consider those questions when some effort is made to enforce the lien or collect the tax from the United States. P. 484.

6. The State has territorial jurisdiction to lay the tax upon activities carried on within the forest reserve purchased by the United States. P. 486.

(a) The Arkansas statute consenting to the purchase of forest lands by the United States (Pope's Digest, Arkansas Statutes, § 5646) made no express grant or reservation of legislative power over the areas purchased and can not be taken as having yielded or intended to surrender to the Federal Government the state legislative jurisdiction over the area in question, so far as exercise of that jurisdiction is consistent with federal functions. P. 486.

(b) By § 12 of the Act of March 1, 1911, 16 U. S. C. § 516, authorizing the purchase of forest reserves, Congress in effect has declined to accept exclusive legislative jurisdiction over forest reserve lands, and expressly provided that the State shall not lose its jurisdiction in this respect nor the inhabitants "be absolved from their duties as citizens of the State." P. 486.

7. The State has legislative jurisdiction over the federal forest reserve lands located within it which were public lands of the United States when Arkansas was admitted to statehood. P. 487.

(a) Upon admission of Arkansas to statehood upon an equal footing with the original States, the legislative authority of the State extended over the federally owned lands within the State, to the same extent as over similar property held by private owners, except that the State could enact no law which would conflict with the powers reserved to the United States by the Constitution. P. 487.

(b) Such authority did not pass to the United States by virtue of the provision of Article I, § 8, cl. 17 of the Constitution, which authorizes it "to exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be." P. 488.

(c) Since the United States did not purchase the lands with the consent of the State, it did not acquire exclusive jurisdiction under the constitutional provision, and there has been no cession of jurisdiction by the State. P. 488.

(d) Although Arkansas has conferred on Congress power to pass laws for the administration and control of lands acquired by the United States in Arkansas, it has not ceded exclusive legislative jurisdiction either over lands reserved by the United States from the public domain or over lands acquired in the State. P. 488.

208 Ark. 459, 187 S. W. 2d 7, reversed in part and affirmed in part.

A contractor who had contracted with the United States for the purchase and severance of timber on national forest reserves in the State of Arkansas sued to enjoin collection of a tax levied by the State on the severance of timber from the soil. The state chancery court enjoined collection of the tax. On appeal, the Supreme Court of Arkansas modified the judgment, holding that the State was without authority to lay a tax on the severance of timber from lands which were public lands of the United States when Arkansas was admitted to statehood; that the authority of the State to lay the tax extended to transactions occurring on the forest reserve acquired by the United States by purchase; and that the tax assessed against the contractor for the severance of timber on forest reserves of the latter class did not lay an unconstitutional burden on the United States. 208 Ark. 459; 187 S. W. 2d 7. Each party appealed from that part of the decision which was adverse to him. On submission of jurisdictional statements, this Court postponed consideration of its jurisdiction of the contractor's appeal (No. 328), but dismissed the Tax Commissioner's appeal (No. 329), for want of jurisdiction, treated the papers as

a petition for certiorari, and granted certiorari. 326 U. S. 685. *Reversed in part and affirmed in part,* p. 489.

Wm. J. Kirby submitted on brief for Wilson et al.

O. T. Ward argued the cause for the Commissioner of Revenues. With him on the brief was *R. S. Wilson.* In No. 328, *Thos. S. Buzbee* filed a motion to affirm or dismiss in part.

Solicitor General McGrath, Assistant Attorney General Samuel O. Clark, Jr., Sewall Key, Arnold Raum, J. Louis Monarch and *William Robert Koerner* filed a brief for the United States, as *amicus curiae.*

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

An Arkansas statute, Act 118 of 1923, Pope's Digest, Arkansas Statutes (1937), § 13371, imposes "a privilege or license tax . . . upon each person . . . engaged in the business of . . . severing from the soil . . . for commercial purposes natural resources, including . . . timber . . ." By § 13372, as a condition of the license, there is imposed on the severer an obligation to pay the tax and consent that the tax "shall . . . remain a lien on each unit of production until paid into the State Treasury . . ." Section 13375 fixes the tax at 7 cents per thousand feet of the timber severed. Section 13376 provides that the state "shall have a lien upon any and all natural resources severed from the soil . . ." In § 13382 it is provided that "the payment of said privilege taxes shall be required of the severer . . . actually engaged in the operation of severing natural products whether as owner, lessee, concessionaire or contractor. The reporting taxpayer shall collect or withhold out of the proceeds of the sale of the products severed the proportionate parts of the total tax due by the

respective owners of such natural resources at the time of severance."

Appellants in No. 328, a copartnership, entered into contracts with the United States for the purchase and severance of timber on national forest reserves located within the state, some of which were public lands of the United States when Arkansas was admitted to statehood and some of which were acquired by the United States by purchase with the consent of the state. The contracts of severance and purchase provided that "title to all timber included in this agreement shall remain in the United States until it has been paid for, and scaled, measured or counted." By the contracts the appellants were required in advance of severance to place with the Government representative advance installments of the estimated purchase price.

In the years 1937 to 1942, appellants, proceeding under their contract, severed timber from the forest reserves in question. An execution having been issued and delivered to the county sheriff, appellee in No. 328, and also appellant in No. 329, for collection of the tax assessed against appellants in No. 328 for the years in question, they brought the present suit in the state chancery court to enjoin the collection. The questions on which the parties ask decision are (a) whether the forest reserves which were public lands of the United States before Arkansas was admitted to statehood are subject to the taxing jurisdiction of the state; (b) whether the forest reserves acquired by the United States by purchase remain subject to the taxing authority of the state; and (c) whether the tax is unconstitutional as a tax laid upon the property or activities of the United States, or because the tax laid on plaintiffs imposed an unconstitutional burden on the United States.

The chancery court gave judgment for plaintiffs, enjoining collection of the tax. It held that if the tax "be

applied" to plaintiffs, it "would be a tax upon the operations of the Government of the United States," and that the tax "does not apply to the timber severed by the plaintiffs from the National Forest." On appeal the Supreme Court of Arkansas modified the judgment, holding that the state was without authority to lay a tax on the severance of timber from lands which were public lands of the United States when Arkansas was admitted to statehood; that the authority of the state to lay the tax extended to transactions occurring on the forest reserve acquired by the United States by purchase; and that the present tax assessed against plaintiffs for the severance of timber on forest reserves of this class did not lay an unconstitutional burden on the United States. 208 Ark. 459, 187 S. W. 2d 7.

Plaintiffs have appealed, in No. 328, from so much of the judgment as sustained the tax with respect to lands acquired by the United States by purchase, urging in their assignments of error that the Supreme Court of Arkansas erred in reversing the judgment of the chancery court, "which held to be void the severance tax statute," and in holding that the severance tax law is not repugnant to the supremacy clause, Art. VI, cl. 2 of the Constitution, or to Art. IV, § 3, cl. 2, conferring on Congress power to dispose of "and make all needful Rules and Regulations respecting . . . Property belonging to the United States . . ." Defendant, appellant in No. 329, seeks by his appeal to reverse so much of the judgment as denied the right to levy the tax for severance of timber from forest lands reserved from the public domain. On submission of the jurisdictional statements in this Court we postponed to the hearing on the merits consideration of our jurisdiction in No. 328. In No. 329 we dismissed the appeal for want of jurisdiction. § 237 (a) of the Judicial Code as amended, 28 U. S. C. § 344 (a). Treating the papers on which the ap-

peal was allowed as a petition for writ of certiorari, as required by § 237 (c) of the Judicial Code as amended, we granted certiorari.

Under § 237 of the Judicial Code we are without jurisdiction of the appeal in No. 328, unless there was "drawn in question" before the Supreme Court of Arkansas "the validity of a statute" of the state, "on the ground of its being repugnant to the Constitution, . . . or laws of the United States." The purpose of this requirement is to restrict our mandatory jurisdiction on appeal, *Memphis Gas Co.* v. *Beeler,* 315 U. S. 649, 651, and to make certain that no judgment of a state court will be reviewed on appeal by this Court unless the highest court of the state has first been apprised that a state statute is being assailed as invalid on federal grounds, *Charleston Assn.* v. *Alderson,* 324 U. S. 182, 185–6 and cases cited, or, when the statute, as applied, is so assailed, until it has opportunity authoritatively to construe it. *Fiske* v. *Kansas,* 274 U. S. 380, 385 and cases cited. This jurisdictional requirement is satisfied only if the record shows that the question of the validity under federal law of the state statute, as construed and applied, has either been presented for decision to the highest court of the state, *Wall* v. *Chesapeake & Ohio R. Co.,* 256 U. S. 125, 126; *Citizens National Bank* v. *Durr,* 257 U. S. 99, 106, or has in fact been decided by it, *Nickey* v. *Mississippi,* 292 U. S. 393, 394; *Whitfield* v. *Ohio,* 297 U. S. 431, 435–6, and that its decision was necessary to the judgment. *Cuyahoga Power Co.* v. *Northern Realty Co.,* 244 U. S. 300, 304 and cases cited. The record in this case does not disclose that at any time in the course of the proceedings in the state courts plaintiffs asserted the invalidity of a state statute on any federal ground. The bill of complaint in the chancery court set up only that the demand of the state for the tax "is an illegal and void exaction" and "is in violation of " Art. IV, § 3, cl. 2 and of Art.

VI, cl. 2 of the Constitution. There were no assignments of error in the Supreme Court of Arkansas.

As the record does not show that the plaintiffs presented for decision to the state Supreme Court any federal question, they have no appeal to this Court unless the opinion of the state Supreme Court shows that that court ruled on the validity of a state statute under the laws and Constitution of the United States. *Charleston Assn.* v. *Alderson, supra,* 185–6 and cases cited. That court's opinion, while holding that the "tax law" was applicable to "persons severing timber from lands of the United States in a national forest," does not indicate that plaintiffs raised there, or that the court passed upon, the validity of the statute as applied. The court considered only the validity of "the tax," not that of the statute.

With reference to plaintiffs' liability for the tax, it decided only that the state "has the right to collect the severance tax, so far as territorial jurisdiction is concerned," for severance of timber from lands acquired by the United States by purchase, and that plaintiffs could not claim the benefits of the immunity, if any, of the Federal Government from "the tax," since it was imposed on plaintiffs, not the Government or its property. It said that the Government was not constitutionally immune from such economic burden as might be passed on from the taxpayer to the Government by reason of the effect of the tax paid by the severers, citing *James* v. *Dravo Contracting Co.,* 302 U. S. 134 and *Alabama* v. *King & Boozer,* 314 U. S. 1. Being asked to enjoin the collection of the tax, the state court contented itself with holding that the tax, which was assessed on plaintiffs and not the Government, imposed no burden on the Government which infringed its implied constitutional tax immunity. Since the collection of a tax by a state officer, as here, may or may not offend against the Constitution, independently of the

constitutionality of a statute, see *Nashville, C. & St. L. R. Co.* v. *Browning,* 310 U. S. 362, 369, the state court, in holding the tax constitutional, did not necessarily pass on the constitutional validity of the statute.

In order to support an appeal to this Court it is necessary that the question of the validity of the state taxing statute be either presented to the state court or decided by it. It is not sufficient merely to attack, as here, the tax levied under the statute, or "the right to collect the tax" which has been levied, or to show that the validity of the tax alone has been considered. *Charleston Assn.* v. *Alderson, supra,* 185, and cases cited. For "the mere objection to an exercise of authority under a statute, whose validity is not attacked, cannot be made the basis" of an appeal. *Jett Bros. Co.* v. *City of Carrollton,* 252 U. S. 1, 6. It is for this reason that we have held that an appeal will not be sustained where there has been only an attack upon a tax assessment, *Jett Bros. Co.* v. *City of Carrollton, supra; Miller* v. *Board of County Comm'rs,* 290 U. S. 586; *Memphis Gas Co.* v. *Beeler, supra,* 650; *Commercial Credit Co.* v. *O'Brien,* 323 U. S. 665; *Charleston Assn.* v. *Alderson, supra,* 185, or, as here, upon a "tax," *Citizens National Bank* v. *Durr, supra,* 106; *Indian Territory Illuminating Co.* v. *Board of County Comm'rs,* 287 U. S. 573; *Baltimore National Bank* v. *State Tax Comm'n,* 296 U. S. 538; *Irvine* v. *Spaeth,* 314 U. S. 575, or upon the attempt to collect a tax, *Jett Bros. Co.* v. *City of Carrollton, supra.*

Since plaintiffs' attack is directed to the validity of the tax as laid, and not to the validity of the statute, as applied, we are without jurisdiction of their appeal under § 237 of the Judicial Code. Treating the appeal as a petition for writ of certiorari, as required by § 237 (c) of the Judicial Code, we grant certiorari, as we did in No. 329. We can consider only the federal questions passed upon by the state Supreme Court.

Our decision in *James* v. *Dravo Contracting Co., supra,* and in *Alabama* v. *King & Boozer, supra,* and the cases

cited in those opinions, can leave no doubt that the Supreme Court of Arkansas correctly held that plaintiffs, who are taxed by the state on their activities in severing lumber from Government lands under contract with the Government, cannot claim the benefit of the implied constitutional immunity of the Federal Government from taxation by the state.

Plaintiffs now, for the first time, assail the tax and the statute imposing it, on the ground that the Act requires the severer to collect the tax from the owner of the timber at the time of severance, Pope's Digest, § 13382, and gives to the state a lien on the land from which the lumber is severed, *id.*, § 13374, and a lien upon the severed timber, *id.*, § 13376, even though title to the severed product has not passed to the taxpayer. They contend that the Act thus purports to place a forbidden tax directly on the United States. Cf. *Mayo* v. *United States*, 319 U. S. 441.

But we are not free to consider these grounds of attack for the reason that they were not presented to the Supreme Court of Arkansas or considered or decided by it. While the constitutional question now sought to be presented is in some measure related to that decided by the state court, and, like it, arises under the implied constitutional immunity of the Federal Government from state taxation, it is not merely "an enlargement" of an argument made before the state court, but is so distinct from the question decided by the state court that our decision of the issue raised there would not necessarily decide that now sought to be raised. Compare *Dewey* v. *Des Moines*, 173 U. S. 193, 197, 198. We are therefore not free to consider it.

"In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented." *New York ex rel. Cohn*

v. *Graves*, 300 U. S. 308, 317, and cases cited. For, as we said in *McGoldrick* v. *Compagnie Generale*, 309 U. S. 430, 434–435, "In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court." See also *Keokuk & Hamilton Bridge Co.* v. *Illinois*, 175 U. S. 626, 633; *Bolln* v. *Nebraska*, 176 U. S. 83, 89–92; *New York* v. *Kleinert*, 268 U. S. 646, 650–1; *Whitney* v. *California*, 274 U. S. 357, 362, 363; *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 267–8.

In view of the lien provisions of the statute and its provisions which purport to authorize the taxpayer to collect the tax from the owner of the severed timber, here the Government, it is suggested that we cannot rightly adjudge that the state is entitled to recover the tax on the transactions of severance involved, without determining the applicability of these provisions to the Government and their validity if so applied. We are not now concerned with the Government's liability to the statutory lien or for payment of the tax. It will be time enough to consider its interests when some effort is made to enforce the lien or collect the tax from the United States. We obviously do not by our judgment against the plaintiffs

impose the tax on the Government. Their property alone is subject to the lien of the present judgment and to execution issued under it. They cannot recover the amount of the judgment from the Government unless the Constitution permits. And if it forbids they obviously will not collect the tax. In neither case does our judgment impose any burden on the United States. We are not called on to determine whether plaintiffs could have successfully contested their liability in the state courts or here, if the contentions were properly raised, upon the ground that they would be unable to collect the tax from the Government, either because the provision purporting to allow such collection is inapplicable where the owner is the Government or, if applicable, invalid, or on the ground that the tax, applied to them without recourse against the Government, would deny to them the equal protection of the laws.

The state, construing its own law, has rendered an unconditional judgment holding plaintiffs liable for the tax. For purposes of our review we must assume that the judgment conforms to state law. Hence we are called on to determine only federal questions properly raised on the record. Considering the only question of the tax immunity of the United States which is so raised, we decide for reasons already stated that the tax now laid and sustained imposes no unconstitutional burden on the Federal Government. No question arising under the Fourteenth Amendment is raised by the record either in the state courts or here, and we are without jurisdiction to pass upon it.*

*Even if the opinion of the Supreme Court of Arkansas had proceeded on a ground so unexpected as to make timely, by petition for rehearing, the raising of the federal questions now for the first time advanced, compare *Saunders* v. *Shaw*, 244 U. S. 317; *Ohio* v. *Akron Park District*, 281 U. S. 74, 79, plaintiffs in their petition for rehearing did not suggest them.

A further question is whether the lands in the forest reserve, which were purchased for that purpose by the United States, are within the territorial taxing jurisdiction of the state. The answer turns on the interpretation of the statute of the United States authorizing the acquisition of the lands, §§ 7 and 12 of the Act of March 1, 1911, c. 186, 36 Stat. 961, 16 U. S. C. §§ 480, 516, and of the state statute of Arkansas authorizing the sale. Pope's Digest, § 5646. The meaning of both statutes, as applied in this case, is a federal question, since upon their construction depend rights, powers and duties of the United States. *Mason Co.* v. *Tax Comm'n,* 302 U. S. 186, 197, and cases cited.

The statute of Arkansas consenting to the purchase of forest lands by the United States, provided that the state should "retain a concurrent jurisdiction with the United States in and over lands so acquired . . .," to issue and execute "civil process in all cases, and such criminal process as may issue under the authority of the State . . ." It made no express grant or reservation of legislative power over the areas purchased. Hence the statute cannot be taken as having yielded or intended to surrender to the Federal Government the state legislative jurisdiction over the area in question, so far as exercise of that jurisdiction is consistent with federal functions. Any doubt as to the effect of such a grant by the state in conferring exclusive legislative jurisdiction over the territory which is acquired by the Federal Government is removed by the provisions of the federal statute.

Section 12 of the federal statute, authorizing the purchase, provided:

> "That the jurisdiction, both civil and criminal, over persons upon the lands acquired under this Act shall not be affected or changed by their permanent reservation . . . as national forest lands, except so far as

> the punishment of offenses against the United States is concerned, the intent and meaning of this section being that the State wherein such land is situated shall not, by reason of such reservation and administration, lose its jurisdiction nor the inhabitants thereof their rights and privileges as citizens or be absolved from their duties as citizens of the State."

By this enactment Congress in effect has declined to accept exclusive legislative jurisdiction over forest reserve lands, and expressly provided that the state shall not lose its jurisdiction in this respect nor the inhabitants "be absolved from their duties as citizens of the State." Compare *Mason Co.* v. *Tax Comm'n, supra; Atkinson* v. *Tax Comm'n,* 303 U. S. 20; *Collins* v. *Yosemite Park Co.,* 304 U. S. 518, 528; *Stewart & Co.* v. *Sadrakula,* 309 U. S. 94, 99.

Our conclusion, based on the construction of the interrelated state and federal statutes, is that the state has territorial jurisdiction to lay the tax upon activities carried on within the forest reserve purchased by the United States.

What we have said of the argument that the tax assessed on plaintiffs is an unconstitutional burden on the Government, is applicable to the tax assessed for severance of timber from forest reserve lands which, from the beginning, have been a part of the public domain. That tax is likewise valid if the state has legislative jurisdiction over such lands within its boundaries.

Upon admission of Arkansas to statehood in 1836 upon an equal footing with the original states (Act of June 15, 1836, c. 100, 5 Stat. 50), the legislative authority of the state extended over the federally owned lands within the state, to the same extent as over similar property held by private owners, save that the state could enact no law which would conflict with the powers reserved to the United States by the Constitution. *Ft. Leavenworth R.*

Co. v. *Lowe,* 114 U. S. 525, 539; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 404. Such authority did not pass to the United States by virtue of the provisions of Article I, § 8, cl. 17 of the Constitution, which authorize it "to exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be."

Since the United States did not purchase the lands with the consent of the state, it did not acquire exclusive jurisdiction under the constitutional provision, and there has been no cession of jurisdiction by the state. *Surplus Trading Co.* v. *Cook,* 281 U. S. 647, 651; *Mason Co.* v. *Tax Comm'n, supra,* 210. Although Arkansas has, by § 5647, Pope's Digest, conferred on Congress power to pass laws, civil and criminal, for the administration and control of lands acquired by the United States in Arkansas, it has ceded exclusive legislative jurisdiction neither over lands reserved by the United States from the public domain nor over lands acquired in the state. *Ft. Leavenworth R. Co.* v. *Lowe, supra,* 530, 531. It follows that the state has retained its legislative jurisdiction, which it acquired by statehood, over public lands within the state, which have been included within the forest reserve.

We conclude that the state has legislative jurisdiction over the federal forest reserve lands located within it, whether they were originally a part of the public domain of the United States, or were acquired by the United States by purchase, and that the tax assessed against plaintiffs is not subject to any constitutional infirmity, or to any want of taxing jurisdiction of the state to lay it with respect to transactions on the federal forest reserve located within the state.

The judgment is reversed insofar as it adjudged plaintiffs not liable for the tax on severance of timber from lands held by the United States as original owner, and the cause

is remanded to the Supreme Court of Arkansas for further proceedings not inconsistent with this opinion. In all other respects the judgment is affirmed. On the remand the state courts will be free, so far as their own practice allows, to determine any state questions here involved and any federal questions not already decided by this opinion. Compare *Schuylkill Trust Co.* v. *Pennsylvania,* 302 U. S. 506, with *Schuylkill Trust Co.* v. *Pennsylvania,* 296 U. S. 113.

So ordered.

MR. JUSTICE DOUGLAS concurs in the result.

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

Opinion of MR. JUSTICE RUTLEDGE, dissenting, announced by the CHIEF JUSTICE.

In No. 328 the Court sustains the application of the Arkansas severance tax to the appellants.[1] In my judgment the cause should be remanded to the state court for it to determine the applicability of the lien and collection provisions to the United States, or their severability, and in the light of that determination to ascertain the constitutional validity of the tax as applied to appellants. Those issues are inescapable on the record in this case. For until they are determined any decision here can affect only a tax of uncertain incidence, unless the Court in sustaining it means to rule, as I think the Arkansas court ruled, that the tax is valid whether or not the statute's lien and collection provisions[2] apply to the United States as owner of the land and the severed timber.

[1] On the jurisdictional discussion of the Court the appellants are, of course, petitioners on certiorari.

[2] Pope's Digest Ark. (1937) §§ 13371–13395. The statute was first enacted in 1923. Acts of Arkansas, 1923, Act 118. It was materially

Neither course is properly open to us. Since the Arkansas court, as this Court's opinion does not dispute, has sustained the tax without deciding whether the lien and collection provisions are severable and inapplicable to the United States, we are completely at loss to know whether the tax rests ultimately upon the Government, as it does under Arkansas law on all other owners not expressly exempted. Consequently we have no determinable issue, but only a speculative inquiry of a sort beyond the tradition and, in my opinion, the jurisdiction of this Court to decide. On the other hand, if the effect of the decision here, as in the Arkansas court, is to sustain the tax regardless of whether the lien and collection provisions apply in whole or in part to the United States, the result is substantially to sustain a tax laid by the state directly on the Government. This result is as unacceptable as to render an advisory opinion upon the validity of a tax of uncertain and speculative application.

From *McCulloch* v. *Maryland*, 4 Wheat. 316, to now the rule has remained that the states are without power, absent the consent of Congress, to tax the United States, whether with reference to its property or its functions.

---

amended in 1929, but its essential scheme remained the same. Acts of Arkansas, 1929, Act 283. See notes 4–6, 9–12, and text, for the substance and effects of the provisions.

Although, as I read its opinion, the Arkansas court carefully refrained from ruling upon their severability and therefore also their applicability to the Government (see text *infra*), the lien and collection provisions were before it, were cited in the opinion, and were necessarily involved in the issues presented. The court appears to have ruled that the tax is valid as applied to the appellants regardless of whether these provisions are severable or are applicable to the United States. That it did so furnishes no ground for believing that the issues relating to them were not presented or were waived. The petition for rehearing, as well as the opinion itself, demonstrates the contrary. The first ground set forth was: "The court erred in holding that the tax was not a direct tax on the United States."

United States v. *Allegheny County,* 322 U. S. 174, 177. That rule is of the essence of federal supremacy. It is not to be chipped away by ambiguous decisions of state courts or easy assumptions relating to their effects which ignore the direct impact of state taxes where they have no right to strike.

This is true regardless of the vagaries of decision, at different periods, in allowing expansion of the Government's immunity to include others. Recent recessions from former broad extensions of this kind have settled that ultimate economic incidence upon the Government of a state tax laid upon others is not alone enough to invalidate the tax. *James* v. *Dravo Contracting Co.,* 302 U. S. 134; *Alabama* v. *King & Boozer,* 314 U. S. 1; see *Penn Dairies* v. *Milk Control Comm'n,* 318 U. S. 261, 269.[3] But this does not mean either that such incidence of the tax is irrelevant to its validity or that all state taxes purporting to be laid upon others but in fact reaching the Government are valid.

It is still true that "the taxpayer is the person ultimately liable for the tax itself." *Colorado Bank* v. *Bedford,* 310 U. S. 41, 52; *Federal Land Bank* v. *Bismarck,* 314 U. S. 95. If the person who must pay the tax in the first place is required by the taxing statute to collect the tax or an equivalent amount from the United States, the tax is upon the United States. "State law could not obligate the Central Government to reimburse for a valid tax, much less for an invalid one." *United States* v. *Allegheny County,* 322 U. S. 174, 189. Although the Court has gone far in permitting the states to force one private person to act as tax collector for another, cf. *Monamotor Oil Co.* v. *Johnson,* 292 U. S. 86; *Felt & Tarrant Mfg. Co.* v. *Galla-*

[3] See Powell, The Waning of Intergovernmental Tax Immunities (1945) 58 Harv. L. Rev. 633; Powell, The Remnant of Intergovernmental Tax Immunities (1945) 58 Harv. L. Rev. 757.

gher, 306 U. S. 62; *General Trading Co.* v. *Iowa Tax Comm'n,* 322 U. S. 335, and dissenting opinion at 339, that device cannot be utilized by the states to lay taxes on the United States. Nor has it been held heretofore, if it is now, that a tax purporting to be laid upon a private individual or concern is valid regardless of whether the provisions of the state taxing statute for passing on the tax to another are applicable to the United States or are valid if so applied.

I am unable to comprehend the effect of the Court's decision. If it is ruling *sub silentio* or *ex hypothesi* that the lien and collection provisions of the Arkansas statute, for any application to the Government, are inapplicable or severable, we have no right to make such a decision. That is the business of the Arkansas courts. If the ruling is that the tax is valid even though those provisions are applicable to the United States, then for the first time the Court is overruling the basic principle of *McCulloch* v. *Maryland.* If the decision is, finally, that the tax is valid whether or not the lien and collection provisions are applicable or severable, then it embodies both faults.

I do not think the Court means to overrule *McCulloch* v. *Maryland.* Nor does it purport to interpret or determine the Arkansas law concerning either applicability or severability of the statute's provisions. But unless it is doing this, without so stating, I see no escape from the other horn of the dilemma. Either the tax as applied is valid or it is invalid. Whether it is valid or not depends on whether the lien and collection provisions apply to the United States, for they place the tax directly upon the owner. That issue is inescapable in this case, whether in the Arkansas court or here.

I do not think the Arkansas court decided either that the lien and collection provisions are inapplicable to the United States or that they are severable from the re-

mainder of the statute, notwithstanding it had those provisions before it, cited them though without ruling upon them, and proceeded to sustain the application of the tax to appellants. I think it clear that the court avoided making such a ruling. In my opinion the Arkansas decision in effect, though not in words, was that the tax is valid regardless of whether the enforcement provisions apply to the United States; which in effect was to rule that the tax had been constitutionally applied even though the collection provisions are applicable to the United States, to the extent at least of the withholding provisions.

My reasons for this view are several. In the first place, the court's opinion, though noting the collection and lien provisions and the contract's term that title to the severed timber should remain in the Government "until it has been paid for, and scaled, measured or counted," does this in the introductory statement of the case and then proceeds through a lengthy discussion without again referring to those provisions.

Moreover they provide plainly that where the severer is different from the owner, the former must pay the tax but he is required to pass it on to the owner.[4] A further provision requires him to withhold the amount of the tax from any money or severed property in kind due the owner under their contract.[5] Another section gives the state a

[4] Pope's Digest Ark. § 13382 provides: "The reporting taxpayer *shall* collect or withhold *out of the proceeds of the sale* of the products severed the proportionate parts of the total tax *due by the respective owners of such natural resources* at the time of severance." (Emphasis added.)

[5] The provision reads: "Every producer actually operating any oil or gas well, quarry or other property from which natural resources are severed, under contract or agreement requiring payment direct to the owner of any royalty, excess royalty or working interest, either in money or in kind, is hereby authorized, empowered *and required* to deduct from any such royalty or other interest the amount of the

lien on the severed resources for the tax and penalties.[6] The clear effect of the provisions requiring "the reporting taxpayer" to "collect or withhold" the amount of the tax from the owner is to give him a defense to the owner's action to recover the full contract price for the severed resources and an equally clear right of action against the owner for the amount of the tax.

Thus the scheme of the tax is to place both its ultimate legal and its ultimate economic incidence on the owner. The tax in terms is "due by the respective owners of such natural resources." [7] It is "a privilege tax or license tax; and is levied on the business of severing," as the Arkansas court declared in this case. 208 Ark. 459, 468, 187 S. W. 2d 7, 12. But it is ultimately, as that court has also declared, though not expressly in this case, a privilege or license tax levied upon *the owner's* business of severing, for it applies to him whenever he severs or permits severance for sale; and "sale" includes turning over the timber

severance tax herein levied before making such payment." Pope's Digest Ark. § 13382. (Emphasis added.)

"Producer" is defined as every person, firm, corporation or association of persons "engaged in the business of mining, cutting or otherwise severing from the soil or water for commercial purposes natural resources, including minerals and ores, pearls, diamonds, and other precious stones, bauxite, fuller's earth, phosphates, shells, chalk, cement, clay, sand, gravel, asphalt, ochre, oil, gas, salt, sulphur, lignite, coal, marble, stones and stone products, timber, turpentine and all other forest products and all other natural products of the soil or water of Arkansas." Pope's Digest Ark. § 13371.

[6] Pope's Digest Ark. § 13376: "The State of Arkansas shall have a lien upon any and all natural resources severed from the soil or water for the tax and penalties herein imposed and, in addition thereto, said lien shall attach to the well, machinery, tools and implements used in severing of such resources."

As the section was enacted originally in 1923 the provision for attachment of the lien to machinery, etc., used in severing was not included. This was added by amendment in 1929. Cf. note 2.

[7] See note 4.

to one who clears the land as payment for the clearing, although his purpose in doing this is only to make the soil available for tilling.[8]

Moreover, as the Arkansas court did hold specifically in this case, the act contains only two exemptions, neither of which applies to the United States.[9] And on this ground, together with the maxim *expressio unius,* it ruled the act applicable to the severance of timber "in all instances except the two exemptions mentioned." [10]

That ruling, it seems to me, is especially significant when it is considered not only in the light of the court's failure to make further reference to or ruling upon the collection provisions, but also in view of the Arkansas court's previous decisions. Thus, in *Miller Lumber Co.* v. *Floyd,* 169 Ark. 473, 480, 275 S. W. 741, the court held: "Where a landowner makes a contract with another person to cut and remove the timber from his land for sale or commercial purposes, the owner *must* pay the severance tax; for such contractor and his servants who actually sever the timber *act for the owner in the premises, and their act of severing* the timber *is the act of the owner.*" [11] (Emphasis added.)

[8] See note 11.

[9] One was for the individual owner who occasionally severs in order to build or repair improvements on the premises or for his own use and another for the "producer of switch ties" who hews them out entirely by hand. 208 Ark. 459, 463, 187 S. W. 2d 7, 10.

[10] The decision held the tax invalid as applied to the severance from lands held by the United States as original owner, though not as to those purchased with the state's consent.

[11] The effect of the quoted statement is emphasized by its context, in part as follows: "It is apparent then that the owner of lands, who cuts down trees for the purpose of building fences or repairing and constructing houses and other improvements on the land from the timber thus severed from the soil is exempted from paying the tax. It is equally evident that when the timber severed from the soil is

No reference was made in this case to the *Miller* case. In the absence of one we cannot assume that the court intended to overrule that decision or to destroy its rationalization or universal applicability, except for the specific exemptions. Not only the opinion in this case, as much by its omissions as by what it expressly rules, but also the Arkansas court's prior decisions, give every ground for believing that it did not intend either to apply the tax differently in this case than in any other or to overrule its

---

sold, it falls within the terms of the act, and the tax must be paid by someone. To illustrate: if the owner of timber lands desired to sever it for the purpose of clearing the land and putting it in cultivation and hired other persons to sever the timber for him, he would be required to pay the severance tax. If the owner should lease his land to another person for a designated number of years in order to have his lessee clear the land and put it in cultivation, and if the consideration for the lease in whole or in part was that the lessee should have the timber so removed from the land, the severance tax would have to be paid by such lessee. It will be noted that the language of the act is specific on this subject and provides that the severer or producer as he is called shall pay the tax. The act is very broad and comprehensive, and is levied upon all persons engaged in severing the timber from the soil for sale or commercial purposes, regardless of the purpose for which it is done. The only exception is that the tax shall not be paid where the timber severed is actually used in erecting or repairing structures and other improvements on the land. The application of the timber in part payment for clearing the land is a severing of it for commercial purposes, although the primary purpose of severing it is to enable the land to be put in cultivation. Where a landowner makes a contract with another person to cut and remove the timber from his land for sale or commercial purposes, the owner must pay the severance tax; for such contractor and his servants who actually sever the timber act for the owner in the premises, and their act of severing the timber is the act of the owner."

In a previous appeal in the same case, 160 Ark. 17, 254 S. W. 450, the court had sustained the act as constitutional on the theory that it was a privilege tax and not a property tax.

prior determinations of the ultimate nature, character and incidence of the tax.[12]

The majority seem to imply however that this may be exactly what was done; that perhaps the Arkansas court held that since the tax would be unconstitutional if, as the statute contemplates, it were directly placed upon the Government as owner, it would treat the tax as falling not on the Government but on the severer alone. As has been stated, nothing in that court's opinion suggests such a ruling. And if there were either a ruling or a sufficient suggestion of this sort, it would raise other serious questions, not considered by that court or here, concerning the validity of the tax. The effect of such a holding would seem to be to single out contractors with the Government for the imposition of a tax not placed on other severers. All other contractors, by the terms of the statute and the Arkansas decisions, would be required to pass the tax along to owners. Only contractors with the Government would not be allowed or required to do this. Thus to treat the tax as applicable only to the severer in this case, and the collection provisions affecting the owner as severable and inapplicable, would raise serious questions of discrimination, which neither the Arkansas court nor this Court has

[12] This view is sustained also by the court's expressed view that "Imposition of the tax here does not in any sense interfere with the Government's business." 208 Ark. 459, 468, 187 S. W. 2d 7, 12. The statement could mean that the tax would not be applied to the Government as to other owners, in which event a severance of the collection provisions would be implied. That it does not have this meaning is evidenced, I think, by the court's reliance on *James* v. *Dravo Contracting Co., supra,* where quite different statutory provisions were in question. The court's misapplication of the *Dravo* case was, I think, but a reflection of its implicit idea that the tax would be valid since it was collected immediately from the appellants, even though they might pass on its economic burden to the Government, without regard to how that might be done.

considered and which appellants are entitled to have determined.

It is true that they have not raised here any question of discriminatory enforcement. But this is because they had no reason to believe that the Arkansas court had applied, or would apply, the statute differently to them than to others or to anticipate the character of the ruling now made. It is doubtful, to say the least, that the Arkansas legislature could place a severance tax exclusively upon persons who sever resources from governmentally owned land. The same doubt would apply to the state court's effort to make the statute so effective, were it to undertake doing this. In my judgment it has not done so. Whether or not such an effort ultimately would be successful, appellants are entitled to be heard upon the question before that result is achieved. They should not be deprived of this opportunity through this Court's upholding of an ambiguously applicable statute or in advance of a decision by the only court which can remove the ambiguity. Because the Arkansas court has not passed upon applicability or severability of the collection provisions as they affect the owner, and because it has not determined the validity of the tax as applied in the light of such a determination, I think the cause should be remanded to it, so that the former questions may be authoritatively determined before we undertake to decide, upon the wholly speculative basis now presented, whether the tax as applied is valid.

Statement of the Case.

DUGGAN, TRUSTEE, *v.* SANSBERRY, TRUSTEE.

NO. 418. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.*

Argued February 6, 1946.—Decided March 4, 1946.

1. In a federal court in which a petition for reorganization of a corporation under Chapter X of the Bankruptcy Act had been approved and reorganization proceedings were pending, a petition was filed for reorganization under Chapter X of an alleged subsidiary against which a bankruptcy proceeding was then pending in another federal court. The reorganization court ordered a stay of a scheduled sale of the property of the alleged subsidiary in the bankruptcy proceeding. *Held* that the order of the reorganization court was binding upon the bankruptcy court and was not there subject to collateral attack. Pp. 501, 504.
2. It was the duty of the bankruptcy court to obey the stay order of the reorganization court, irrespective of whether the petition for reorganization of the alleged subsidiary had been properly filed. P. 504.
3. Since the interested parties had an opportunity in the reorganization proceeding to secure a determination of the question whether a parent-subsidiary relationship existed between the corporations, the same issue should not be tried collaterally in the bankruptcy proceeding. P. 507.
4. Section 149 of the Bankruptcy Act, which provides that "An order, which has become final, approving a petition filed under this chapter shall be a conclusive determination of the jurisdiction of the court," can not be construed as allowing a collateral attack in the bankruptcy court upon the proceedings in the reorganization court. P. 508.
5. Under its constitutional power on the subject of bankruptcies, Congress may proscribe collateral attack in bankruptcy proceedings on proceedings initiated in a reorganization court. P. 510.

149 F. 2d 548, reversed.

Christopher Engineering Company petitioned for reorganization under Chapter X of the Bankruptcy Act in

*Together with No. 419, *National Aircraft Corp.* v. *Sansberry, Trustee*, also on certiorari to the same court, argued and decided on the same dates.

the District Court for the Eastern District of Missouri, which appointed Duggan as trustee. Subsequently, an involuntary petition in bankruptcy was filed by its creditors against National Aircraft Corporation in the District Court for the Southern District of Indiana, which appointed Sansberry as trustee. Later an order was entered directing that National's property be offered for public sale. On the day before the sale, a petition was filed on behalf of National in the reorganization proceedings of Christopher in the Missouri District Court, which issued a decree finding that National was a wholly owned subsidiary of Christopher and enjoining the sale of National's property. The sale nevertheless was made, approved and confirmed. Upon petitions for review filed by Duggan and the National Aircraft Corporation, the District Court affirmed the referee's order. Its decision was affirmed by the Circuit Court of Appeals. 149 F. 2d 548. This Court granted certiorari. 326 U. S. 709. *Reversed and remanded* for further proceedings, p. 511.

Geo. O. Durham argued the cause for petitioners. With him on the brief were *Luke E. Hart* and *Noah Weinstein.*

Isidore Feibleman and *Charles B. Feibleman* argued the cause for respondent. With them on the brief was *Ralph Bamberger.*

Opinion of the Court by MR. JUSTICE RUTLEDGE, announced by MR. JUSTICE MURPHY.

These cases involve, as the Circuit Court of Appeals said, 149 F. 2d 548, "a clash of jurisdiction" between two District Courts. They raise important questions as to the construction of certain sections of Chapter X of the Bankruptcy Act, 11 U. S. C. § 501 *et seq.* Two corporations, Christopher Engineering Company and National Aircraft

Corporation, are concerned, as is the question of their relationship as parent and subsidiary corporations.

On December 27, 1943, Christopher Engineering Company filed a petition for reorganization under Chapter X in the District Court for the Eastern Division of the Eastern Judicial District of Missouri. On the same day the petition was approved as properly filed and petitioner Duggan was appointed trustee. Approximately a month later, January 21, 1944, an involuntary petition in ordinary bankruptcy was filed by its creditors against National Aircraft Corporation, which petitioner Duggan claims was a subsidiary of Christopher, in the District Court for the Southern District of Indiana.[1] A petition for the appointment of a receiver in bankruptcy for National was filed and referred to a referee who took the matter under advisement after holding a hearing at which Duggan, as trustee of Christopher, appeared by his attorney. On February 7, 1944, the involuntary petition being unopposed, the referee entered an order of adjudication, and the following day appointed respondent Sansberry as receiver. On March 7, 1944, the first meeting of National's creditors was held. At that meeting Brown, its secretary-treasurer, testified that in December, 1942, he and A. B. Christopher [2] had purchased all the capital stock of National and that, although the certificates had been turned over to Duggan, "there is no reason that he [Brown] knows of why such capital stock should be considered as the property of Christopher Engineering Company instead of the property of himself and Christopher, individ-

[1] On January 19, 1944, an Indiana state court appointed a receiver for National. The receiver never qualified, however, the qualification having been delayed because of a restraining order entered by the District Judge in the Christopher reorganization proceedings.

[2] A. B. Christopher was president of the Christopher Engineering Company and Brown was vice president of the same company.

ually." At this meeting also the receiver Sansberry was selected as trustee in bankruptcy for National.

On March 21, 1944, Sansberry, acting as trustee, filed a petition for an order authorizing him to offer for sale and to sell the tangible personal property and the real estate belonging to National. The referee ordered that a meeting of creditors be held to consider this petition. Notice of the meeting was sent to Duggan and also to the attorneys for Brown. The meeting was held on April 4, 1944. Neither Duggan nor Brown appeared. No objection to the proposed sale was made except by the United States Army Air Force, which claimed certain personal property. But it was expressly stated on its behalf that there was no objection to the entering of an order for the sale covering any other property of National. On April 6 the referee entered an order directing that the real and personal property of National, with certain exceptions, be offered for public sale on April 20, 1944. Notice of the sale was sent to Duggan and Brown among others.

On April 19, the day prior to the sale, a petition was filed on behalf of National in the reorganization proceedings of Christopher in the Missouri District Court.[3] On the same day that court issued an injunction against holding the sale of National's property. The decree contained a finding that National is a wholly owned subsidiary of the Christopher Engineering Company.

Immediately preceding the sale on April 20, copies of the injunction order were served upon Sansberry and the auctioneer; but they proceeded with the sale. On May 3, after the trustee had filed his report to the effect that the

[3] The petition was signed "National Aircraft Corporation, a corporation, By J. M. Brown, Petitioner." It recited that "the majority of the capital stock of this subsidiary corporation having power to vote for the election of directors is owned directly by the debtor or indirectly through nominees."

sale had been advantageous and after a hearing had been held, the referee approved and confirmed the sale. He then granted petitions for review of this order which were filed by Duggan and by the National Aircraft Corporation per Brown.[4] The District Court affirmed the referee's order, as did the Circuit Court of Appeals, one judge concurring specially and one dissenting. 149 F. 2d 548. We granted certiorari. 326 U. S. 709.

The Circuit Court of Appeals held, in the first place, that for the District Court in Missouri to obtain jurisdiction over National and its assets, it had to be established as a "jurisdictional fact" that "National was a subsidiary of Christopher, not only on April 19, 1944, but on December 27, 1943, when Christopher filed its petition for reorganization, and also on January 21, 1944, when the involuntary petition in bankruptcy against National was filed [in the District Court] in Indiana." This fact, the court found,

[4] In granting the petitions for review, the referee noted that "neither petition was in duplicate as required by Rule 19 of the Rules of the District Court of the United States for the Southern District of Indiana, and neither petition was accompanied by brief as required by said Rule." He also noted that copies of the petitions had not been served upon the trustee, as required by the provisions of § 39 (c) of the Bankruptcy Act, 11 U. S. C. § 67 (c). He stated: "It seems obvious that the failure of the petitioners for review to comply with the Rules of Court and the provisions of the Bankruptcy Act in respect to the filing of such petitions would justify the denial thereof. In order, however, to resolve all doubts in favor of the petitioners and so that the matter may be presented to the Judge of the United States District Court for the Southern District of Indiana, the Referee finds that said petition should be granted." The referee's granting of the petitions, despite petitioners' failure to comply with § 39 (c), appears to be justified because the record indicates that the trustee waived service. It has been said that the requirement of service is not jurisdictional. 2 Collier, Bankruptcy (14th ed.) § 39.24, n. 15.

The referee denied petitions for a stay of enforcement of the order approving and confirming the sale. No appeal was taken from the order of denial.

had not been established; for the order of the Missouri court did not state that Christopher owned any stock of National prior to April 19, 1944; and, as April 19 was the date as of which the Missouri court's determination was effective, "we must presume that there was no evidence before it that the relationship existed earlier." 149 F. 2d at 550.

In the second place, the Court of Appeals held that under Chapter X, when a subsidiary corporation has been adjudicated a bankrupt in one District Court and its property is transferred to a trustee, it may not file a petition for reorganization in another District Court where the reorganization proceeding of its parent is pending.[5] And finally the court held that the petition for reorganization was improperly filed in any case, since it was not shown that Brown was authorized to file it.

We come to different conclusions. Regardless of whether National's petition for reorganization in the Missouri proceedings was properly filed on April 19, the Indiana court, on being notified that the petition had been filed and approved[6] and that an injunction had issued, should have stayed immediately the sale of National's assets. Section 113, 11 U. S. C. § 513, provides with respect to reorganization proceedings: "Prior to the approval of a petition, the judge may upon cause shown grant a temporary stay, until the petition is approved or dismissed, of a prior pending bankruptcy, mortgage foreclosure or equity receivership proceeding and of any act or other proceeding to enforce a lien against a debtor's property, and may upon cause shown enjoin or stay until

[5] See 149 F. 2d at 551–552 for the court's construction of the statute which led it to this conclusion, and compare the dissenting opinion, 149 F. 2d at 553, for a different construction.

[6] The petition was approved on the same day that it was filed. See notes 7 and 11.

the petition is approved or dismissed the commencement or continuation of a suit against a debtor." It was on the authority of this section, we may assume,[7] that the injunction staying the sale of National's property was issued. As interpreted [8] the section declares that when a petition for reorganization has been filed by a corporation, the judge may stay pending proceedings. It does not differentiate between petitions filed by parent corporations and petitions filed by subsidiaries, nor does it distinguish petitions which have been filed correctly from those which have been filed erroneously with the reorganization court. It thus applies to National, whose petition for reorganization had been filed and against which a bankruptcy proceeding was pending.

Opportunity was afforded to interested parties to come into the reorganization proceeding in order to show that National's petition should not have been approved. See

[7] For the purposes of this case it is not necessary to decide whether the applicable section is § 113 or § 148, and we therefore expressly reserve that question.

Section 148 provides: "Until otherwise ordered by the judge, an order approving a petition shall operate as a stay of a prior pending bankruptcy, mortgage foreclosure, or equity receivership proceeding, and of any act or other proceeding to enforce a lien against the debtor's property." It might be urged that this section would apply since the petition had been "approved" in the sense of § 141, 11 U. S. C. § 541, which provides: "Upon the filing of a petition by a debtor, the judge shall enter an order approving the petition, if satisfied that it complies with the requirements of this chapter and has been filed in good faith, or dismissing it if not so satisfied"; and that therefore, under § 148, the bankruptcy proceeding was automatically stayed and it was unnecessary for the injunction to issue.

The alternative view would be that the meaning of "approve" as used in §§ 113 and 148 is not the *ex parte* approval given immediately upon the filing of a petition under § 141 but the approval given after adversary proceedings under § 144, 11 U. S. C. § 544. See note 11 and text.

[8] See note 7.

§ 137, 11 U. S. C. § 537, which provides: "Prior to the first date set for the hearing provided in section 561 of this title,[9] an answer controverting the allegations of a petition by or against a debtor may be filed by any creditor or indenture trustee or, if the debtor is not insolvent,[10] by any stockholder of the debtor." And § 144, 11 U. S. C. § 544, provides, "If an answer filed by any creditor, indenture trustee, or stockholder shall controvert any of the material allegations of the petition, the judge shall, as soon as may be, determine, without the intervention of a jury, the issues presented by the pleadings and enter an order approving the petition, if satisfied that it complies with the requirements of this chapter and has been filed in good faith and that the material allegations are sustained by the proofs, or dismissing it if not so satisfied." [11] Thus, under §§ 137

[9] Section 161, 11 U. S. C. § 561, reads: "The judge shall fix a time of hearing, to be held not less than thirty days and not more than sixty days after the approval of the petition, of which hearing at least thirty days' notice shall be given by mail to the creditors, stockholders, indenture trustees, the Securities and Exchange Commission and such other persons as the judge may designate, and, if directed by the judge, by publication in such newspaper or newspapers of general circulation as the judge may designate."

In connection with § 161, see § 162, 11 U. S. C. § 562.

[10] National's petition for reorganization alleged: "This subsidiary corporation is unable to meet its debts as they mature . . . ."

[11] Under this section the District Court, if satisfied that the petition complies with the requirements of Chapter X and has been filed in good faith and that the material allegations are sustained by the proofs, may be approving the petition *for the second time;* for, as in the present case, he may have approved it in accordance with § 141, 11 U. S. C. § 541, for the first time at the time the petition was filed. See 10 Remington, Bankruptcy (1939) § 4466. Cf. note 7.

The order of approval under § 141, which consists of "first, a conclusion of law to the effect that the petition is sufficient in respect of its allegations, second, a finding of fact that the petition is filed in good faith," 10 Remington § 4453, having been made *ex parte,* is of course not conclusive. See note 7. See also the testimony of Mr.

and 144, an answer could be filed to National's petition, denying that National was a subsidiary of Christopher, and asking that the petition be dismissed. The judge would then be obliged to hold at least a summary hearing, see *In re Cheney Bros.*, 12 F. Supp. 609, 611,[12] a material allegation being controverted, and to decide the disputed issue on its merits.

In as much as the interested parties thus had an opportunity in the reorganization proceeding to dispute the allegation of National's petition that a parent-subsidiary relationship existed between it and Christopher and by doing so to have that issue determined on the facts, we

Harold Remington in Hearings before the Committee on the Judiciary of the House of Representatives on H. R. 6439, subsequently reported as H. R. 8046, 75th Cong., 1st Sess., 226–227. And see Gerdes, Corporate Reorganizations: Changes Effected by Chapter X of the Bankruptcy Act (1938) 52 Harv. L. Rev. 1, 7, n. 38, for a suggestion that the time within which answers to the petition may be filed cannot be fixed until an order approving the petition, under § 141, has been entered. If this be the case, it would seem that a judge could not avoid this problem of double approval by not approving the petition until an answer had been received.

[12] Cf. Gerdes, Corporate Reorganizations: Changes Effected by Chapter X of the Bankruptcy Act (1938) 52 Harv. L. Rev. 1, 7: "The statute contains no mandatory provision requiring notice of the hearing on the issues raised by an answer to be given to all creditors and stockholders entitled to controvert the allegations of the petition. If such notice is given, a determination of any issue tried at the hearing becomes conclusive [citing § 145, 11 U. S. C. § 545]. In the absence of such notice, recurrent trials of the same issues may be necessary. Once an order approving the petition has been entered, however, it may be possible to avoid the expense of giving notice to all creditors and stockholders and also avoid repeated trials by postponing the hearings until after the time to file answers has expired, and then trying all of such issues at the same time." Cf. also 10 Remington, Bankruptcy (1939) § 4466: "The possibility of successive orders of approval is probably more formal and theoretical than substantial and real, since the hearing upon all answers filed by creditors, indenture trustees and stockholders would probably be consolidated."

think it plain that Congress intended that the same issue should not be tried collaterally in the bankruptcy proceeding.[13]

But respondent relies especially upon § 149, 11 U. S. C. § 549, as allowing a collateral attack in the bankruptcy court upon the reorganization proceedings initiated by National. This section reads: "An order, which has become final, approving a petition filed under this chapter shall be a conclusive determination of the jurisdiction of the court." Respondent's position is that the Missouri District Court's approval of the petition upon its filing was not an order which had become final and that as a result the reorganization proceedings thereby initiated by National were subject to question in the bankruptcy forum.

Assuming arguendo that the *ex parte* order of approval, made upon the day the petition for reorganization was filed, was not a final order [14] and assuming also that, as respondent argues, "jurisdiction" within the meaning of this

[13] It might be argued that if the Circuit Court of Appeals was correct in holding that for the Missouri District Court to obtain jurisdiction over National it was necessary that National be a subsidiary of Christopher, not only on the date when National filed its petition for reorganization, but also when Christopher filed its petition and when the involuntary petition in bankruptcy was filed against National, then interested parties would not have an opportunity to controvert a material allegation of the petition, namely, that such a parent-subsidiary relationship did exist on those dates, since the petition contained no such explicit statement. The answer would be, however, that the interested parties, first, could contend that such an allegation was required as a jurisdictional fact, see § 130 (2), 11 U. S. C. § 530 (2), and, second, if the mere general statement of the parent-subsidiary relationship were to be taken to satisfy the requirement, if any, that it also existed on the prior dates, they could raise in answer to the petition that it did not exist on those dates. It would then be for the reorganization court to determine the correctness of either contention or both.

[14] S. Rep. 1916, 75th Cong., 3d Sess., 27, says that § 149 "is designed to foreclose all direct or collateral attack upon jurisdiction or venue, once the period for appeal from an order approving a petition has

section does not have the limited meaning of "venue," the section nevertheless does not support the position taken. Congress in § 113, 11 U. S. C. § 513, explicitly provided that a reorganization court, upon the filing of a petition, could stay pending bankruptcy proceedings.[15] In the light of this provision it is scarcely possible that Congress also intended that a collateral attack could be made in the bankruptcy forum, the proceedings in which had been stayed,[16] upon the proceedings in the reorganization forum.

But it is said that if this be the case, then § 149 has no meaning at all. We do not think this conclusion follows. Although, as we construe the Act, no collateral attack may be brought against the reorganization proceedings, at least in a bankruptcy forum the proceedings in which the reorganization court has stayed, this does not mean that under other circumstances, where an order of approval is not final, § 149 would not allow the reorganization proceeding to be attacked collaterally in some other forum, in particular where "a prior . . . bankruptcy, mortgage foreclosure or equity receivership proceeding [or] . . . any act or other proceeding to enforce a lien against a debtor's property," § 113, 11 U. S. C. § 513, is not pending. Moreover, had the Missouri District Court not enjoined the bankruptcy proceeding, we may assume [17] that the bankruptcy court would have been correct in not ordering the sale of the assets of National halted.

---

expired." See for a discussion of the meaning of "final," Gerdes, Corporate Reorganizations: Changes Effected by Chapter X of the Bankruptcy Act (1938) 52 Harv. L. Rev. 1, 7–8.

[15] See note 7 and text.

[16] Although the Missouri District Court enjoined only the sale, this was in effect an injunction against the entire bankruptcy proceedings. See *In re Long Island Properties,* 42 F. Supp. 323, to the effect that a judgment rendered by a state court in violation of a stay order that had been issued by a reorganization court was without effect in the reorganization.

[17] See note 14 and text; also note 7.

The problem involves, of course, not the ordinary power of one court of general jurisdiction to question the jurisdiction of another court of general jurisdiction. The jurisdiction of both the bankruptcy forum and the reorganization forum is derived from and is limited by the Bankruptcy Act, enacted in accordance with the congressional power "to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . . ." Constitution, Article I, § 8. It was within the power of Congress to provide that a bankruptcy court could not permit an attack, even on the usual grounds, to be made upon proceedings initiated in a reorganization court.[18] This power Congress exercised by permitting the reorganization court to stay, as it did,[19] the bankruptcy proceedings.

The exercise of this power, taken in relation to the facts at bar, was in pursuance of the congressional intention ordinarily to allow parent and subsidiary to be reorganized in a single proceeding,[20] thereby effectuating its gen-

[18] In *Kalb* v. *Feuerstein*, 308 U. S. 433, 438–439, what is almost the converse was stated: "It is generally true that a judgment by a court of competent jurisdiction bears a presumption of regularity and is not thereafter subject to collateral attack. But Congress, because its power over the subject of bankruptcy is plenary, may by specific bankruptcy legislation create an exception to that principle and render judicial acts taken with respect to the person or property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally."

[19] See note 16.

[20] At the Hearings on the Chandler Act Mr. Weinstein stated: "It is advisable that the court which is considering the proceeding of a parent corporation should also have before it the proceeding of the subsidiary, because there may be these interrelations and these connected interests, and the plans of reorganization offered by them, respectively, may be carried forward concurrently." Hearings before the Committee on the Judiciary, House of Representatives, on H. R. 6439, subsequently reported as H. R. 8046, 75th Cong., 1st Sess., 136. See H. Rep. 1409, 75th Cong., 1st Sess., 41; S. Rep. 1916, 75th Cong.,

eral policy that the entire administration of an estate should be centralized in a single reorganization court.[21] If the reorganization forum lacked the power to stay the bankruptcy proceeding and thereby to prevent a collateral inquiry into its own jurisdiction, this policy of Congress would be frustrated; for instead of one court's having "exclusive jurisdiction of the debtor and its property, wherever located," [22] there would be two courts each with a claim to jurisdiction and each denying the other's jurisdiction. We may not construe the Bankruptcy Act as permitting such a state of affairs.

In view of the disposition we make of the cause it is unnecessary to take specific action concerning petitioners' motion, submitted in their reply brief, relating to certain matters affecting the state of the record.

The judgments are reversed and the causes are remanded for further proceedings in conformity with this opinion.

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

3d Sess., 25. Cf. *In re Associated Gas & Electric Co.*, 11 F. Supp. 359, 373–374, a § 77B case, holding that although subsidiary corporations had not filed petitions in the parent's reorganization, "It does not follow, however, that the court has no jurisdiction to restrain subsidiaries over whose action the debtor company has control, from so dealing with their assets as to dilute the equity of the debtor company and thus to endanger the interests of creditors on whose behalf the jurisdiction of the court was invoked."

[21] See *Mar-Tex Realization Corp.* v. *Wolfson*, 145 F. 2d 360, 362–363.

[22] § 111, 11 U. S. C. § 511. This section reads in full: "Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located."

Section 118, 11 U. S. C. § 518, provides, however: "The judge may transfer a proceeding under this chapter to a court of bankruptcy in any other district, regardless of the location of the principal assets of the debtor or its principal place of business, if the interests of the parties will be best served by such transfer."

COMMISSIONER OF INTERNAL REVENUE *v.* FISHER ET AL., EXECUTORS.

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

No. 452. Argued February 27, 1946.—Decided March 11, 1946.

1. In computing under § 115 (a) of the Revenue Act of 1934 the amount of "earnings or profits" distributed by a family investment corporation with respect to securities which it had acquired by tax-free exchanges for its own stock, the basis is the transferor's cost rather than the value of the securities at the time of their acquisition by the corporation. *Commissioner* v. *Wheeler,* 324 U. S. 542. P. 514.
2. Where a distribution of assets by a family investment corporation to one of its stockholders in 1934 imposed a tax liability on him under the Revenue Act of 1934, as interpreted in *Commissioner* v. *Wheeler,* 324 U. S. 542, the taxpayer (whose liability was pending before the Tax Court on September 20, 1940) was not exempted from liability by the proviso of § 501 (c) of the Second Revenue Act of 1940 to the effect that nothing therein "shall affect the tax liability of any taxpayer for any year which, on September 20, 1940, was pending before . . . the Board of Tax Appeals, or any court." P. 514.

   (a) That proviso does not grant a special tax exemption to taxpayers who happened to have tax litigation pending in September 1940. P. 514.

   (b) It means that the enactment of the 1940 Act was not to affect the tax liability of those who had cases pending before the Board or courts, whatever that tax liability may have been under the earlier revenue laws. P. 515.

150 F. 2d 198, reversed.

The Commissioner of Internal Revenue assessed an income tax deficiency against respondents. The Tax Court overruled the Commissioner. The Circuit Court of Appeals affirmed. 150 F. 2d 198. This Court granted certiorari. 326 U. S. 710. *Reversed,* p. 515.

Walter J. Cummings, Jr. argued the cause for petitioner. With him on the brief were *Solicitor General McGrath,*

Acting Assistant Attorney General Sewall Key, Robert N. Anderson and *Hilbert P. Zarky.*

R. M. O'Hara argued the cause for respondents. With him on the brief was *Benjamin E. Jaffe.*

MR. JUSTICE BLACK delivered the opinion of the Court.

In 1934 the Senior Investment Corporation, organized in 1929 by one Fisher and his wife for family investment purposes, distributed to Fisher 43,300 shares of General Motors stock valued at $1,723,881.25. Fisher and his wife made a joint tax return but did not report this amount as income. The taxpayers contended that since the Senior Investment Corporation showed a book deficit for 1934, the distribution in question was a "capital distribution" and not a corporate dividend from "earnings or profits," which latter was the type of distribution taxable under § 115 (a) of the then controlling tax law. 48 Stat. 680, 711. The Commissioner decided that the following circumstances justified a finding that the distribution was taxable as a dividend from "earnings or profits": When the Senior Investment Corporation was organized Fisher and his wife paid for their shares of stock with securities which had cost them $14,500,000 but had by the date of organization acquired a market value of $88,000,000. To show that the corporation had a deficit and that consequently the distribution of General Motors stock was not from "earnings or profits," the taxpayers used the corporation's computation based on the $88,000,000 rather than the $14,500,000 figure. The Commissioner decided that the $14,500,000 cost to Fisher and his wife of the securities they transferred to the corporation in exchange for shares of its stock was the proper base for ascertaining whether the corporation could make a distribution from profits; that the use of that figure would show a surplus in 1934; and that the distribution of the General Motors

stock was therefore a taxable dividend from "earnings or profits." On review the Tax Court following its prior holdings rejected the Commissioner's argument and decided for the respondents. The Circuit Court of Appeals affirmed. 150 F. 2d 198.

Since § 112 of the Revenue Act of 1934 did not tax the gain resulting from transfers of property to a corporation in exchange for stock in that corporation, it is obvious that rejection of the Commissioner's contention would result in permitting the § 112 exemption to be used as a device for evading taxes Congress intended to impose on many gains actually realized from sales of property. But we upheld the views urged by the Commissioner here, in *Commissioner* v. *Wheeler,* 324 U. S. 542, decided on the same day that the Circuit Court of Appeals handed down its decision in this case. In that case we held that in the Second Revenue Act of 1940, 54 Stat. 974, 1004–1005, Congress clarified its original purpose in enacting the 1934 Act and others to require that corporate earnings be computed on a basis of cost of the property to transferors like Fisher. That decision would have controlled the disposition of this case were it not for the fact that on rehearing the Circuit Court of Appeals held that a proviso in the Second Revenue Act of 1940 excepted taxpayers like Fisher from liability under the Revenue Act of 1934. That proviso stated that the 1940 Act should not "affect the tax liability of any taxpayer for any year which, on September 20, 1940, was pending before, or was theretofore determined by, the Board of Tax Appeals, or any court of the United States." This case was pending before the Tax Court on September 20, 1940, and respondents here contend that the proviso was intended to exempt Fisher from the tax liability to which he would otherwise be subject.

In other words, respondents assert that Congress intended by the proviso to pick out a small group of tax-

payers and award them special tax exemptions which the whole Act was designed to deny all other taxpayers who did not happen to have tax litigation pending in September 1940. The proviso indicates no such purpose. The proviso means what it says, that the enactment of the 1940 Act was not to affect the tax liability of those who had cases before the Board or courts, whatever that tax liability under the earlier revenue laws. Under those earlier laws as interpreted by us in the *Wheeler* case, the distribution of General Motors stock to Fisher imposed on him a tax liability which remained unaffected by the enactment of the 1940 statute.

Reversed.

MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

UNITED STATES ET AL. *v.* PIERCE AUTO FREIGHT LINES, INC. ET AL.

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

No. 74. Argued January 28, 1946.—Decided March 11, 1946.

1. Each of two motor carriers made application to the Interstate Commerce Commission under Part II of the Interstate Commerce Act for a permit to operate between points A and C. One was then operating between A and B; the other between B and C; and they operated joint service between A and C by freight interchange. Each applicant opposed the other's application, and competing carriers opposed both. The applications were heard separately by different joint boards but were dealt with by the Commission in a single report. *Held* that an order of the Commission granting both applications was valid. Pp. 517, 523.
2. Neither the fact that the Commission dealt with both applications in one report nor the fact that the Commission granted both applications invalidated its order. P. 523.

3. The Commission's disposition of the applications did not inject into the proceedings as a "new issue" the question whether both applications should be granted. P. 526.
4. That the Commission did not determine each case exclusively on the record therein but considered the evidence in both proceedings does not warrant invalidating its order, in the absence of any showing of specific prejudice. P. 528.
5. Where the Commission's report contains all the required findings, it is not obliged to annotate to each finding the evidence supporting it. P. 529.
6. The fact that an administrative agency has considered matters *dehors* the record does not invalidate its action unless substantial prejudice is shown. P. 530.
7. The order of the Commission granting both applications was supported by the findings and the evidence. P. 530.
8. The Commission's ultimate finding as to the fitness and ability of one of the applicants in this case was supported by a sufficient basic finding and by evidence. P. 533.
9. Rehearings before administrative bodies are within their own discretion, and only the clearest abuse, not shown upon the record in this case, will sustain an exception to the rule. *Atchison, T. & S. F. R. Co.* v. *United States,* 284 U. S. 248, distinguished. P. 534.
10. The Interstate Commerce Commission and not the reviewing court is the arbiter of the paramount public interest. The judicial function is limited to ascertaining whether the order has support in the law and in the record. P. 535.

57 F. Supp. 192, reversed.

Appeal from a decree of a district court of three judges, which suspended an order of the Interstate Commerce Commission and remanded the cause to the Commission for a rehearing. 57 F. Supp. 192. *Reversed,* p. 536.

J. Stanley Payne argued the cause for the United States and the Interstate Commerce Commission, appellants. With him on the brief were *Solicitor General McGrath, Walter J. Cummings, Jr., Daniel W. Knowlton* and *Allen Crenshaw.*

Donald A. Schafer argued the cause and filed a brief for Consolidated Freightways, Inc. et al., appellants.

Wm. P. Ellis argued the cause for appellees. With him on the brief were *Henry T. Ivers* and *Alfred A. Hampson.*

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

The validity of an order of the Interstate Commerce Commission is in question. The order granted to appellants, Consolidated Freightways, Inc., and Oregon-Nevada-California Fast Freight, Inc., certificates of public convenience and necessity authorizing extensions of their operations as motor carriers. Appellees, competing carriers, some of whom are railway affiliates, were protestants in the proceedings before the Commission. They successfully attacked the order in a specially constituted District Court, on grounds questioning the sufficiency of the findings and the evidence, as well as the propriety and fairness of the Commission's procedure. The District Court's decree, 57 F. Supp. 192, "suspended" the order and remanded the cause to the Commission for rehearing although a stay pending appeal was denied.

The shortened statement of the major thing in controversy is whether the appellants, Consolidated and O. N. C., properly were allowed by the Commission to substitute wholly independent and competing through services between Portland, Oregon, and San Francisco, California, for the service which they jointly rendered between those cities, prior to the filing of these applications, by interchanging freight at intermediate points. The protesting appellees were carriers competing with the joint service of Consolidated and O. N. C. and will be competitors of each, as those companies will be with each other, if the Commission's order is sustained. This fact is the source of the controversy and is important to bear in mind for full understanding of the detailed facts and issues as well as of what is ultimately at stake. Although each ap-

pellant originally sought exclusive authority to conduct the proposed through operation in substitution for the former joint service, and thus opposed the other's application, both now seek to sustain the Commission's order, as of course does the Commission itself.

At the time of Consolidated's application in December, 1939, it operated various routes in the Northwest, some extending eastward from the Portland and Seattle areas, in addition to the joint service by interchange with O. N. C. southward from Portland to San Francisco.[1] Two of these routes, comprising part of the latter service, extended from Portland southerly to Medford and Klamath Falls, both of which lie just north of the Oregon-California boundary and were points of interchange with O. N. C.[2] In so far as it is now pertinent, Consolidated's application sought permission to extend its operations from Medford and Klamath Falls southward to San Francisco,[3] in other words, over the portion of the route previously used in the joint service for O. N. C.'s operations.

---

[1] There are two main north-south highways between the San Francisco and Portland areas, U. S. 101, the so-called Coast Route, and U. S. 99, roughly parallel but some miles inland, called the Valley Route. The joint service was conducted over the latter and the applications of Consolidated and O. N. C. each sought to extend operations over this route.

[2] The joint service followed Highway 99 from San Francisco nearly to the northern boundary of California, from where part continued on No. 99 to Medford and the remainder followed a separate highway to Klamath Falls, this leg of the journey being made with O. N. C.'s equipment in both directions. Consolidated's "leg" between Portland at the north and Medford and Klamath Falls at the south followed different, but substantially parallel, highways, the westerly route being No. 99.

[3] Consolidated also sought authority to extend its service from Marshfield, Oregon, to San Francisco over the Coast Route, see note 1, and from Lakeview, Oregon, to Redding, California, through Alturas, California.

Conversely, at the time of O. N. C.'s application in January, 1940, it was operating from San Francisco to Medford and Klamath Falls.[4] It sought to extend its operations from Medford to Portland and, as an alternative slightly longer route, from Klamath Falls to Portland through Goshen, Oregon.[5]

Thus, in effect, Consolidated and O. N. C. each sought to conduct operations independently throughout the entire distance between Portland and San Francisco.[6] The occasion for the separate applications was O. N. C.'s refusal to join an association of connecting carriers which Consolidated was sponsoring.[7]

The applications were heard separately, as the statute requires, before different joint boards.[8] However, because

[4] O. N. C. also operated a route from San Francisco to Elko, Nevada.

[5] O. N. C. also sought authority to serve Marshfield, Oregon, and other points in the Coos Bay area.

[6] The Commission stated in its report: ". . . O. N. C. and Consolidated have interchanged freight at Medford for over 11 years and at Klamath Falls for over 6 years to give joint through service between points served by each. Since July 1939 about one-third of the tonnage has been handled through interchange of trailers. At first, the amount of interchanged traffic was small and Consolidated's principal business was of a local nature to and from Medford. Apparently, O. N. C.'s principal business also was local. The interchange business has since increased until it far exceeds that of the local business."

[7] Although the president of Consolidated admitted at the hearing that O. N. C.'s refusal to join the association had a substantial influence in causing the filing of Consolidated's application, he could not say whether or not that application would have been filed if O. N. C. had joined.

[8] Section 205 (a) of the Interstate Commerce Act, 49 U. S. C. § 305 (a). Apparently the reason that the two proceedings were not consolidated and heard before one joint board arose from the fact that, although the major issue, whether or not a through route between San Francisco and Portland should be allowed, was common to both

they were so closely related in their common features, the hearings were held at the same places and one application was heard immediately after the other. Each applicant intervened in the proceeding on the other's application, and various parties, including the appellees,[9] appeared in opposition in both proceedings. The parties stipulated that much of the evidence presented in the O. N. C. hearing should be introduced by reference into the Consolidated record. This included all of the appellees' affirmative evidence in opposition to the two applications. The hearings thus were substantially coordinated, though not technically consolidated, for the common features of the applications.

As neither joint board could agree upon the recommendations to be made, both matters were referred to an examiner.[10] In separate reports he recommended the denial of both applications. Division 5, with one commissioner dissenting, dealt with both in a single report. It reversed the examiner in both cases and ordered that each

---

cases, certain other issues were not and, since some of the latter relating to O. N. C. affected operations in Washington as well as in Oregon and California, a differently constituted board was required for making recommendations concerning them. Cf. *American Trucking Ass'ns* v. *United States,* 326 U. S. 77, 81–83.

[9] There are five appellees. Pierce Auto Freight Lines, Inc., Los Angeles-Seattle Motor Express, and Angelo Colletti (doing business as Colletti Fast Freight), are common carriers by motor vehicle which operate between Portland and San Francisco. Pacific Motor Trucking Company is a subsidiary of Southern Pacific Company and performs certain motor vehicle operations which are auxiliary to the rail services of the Southern Pacific Railway. Pacific Southwest Railroad Association is an unincorporated association of railroads serving the Pacific southwest territory, organized to protect rail interests as they may be affected by motor carrier operations in that territory.

[10] Section 205 (b) of the Interstate Commerce Act, 49 U. S. C. § 305 (b).

application be granted.[11] Appellees' petition for rehearing was denied. They thereupon brought this suit in the District Court.[12]

The findings of fact and the court's opinion, 57 F. Supp. 192, disclose that it held the Commission's order invalid on several grounds. One was that "the Commission considered the separate records as though the case was a consolidated one. Evidence which appeared only in one record was used by the Commission to support general findings in the Report concerning both Consolidated and O. N. C. In each proceeding embraced within the Report and the Commission's order, evidence not offered or received in such proceeding and not a part of the record therein was drawn upon and considered by the Commission." The court also found that there was no evidence in either record to support the Commission's finding that "the present and future public convenience and necessity require *both* the operations" by Consolidated and those by O. N. C. (Emphasis added.) And it further found that at no time in the proceeding had there been notice to the parties, the witnesses, or the general public that *both*

[11] The certificate of public convenience and necessity granted to Consolidated authorizes extensions of its routes from Medford and Klamath Falls to San Francisco and also from Lakeview, Oregon, to Redding, California. The certificate granted to O. N. C. authorizes extensions from Medford to Portland and from Klamath Falls to Goshen, Oregon. In both cases, operation was thus authorized over alternate highways. Cf. notes 3 and 5.

[12] The District Court permitted Consolidated to intervene and file an answer "with admissions and denials to the petition," but refused to consider and ordered stricken the affirmative defenses which Consolidated set up. One of these was that the appellees were guilty of laches in bringing the suit, since the certificates of public convenience and necessity were issued in September, 1943, and the complaint was not filed until January, 1944. Consolidated contends that the District Court erred in striking the affirmative defenses. In the view that we take of the case it is not necessary to consider this question.

applications might be granted; that indeed "the whole basis of the original proceedings before the Joint Boards was the question of whether *any* through-line operation between San Francisco and Portland should be allowed and, if so, *which one* of the two separate applications"; and that "no opportunity was given to plaintiffs to maintain their rights or to present appropriate protests and defenses to the institution of *two competing* through-line operations between San Francisco and Portland." (Emphasis added.) Finally the court held that in granting both applications the Commission had not considered the public interest and suggested that its denial of the petition for rehearing was improper.[13]

For all these supposed errors the District Court suspended the Commission's order and remanded the cause "for rehearing." In doing so it said: "This action will be taken in order that all parties may be placed on notice as to what type hearing will be held, whether joint or several, and in order that appropriate findings be made as to the public convenience and necessity which requires the authorization of *two* new through-lines in competition with each other and in competition with the other facilities, and also as to the ability of Consolidated to initiate and maintain one of such lines *in view of present conditions.*" (Emphasis added.) 57 F. Supp. at 198.

[13] The District Court also found that "The Commission failed to find, and there was no evidence in either record to support such a finding, that each applicant was separately capable of equipping, maintaining, and conducting the proposed operation in the face of competition from the other"; that "the Commission's Report fails to disclose that it gave any consideration to the possibility of adverse effect upon any plaintiff of the institution of two through-line competitive operations between San Francisco and Portland"; and that "the Commission failed to find, and there is no evidence in either record to support such a finding, that Consolidated is adequately equipped to establish and maintain the proposed through-line operations under any conditions." These findings are considered below.

Obviously the court's objection was not to the manner in which the proceedings were conducted prior to the time when the hearings ended and the Commission took the cases under consideration. Up to this point no fault is found with what was done. The difficulty lay altogether, in the court's view, with the way in which it thought the Commission had considered the cases and reached its conclusions. And this arose entirely from the fact that the Commission disposed of them in a single report, rather than in separate ones for each case; and from the further fact that it concluded that both applications should be granted rather than that both should be denied or one denied and one granted.

We are not informed, of course, whether the court would have reached the same result if the Commission had written separate reports in each case, arriving at the same conclusions, although it seems suggested that any of the other possible results would have been impeccable, whether stated in separate reports or a single one. Obviously it was no sufficient ground for suspending the Commission's order that it chose to write one report rather than two, especially in matters as closely related as these, if the single report together with the findings and the evidence was sufficient to sustain the action taken in each case. It is not uncommon judicial practice to follow this course.

Nor, with those conditions satisfied, could the mere fact that the Commission concluded to grant rather than to deny both applications, or to grant one and deny the other, invalidate its judgment. For each application when it was filed sought to conduct the extended operation which it specified; [14] nothing in either foreclosed the

[14] They were not the same, since *the extension* sought in each case covered the portion of the joint route over which the other applicant then was operating. But, of course, if one application had been

possibility that both might be granted, although for obvious reasons each applicant opposed the granting of the other's extension; and from the beginning it was as much a possible outcome that both applications would be granted as that both would be denied or one be granted and one denied. If therefore the Commission had written separate reports in each case, reaching the same result, it would have been squarely within the issues and within the outcomes comprehended from the beginning; and the only questions for judicial consideration, absent some procedural deviation not now presented, would have been the sufficiency of the findings and the evidence to sustain its action in each case. We think those are the only questions of any substance arising upon this appeal.

The District Court, however, regarded the Commission's failure to write separate reports as indicating that it did not consider each case separately and exclusively on its own record, but looked to the evidence in both in forming its judgment. This "approach" the court thought wrong, not only as showing that the Commission considered evidence in each case which it had no right to take into account, but also as injecting a new and important issue in both proceedings not previously regarded by the parties as comprehended within the applications and the hearings. The "new issue" thought to be thus injected was the possibility that *both* applications might be granted. From this

granted and one denied, the practical effect would have been to award to the successful applicant the entire route of the prior joint service, and thus to exclude the unsuccessful one at least from any share in the joint operation; probably also from any practical opportunity of successful operation over its remaining "leg" of the previous joint service. These considerations no doubt were influential in leading the Commission to conclude that either both applications should be granted or both denied, since to grant one and deny the other, entirely apart from considerations relating to so-called "grandfather rights," would work obvious hardship on one. Cf. note 15.

basic idea other errors were pyramided, among them that the protesting appellees had been given no notice of the kind of proceeding which would be held and had been deprived of any opportunity to present proper protests and evidence relating to the allegedly newly injected issue.

The case has taken longer to state than the merits should require for its disposition. Appellees plant themselves here squarely on the District Court's objections to the Commission's "approach" and procedure. Two principal questions thus are presented: (1) Was evidence improperly considered by the Commission, so as to require reversal of its order; and (2) were new issues injected by its action in disposing of the cases with a single report? Other issues more or less related may be shortly disposed of.

We put to one side, in the first place, the idea that the Commission, by the manner in which it disposed of the causes, injected as a "new issue" the question whether both applications might be granted and with it the correlative notions that the appellees had no notice that this issue would be involved and no opportunity to make appropriate protests or to present evidence upon it. In a strict view neither the appellees nor the court were entitled to raise these questions. For it was not at any time suggested to the Commission, as it might have been upon petition for rehearing, that the proceedings had been conducted on the theory that both applications would not be granted. Appellees stated in their petition for rehearing only that "Division 5 has erroneously and improperly assumed that in granting one of the applications it is by force of necessity required to grant the other . . . ." This is very different from suggesting that the Commission was not entitled at all to consider granting both applications. It is highly questionable therefore whether the appellees have not waived this question. But the District Court,

in raising it, has said that it was acting in protection of the public interest and we pass therefore to consideration of the issue on its merits.

The Commission did not, by the manner in which it disposed of the cause, inject as a "new issue" the question whether both applications might be granted. If the appellees actually assumed in the beginning that both applications could not be granted, their assumption was in the teeth of the applications and the permissible outcomes presented for the Commission's decision.

As has been said, the two applications were separately instituted and heard. In the natural course of events each joint board was to decide whether to grant or to deny the particular application before it. The possibilities therefore were that both applications might be denied, that one might be granted and the other denied, or that both might be granted. Moreover, the record contains evidence showing that the possibility of granting both applications was in the minds of counsel and witnesses.[15]

[15] One example is sufficient. The president of Consolidated was asked:

"From your experience in watching the development of this joint service, what do you expect the effect to be of the granting of this application upon the existing carriers between San Francisco and Medford, and San Francisco and Klamath Falls?" He replied:

"Treating them separately, south of Medford, we have in our operation the Oregon-Nevada-California Fast Freight and the Pacific Truck Express and the Pierce Auto Lines.

"The California Fast Freight are concurrently applying for the right to extend their services north of Medford to Portland. The net result of the granting of their application and our application would be the splitting of the traffic between the two companies. We would each take part of the present business we are now jointly handling, and operate our equipment straight through.

"In my opinion, this will result in both of us operating about the same number of vehicles, about the same number of miles; and if our divisions of revenues of the past have been properly arranged,

And this possibility must have been apparent from the beginning, not only from the history of the prior operations and the primary cause for their impending disruption, but also from the obvious relations of the applications to each other, the equally obvious consequences to the applicants of granting one and denying the other, and the Commission's recognition of these facts by the manner in which it scheduled the hearings for substantially concurrent treatment. The parties too apparently gave similar recognition to the questioned possible outcome by their stipulation for the use of evidence in both proceedings.

The issue concerning whether both applications should be granted was injected, not by the Commission's report or any other action taken by it, but by the filing of the applications in the first place. If appellees misconceived the nature of the proceedings in this respect, as we do not think was the case, they were not misled into doing so by any action of the Commission or the other appellants.

We turn therefore to the objections made on the score of the Commission's findings and its treatment of the evidence. In our opinion they are equally untenable. The

---

we continue to gross about the same amount of revenue. It should result in our both having a more profitable operation, as it will eliminate the present waste of checking, weighing, and transferring freight at an intermediate point.

"The service would be improved and no doubt it would attract more volume. That is a conjecture. At the present time, both companies are maintaining terminal facilities in San Francisco so on our part it would mean very little increase in our terminal costs.

"It will mean an increase in terminal costs for the Oregon-Nevada-California Fast Freight, but the cost of it would be offset, in my opinion, by eliminating the cost of transferring the through freight at Medford."

In its report, the Commission stated, "*For reasons which are obvious* [see note 14], authority should be either granted or denied to both applicants to operate over the Valley Route." (Emphasis added.)

principal cause of complaint in these respects is that the Commission did not consider each case exclusively on its own record but looked to the evidence in both proceedings in forming its judgment. If this is true and if it has resulted in substantial prejudice to the appellees, as might occur, for example, if the Commission were shown prejudicially to have considered evidence bearing on one case which did not affect it and was presented in the other, and which appellees were given no opportunity to meet, the orders, or one of them, would be improperly grounded.

But no showing of this sort has been made. It is to be recalled that all of the appellees, as well as both of the applicants, were parties to both proceedings; were represented at all of the hearings, which were conducted at substantially the same times and places; and were given full opportunity to present all evidence they considered pertinent, to cross-examine witnesses and otherwise to protect their interests. Moreover, large portions of the evidence applied as much to one application as to another. This was true, for example, of the proofs relating to traffic conditions, shipper demands, the need for faster service and mechanical refrigeration, and other items. In these circumstances it is difficult to see how appellees could have sustained substantial prejudice from the Commission's consideration of the evidence upon matters as closely related as those in issue in these two proceedings.

Nor indeed do they succeed in showing such prejudice. As we understand them, the most that they assert is that the Commission's report so commingles the two cases that it is impossible to determine which statements are supported by which record. But neither in the briefs, nor upon specific inquiry at the argument, were they able to point to any particular instance of prejudice. Nor in fact does the opinion of the District Court, although it asserts that the report is filled with numerous instances of this

sort. The assertion, we think, is colored by the court's erroneous idea that the report first injected the question whether both applications should be granted; and to the same cause, it would seem, may be attributed the court's undue discounting of the fact that upon this issue, as on the alternative possible outcomes, much of the evidence was identical, made so by the parties' own stipulation. In any event the appellees have not pointed to any specific statement in the report which is obviously applicable to both cases or which is required as a basic finding to support the order in one, which is without support in both records or in the one which is appropriate.

In the absence of any showing of specific prejudice, the claim comes down to the highly technical objection that the Commission, in the final stage of forming its judgment, could not in either case take account of what had been done in the other, notwithstanding the closely related character and objects of the applications and the prior proceedings. The contention in its farthest reach amounts to a legal version of the scriptural injunction against letting one's right hand know what one's left hand may be doing.

Obviously it would be consistent neither with good sense nor, we think, with the type of hearing assured by the statute to force the Commission to put on such complete blinders. Whatever may be the limits outside which it cannot go in looking beyond the record in the particular proceeding at the stage of formulating its judgment, none certainly would go so far. And, given that the report contains all the essential findings required, cf. *Florida* v. *United States,* 282 U. S. 194, the Commission is not compelled to annotate to each finding the evidence supporting it.

It is true that ordinarily an administrative agency will act appropriately, in a proceeding of this sort, upon the

record presented and such matters as properly may receive its attention through "official notice." [16] It is also true that this Court, in appropriate instances, has limited the use of the latter implement in order to assure that the parties will not be deprived of a fair hearing. See *United States* v. *Abilene & Southern R. Co.*, 265 U. S. 274, 286–290; *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 93–94. But in doing so it has not undertaken to make a fetish of sticking squarely within the four corners of the specific record in administrative proceedings or of pinning down such agencies, with reference to fact determinations, even more rigidly than the courts in strictly judicial proceedings. On the contrary, in the one case as in the other, the mere fact that the determining body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result. *Market Street R. Co.* v. *Railroad Comm'n*, 324 U. S. 548, 561–562; cf. *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 154–155. In these cases no more is necessary than to apply that rule.

The remaining objections are directed more appropriately to the findings and their support in the evidence. Appellees say that the order granting both applications is defective in that it is not founded upon an express finding or indeed upon any finding that there was a need for two through-line operations which would be in competition with one another. They urge that it was not sufficient for the Commission to find, as it did on adequate evidence, that the existing service between Portland and San Francisco was inadequate; and to conclude, as the report expressly stated, that in view of this fact, among others, "public convenience and necessity require the op-

[16] Cf. Judicial Notice by Administrative Tribunals (1934) 44 Yale L. J. 355; Faris, Judicial Notice by Administrative Bodies (1928) 4 Ind. L. J. 167.

erations set forth in our findings herein." [17] This statement was additional to the explicit conclusion already noted [18] that the situation presented by the applications was one which required either granting both or denying both. And the findings expressly stated, concerning each application, that the "present and future public convenience and necessity require" the extended operations.[19]

Apart from the fact that this was all that the statute required, cf. *United States* v. *Detroit & Cleveland Navi-*

[17] The Commission's report stated: "Of the motor-carrier protestants, there is only one—Pierce—which is authorized to transport general commodities to and from all intermediate points along the Valley Route. Pierce did not reinstitute daily operation to and from San Francisco, however, until after the filing of these applications and but a few weeks prior to the hearings herein. Shipper witnesses generally were unfamiliar with the fact that Pierce's operation was daily. There are, of course, certain other motor carriers operating over this route but their authority is either (1) restricted in such a way as to preclude a finding that their service is adequate especially as to intermediate points, or (2) the record definitely establishes that their service to intermediate points, and in some instances to and from San Francisco, is at best negligible. In view of the foregoing, we are of the opinion that public convenience and necessity require the operations set forth in our findings herein."

[18] See note 14.

[19] The Commission rested this ultimate finding in part upon the following statement as to the need for extended operations: "There is no doubt but that a number of shippers desire such proposed services. Each applicant also operates units equipped with mechanical refrigeration, which service certain of the shippers desire for the proper transportation of their shipments. The proposed service will enable shippers to obtain goods more rapidly, resulting in an increase in their businesses. Some of the shippers estimate an increase in business amounting to several thousand dollars. Practically all of the witnesses prefer a single-line through service. Some of them have used the services of existing carriers and have not found them satisfactory principally because of improper refrigeration or lack of service to intermediate points." See also note 17. The Commission noted in its report that the traffic between San Francisco and Portland was increasing.

gation Co., 326 U. S. 236, and the further fact that there can be no presumption that the Commission disregarded the public or any other interest, there are two obvious answers. One is that the Commission, in making the separately stated findings, could not have been oblivious to the competitive consequences of its order or the relation of those consequences to the public interest.[20] The other is that those findings, read in the light of the report, adequately and expressly cover the element of public convenience and necessity, including the competitive factors which the Commission inescapably had in mind. Only the most hypercritical reading of the findings, and one which ignores the report's explicit statements in many respects, could construe them as meaning only that *each* operation was required by public convenience and necessity without any regard to the competitive consequences of granting *both*. The Commission should not be required to rewrite its report simply to say, redundantly we think, that *both* operations, as well as each, are required by public convenience and necessity.

Appellees further say that, even if the Commission was correct in granting a certificate of public convenience and necessity to O. N. C., it improperly granted such a certificate to Consolidated. Section 207 (a) requires that the Commission find "that the applicant is fit, willing, and able properly to perform the service proposed" and the District Court made a finding of fact that "the Commission failed to find, and there is no evidence in either record to support such a finding, that Consolidated is adequately equipped . . . under any conditions."

[20] The Commission has recognized the value of reasonable competition, cf. *Chesapeake & Ohio R. Co.* v. *United States*, 283 U. S. 35; *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236; *Inland Motor Freight* v. *United States*, 36 F. Supp. 885; 44 M. C. C. 535, 548, in no case perhaps more clearly than in those presented on this appeal. See also note 15.

The court undoubtedly did not mean that there was no finding whatever as to fitness, willingness and ability, for the Commission did make such a finding in the statutory language. What was obviously meant was that such an ultimate finding was not enough, as of course it was not, see *Florida* v. *United States, supra,* in the absence of a basic finding to support it; and that there was no such basic finding.

We do not agree, however, that there was no such basic finding. The paragraph of the Commission's report set out in the margin [21] was a sufficient finding, though inartistically drawn, concerning Consolidated's financial fitness and ability. Nor was there a lack of evidence to support this.[22]

---

[21] "Fitness.—There is no doubt as to O. N. C.'s fitness, financial or otherwise, to conduct the operations herein authorized, although protestants question Consolidated's financial ability to conduct the proposed operation. Protestants contend that if these applications are granted each applicant will operate at a loss. Each applicant of course claims that it will be better off if allowed to operate straight through without the necessity of interchanging at Medford. Elimination of the cost of transfer at Medford would save approximately fifteen or sixteen hundred dollars a month. Considering the fact heretofore discussed in some detail, we are of the opinion that we should give applicants the benefit of any doubts that may exist as to whether they could operate successfully over the routes authorized herein." See also note 22.

[22] It is true that in 1939 Consolidated had approximately $215,000 of current liabilities in excess of current assets and had hypothecated a great deal of equipment as a means of obtaining capital. Nevertheless, from its inception the company had been financed largely out of earnings and in every year but 1932 had been able to earn profits. Moreover, there was ample testimony that its service was satisfactory and reliable. There was evidence also from which the Commission could find that the additional financial burden which would be imposed by granting Consolidated's application could be met by that company. The amount of additional capital investment needed for terminals and equipment was doubtful. But there was testimony that

Finally, the District Court remanded the cases for rehearing in order for the Commission, among other things, to determine Consolidated's fitness "to initiate and maintain one of such lines in view of present conditions." This action was unwarranted. The records in the two proceedings were closed in October, 1940. The Commission issued its report and order on March 1, 1943. A petition for rehearing was filed by the appellees and other protestants on April 30, 1943, and was denied by the Commission on August 2, 1943.[23] The certificates were issued on September 7 and 15, 1943. Suit was brought in the District Court on January 13, 1944. The court rendered its decision on September 20, 1944, suggesting that the Commission had improperly denied the petition for rehearing. Its view was that the record was so stale, particularly in view of the influence of the war upon transportation facilities, that application of the doctrine of *Atchison, T. & S. F. R. Co.* v. *United States,* 284 U. S. 248, was proper.

That case, as has been indicated more than once, was "promptly restricted . . . to its special facts, *United States* v. *Northern Pacific Ry. Co.,* 288 U. S. 490, and it

---

the intermediate cash outlay necessary for new terminals at Oakland and Sacramento would not be more than $12,000 and that, if additional equipment were needed, Consolidated was in a position to furnish it and have it financed. In addition, because of the considerable distance covered by the new through route, Consolidated would be able to make "a profitable load factor."

On this and other evidence we cannot say that the Commission's finding as to the financial ability of Consolidated to undertake the new service lacked support in the record. For us or the District Court to do so would be to invade the Commission's proper function.

[23] In its exceptions to the examiner's report, O. N. C. asked that the proceeding be reopened because of many changes that had occurred since the closing of the record. In its report, the Commission stated: "In its exceptions, O. N. C. also requests a further hearing, but in view of our conclusions herein it is doubtful whether it would still desire such further hearing. Its request for further hearing is hereby denied."

stands virtually alone." *Interstate Commerce Commission* v. *Jersey City,* 322 U. S. 503, 515; see also *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349, 389. Except in the single instance, it has been held consistently that rehearings before administrative bodies are addressed to their own discretion. *Interstate Commerce Commission* v. *Jersey City, supra.* Only a showing of the clearest abuse of discretion could sustain an exception to that rule. The Commission was well acquainted with the impact of the war upon facilities for transport and upon the transportation business in general. In addition to its own expert knowledge concerning such matters, it had before it not only the facts set forth in the petition for rehearing [24] but also those alleged in the extended replies filed by the applicants.

We think the court misconceived not only the effects of the Commission's action in these cases but also its own function. It is not true, as the opinion stated, that ". . . the courts must in a litigated case, be the arbiters of the paramount public interest." [25] This is rather the

[24] The petition alleged, in part, that "new motor vehicle common carrier operations such as are authorized by the order and which duplicate adequate existing operations are forbidden by orders of the Office of Defense Transportation"; that "since orders of the Office of Defense Transportation prohibit speeds in excess of 35 miles per hour, and the promised service would require consistent highway speeds averaging 52½ miles per hour outside of cities and other restricted areas, it is certain the service proposed and authorized cannot and will not be given, nor can any service faster than that of existing operators be rendered"; and that "all controlling statements of fact relied upon by the division to sustain its conclusions were as of the date of the report and are now entirely and completely untrue . . ."

[25] The full sentence is as follows: "While it is true that problems such as these can only be brought to the courts when private interests conceive there has been injury of rights of property, and although the field of judicial review of administrative determination has been narrowly confined, the courts must in a litigated case, be the arbiters of the paramount public interest." 57 F. Supp. 192, 196.

business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law.

The judgment is

Reversed.

MR. JUSTICE DOUGLAS dissents.

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

CHERRY COTTON MILLS, INC. *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 187. Argued December 14, 1945.—Decided March 25, 1946.

1. Under 28 U. S. C. 250 (2) giving the Court of Claims jurisdiction to hear and determine "All set-offs, counterclaims . . . or other demands whatsoever on the part of the Government . . . against any claimant against the Government in said Court," it is within the jurisdiction of the Court of Claims, in a suit against the Government for a refund of taxes, to hear and determine a counterclaim of the Government based upon a debt owed by claimant to the Reconstruction Finance Corporation. P. 539.
2. That Congress chose to call the R. F. C. a corporation does not alter its characteristics so as to make it something other than it

actually is, an agency selected by the Government to accomplish purely governmental purposes, notwithstanding the fact that, in other situations and with relation to other statutes, this Court has applied the doctrine of governmental immunity or priority rather strictly. P. 539.

3. The jurisdiction of the Court of Claims to hear and determine counterclaims is in no way dependent upon the preliminary intra-governmental steps which precede court action—such as directions issued by the General Accounting Office to the Treasury. P. 538.

103 Ct. Cls. 243, 59 F. Supp. 122, affirmed.

Petitioner sued the Government for a tax refund in the Court of Claims. The Government filed a counterclaim for a debt owed by petitioner to the R. F. C. The Court of Claims overruled a challenge of its jurisdiction under 28 U. S. C. 250 (2) and rendered judgment for the United States and against petitioner for the amount it owed the R. F. C. less the amount of the tax refund. 103 Ct. Cls. 243, 59 F. Supp. 122. This Court granted certiorari. 326 U. S. 705. *Affirmed,* p. 540.

Theodore B. Benson argued the cause and filed a brief for petitioner.

David L. Kreeger argued the cause for the United States. With him on the brief were *Solicitor General McGrath, Assistant Attorney General Sonnett* and *John R. Benney.*

Mr. Justice Black delivered the opinion of the Court.

In 1942 the Government owed the petitioner a $3,104.87 refund of processing and floor taxes paid by the petitioner under the Agricultural Adjustment Act. The petitioner owed the Reconstruction Finance Corporation $5,963.51, balance on a note for borrowed money. The General Accounting Office directed the Treasury not to pay the tax refund to the petitioner, but to issue a check for the refund payable to the R. F. C. "to partially liquidate" petitioner's indebtedness to that governmental agency. As

authorized by 28 U. S. C. 250 (1), the petitioner then brought suit against the Government for the tax refund in the Court of Claims. The Government filed a counterclaim for the $5,963.51, asserting the right to do so under 28 U. S. C. 250 (2), which gives the Court of Claims jurisdiction to hear and determine "All set-offs, counterclaims, . . . or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court . . ." The petitioner challenged the jurisdiction of the Court of Claims to hear and determine the counterclaim on these two grounds: (1) the Comptroller exceeded his authority in directing the Treasury to pay the tax refund to the R. F. C. instead of to the petitioner; (2) the R. F. C. should be treated in the same way as a privately owned corporation and when so treated the petitioner's admittedly valid indebtedness to R. F. C. is not a claim "on the part of the Government" entitling it to set up a counterclaim under 28 U. S. C. 250 (2). The Court of Claims, rejecting both these contentions, rendered judgment for the United States and against the petitioner for the amount it owed the R. F. C. less the amount of the tax refund. We granted certiorari.

Little need be said as to the contention concerning the alleged lack of authority of the General Accounting Office to direct the Treasury not to pay the petitioner, since we agree with the Court of Claims that its jurisdiction to hear and determine counterclaims is in no way dependent upon the preliminary intragovernmental steps which precede court action. For this reason the petitioner's argument based on our decision in *Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1, where we considered the power of the Comptroller General in relation to wholly different legislation, has no bearing on the power of the Court of Claims under 28 U. S. C. 250 (2).

Nor do we find any justification for giving to 250 (2) the narrow interpretation urged. Its purpose was to permit the Government, when sued in the Court of Claims, to have determined in a single suit all questions which involved mutual obligations between the Government and a claimant against it. Legislation of this kind has long been favored and encouraged because of a belief that it accomplishes among other things such useful purposes as avoidance of "circuity of action, inconvenience, expense, consumption of the courts' time, and injustice." *Chicago & N. W. R. Co.* v. *Lindell,* 281 U. S. 14, 17 and cases cited.

We have no doubt but that the set-off and counterclaim jurisdiction of the Court of Claims was intended to permit the Government to have adjudicated in one suit all controversies between it and those granted permission to sue it, whether the Government's interest had been entrusted to its agencies of one kind or another. Every reason that could have prompted Congress to authorize the Government to plead counterclaims for debts owed to any of its other agencies applies with equal force to debts owed to the R. F. C. Its Directors are appointed by the President and confirmed by the Senate; its activities are all aimed at accomplishing a public purpose; all of its money comes from the Government; its profits, if any, go to the Government; its losses the Government must bear. That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely governmental purposes. *Inland Waterways Corp.* v. *Young,* 309 U. S. 517, 524. Nor is this congressionally granted power to plead a counterclaim to be reduced because in other situations, and with relation to other statutes, we have applied the doctrine of governmental

immunity or priority rather strictly.[1] The Government here sought neither immunity nor priority. Its right to counterclaim rests on different principles, one of which was graphically expressed by the sponsors of the Act of which § 250 (2) is a part: It is "as much the duty of the citizen to pay the Government as it is the duty of the Government to pay the citizen." 58 Cong. Globe 1674, April 15, 1862, 37th Cong., 2d Sess.

Affirmed.

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

MACAULEY, ACTING CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, ET AL. *v.* WATERMAN STEAMSHIP CORP.

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

No. 435. Argued February 27, 28, 1946.—Decided March 25, 1946.

The Maritime Commission Price Adjustment Board notified respondent that it had been assigned to renegotiate respondent's war contracts with the Commission pursuant to the Renegotiation Act and requested respondent to attend an initial conference and to supply information. Respondent denied the Board's authority on the ground that its contracts were with a British ministry and not with the Maritime Commission. The Board replied that, although signed by a British ministry, they had been negotiated by the Maritime Commission on behalf of the United States, which was responsible for the obligations incurred, and that, therefore, they were subject to renegotiation. Respondent refused to furnish the information requested and brought suit in a district court for a declaratory judgment that the contracts were not subject to the Renegotiation

[1] *Sloan Shipyards Corp.* v. *U. S. Fleet Corp.*, 258 U. S. 549; *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381; *Reconstruction Finance Corp.* v. *J. G. Menihan Corp.*, 312 U. S. 81.

Act and an injunction against further renegotiation proceedings. *Held:*

1. The District Court was without jurisdiction, because respondent had not exhausted the administrative remedies provided in the Renegotiation Act. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. P. 543.

2. Under § 403 (e) (1) of the Renegotiation Act, which permits contractors aggrieved by an order of an adjustment board to petition the Tax Court for a redetermination and gives that court exclusive jurisdiction "to finally determine the amount, if any, of such excessive profits," the Tax Court has authority to decide questions of coverage. P. 544.

3. The facts that wilful failure to comply with the adjustment board's request for information would subject the contractor to penalties under the Act, that the Chairman of the Commission and the Tax Court can enforce their orders without court proceedings, that the Act specifically provides that the Tax Court's determination is not subject to court review, and that, even if the contractor could have resort to the courts after a Tax Court determination, it would be subjected to a multiplicity of suits to recover on the contracts, do not affect the application of the rule requiring exhaustion of administrative remedies. P. 545.

151 F. 2d 292, reversed.

Respondent sued for a declaratory judgment that certain contracts were not subject to the Renegotiation Act and an injunction prohibiting further renegotiation proceedings. The District Court dismissed the complaint on the ground that respondent had failed to exhaust its administrative remedies. The Court of Appeals reversed. 151 F. 2d 292. This Court granted certiorari. 326 U. S. 709. *Reversed*, p. 545.

Robert L. Stern argued the cause for petitioners. With him on the brief were *Solicitor General McGrath, Assistant Attorney General Sonnett, David L. Kreeger* and *Joseph B. Goldman.*

Bon Geaslin argued the cause and filed a brief for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

The Renegotiation Act[1] authorizes the Chairman of the Maritime Commission under certain conditions prescribed by the Act to renegotiate war contracts made with the Commission for purposes of eliminating excessive profits. Respondent Waterman Steamship Corporation brought this suit against the Chairman of the Maritime Commission and the Maritime Commission Price Adjustment Board seeking a declaratory judgment that certain contracts to which it was a party were not subject to the Renegotiation Act and an injunction prohibiting further renegotiation proceedings involving these contracts. The complaint alleged the following facts here relevant: The Maritime Commission Price Adjustment Board notified Waterman that it had been assigned to renegotiate Waterman's contracts with the Commission and to determine the amount of excessive profits, if any, realized by Waterman. Waterman was requested to attend an initial conference and to supply information concerning these contracts, which included certain Red Sea charters. Waterman in his reply to the Board denied its authority to renegotiate the Red Sea charters on the ground that these had been made with the British Ministry of War Transport and not with the Maritime Commission. The Price Adjustment Board in its answer to Waterman insisted that while the Red Sea charters were signed by the British Ministry for "technical reasons," they had been negotiated with Waterman by the Maritime Commission on behalf of the United States Government which was now responsible for paying the obligations incurred, and that they were therefore renegotiable contracts with the Commission.[2] Respondent refused to furnish the information re-

[1] 56 Stat. 226, 245; 56 Stat. 798, 982; 57 Stat. 347; 57 Stat. 564; 58 Stat. 21, 78.

[2] Part of the Price Adjustment Board letter read as follows:

"On April 30, 1941 the President wrote the Chairman of the Maritime Commission and directed him 'as part of the defense effort to

quested and brought this suit in the District Court. That court, relying on *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, dismissed the complaint on the ground that Waterman had failed to exhaust the administrative remedies provided by Congress in the Renegotiation Act. The Court of Appeals reversed. 151 F. 2d 292. We granted certiorari because of the importance of the question involved.

The District Court properly held that this case should be dismissed on the authority of *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. In that case the employer sought to enjoin officials of the National Labor Relations Board from holding hearings on the ground that the business was not covered by the National Labor Relations Act. This Court held that the injunction could not be issued. It pointed out that the exclusive "power 'to prevent any person from engaging in any unfair practice affecting commerce' . . . [had] been vested by Congress in the Board," 303 U. S. at 48, and concluded that to grant the injunction would violate the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." Under this

---

which this country is committed' to secure the service of at least 2,000,000 tons of merchant shipping. Pursuant to this direction, the Commission negotiated with the vessel owners. The vessels were made available, a charter party was signed with the British Ministry of War Transport for technical reasons but the commission agreed to pay the vessel owner the agreed compensation for the use of the vessel. This arrangement was evidenced by correspondence between the Commission and the vessel owner.

"There appears to have been mutuality of understanding among all the parties interested, legality of consideration and definit'ness [sic] as to terms, time of performance and acceptance. Payment was made in due course as agreed and this payment constitutes a part of the cost of the war to the people of the United States."

rule the District Court here too lacked power to grant an injunction.

Just as in the *Myers* case, the claim here is that the contracts are not covered by the applicable statute. And the applicable statute, the Renegotiation Act, like the National Labor Relations Act in the *Myers* case, empowers administrative bodies to rule on the question of coverage. The Renegotiation Act authorizes the Chairman of the Maritime Commission to conduct investigations in the first instance to determine whether excessive profits had been made on contracts with the Commission. A contractor aggrieved by the Chairman's determination of excessive profits may have them redetermined in a "de novo" proceeding before the Tax Court. Section 403 (e) (1) of the Act provides that the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits . . ." Contrary to respondent's contention that this language limits the Tax Court's jurisdiction so as not to include the power to decide questions of coverage, we think the language shows that the Tax Court has such power. For a decision as to what are and are not negotiable contracts is an essential part in determining the amount of a contractor's excessive profits. The legislative history of the Renegotiation Act, moreover, shows that Congress intended the Tax Court to have exclusive jurisdiction to decide questions of fact and law,[3] which latter include the issue raised here of whether the contracts in question are subject to the Act. In order to grant the injunction sought the District Court would have to decide this issue in the first instance. Whether it ever can do so or not, it cannot now decide questions of coverage when the administrative agencies authorized to do so have not yet made their determination. Here, just

[3] One of the sponsors of the Renegotiation Act in the House explained the Bill as providing that the Tax Court could make decisions on all "questions of fact and law . . ." 90 Cong. Rec. 1355.

as in the *Myers* case, the administrative process, far from being exhausted, had hardly begun. The District Court consequently was correct in holding that it lacked jurisdiction to act.[4]

Respondent urges several grounds for not applying the rule of the *Myers* case here. It points out that wilful failure to comply with the Adjustment Board's request for information would subject it to penalties under the Act; that the Chairman of the Commission and the Tax Court can enforce their orders without court enforcement proceedings; that the Act specifically provides that the Tax Court's determination is not subject to court review; and that, even if respondent could, subsequent to a Tax Court determination, have resort to the courts, it would be subjected to a multiplicity of suits in order to recover the money due on the contracts. Even if one or all of these things might possibly occur in the future, that possibility does not affect the application of the rule requiring exhaustion of administrative remedies. The District Court had no power to determine in this proceeding and at this time issues that might arise because of these future contingencies. Its judgment dismissing the complaint was correct. The judgment of the Circuit Court of Appeals is

Reversed.

MR. JUSTICE DOUGLAS concurs in the result.

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

---

[4] The same principles which justified dismissal of the cause insofar as it sought injunction justified denial of the prayer for a declaratory judgment. *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 299; *Coffman* v. *Breeze Corporations*, 323 U. S. 316; *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450; *Brillhart* v. *Excess Ins. Co.*, 316 U. S. 491, 494, 499.

UNITED STATES EX REL. TENNESSEE VALLEY AUTHORITY *v.* WELCH.

NO. 528. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.*

Argued March 7, 1946.—Decided March 25, 1946.

Tennessee Valley Authority built a power dam creating a large reservoir, thus flooding a highway which afforded the only reasonable means of access to a large area of mountainous land constituting part of the watershed and lying between the reservoir and a national park. A new road could have been built at a cost disproportionate to its value to the public. After lengthy consideration of all public and private interests, it was agreed between the national, state and county authorities that the best solution of the problem was for T. V. A. to acquire all land in the isolated area and add it to the national park, making satisfactory financial adjustments with all interests, public and private, and reserving all rights required to carry out the T. V. A. program. T. V. A. adopted a resolution that it deemed the acquisition of the land necessary to carry out the purposes of the T. V. A. Act. All landowners in the area sold their property voluntarily, except the six respondents here. They contested condemnation proceedings on the ground that the taking was beyond the authority conferred by §§ 4 and 25 of the T. V. A. Act to condemn all property that T. V. A. "deems necessary for carrying out the purposes" of the Act, which places broad responsibilities on T. V. A. relating to navigability, flood control, reforestation, marginal lands, and agricultural and industrial development of the whole Tennessee Valley and specifically admonishes it to cooperate with other governmental agencies, federal, state and local, in relation to the problem of "readjustment of the population displaced by the construction of dams, the acquisition of reservoir areas, the protection of watersheds," etc. *Held:*

1. The condemnation is sustained, since it was for a public purpose authorized by the Act and T. V. A. proceeded in complete accord with the congressional policy embodied in the Act. P. 552.

---

*Together with No. 529, *United States ex rel. Tennessee Valley Authority* v. *Burns et al.;* No. 530, *United States ex rel. Tennessee Valley Authority* v. *Lollis et al.;* No. 531, *United States ex rel. Tennessee Valley Authority* v. *Bradshaw et al.;* No. 532, *United States*

2. The common law rule requiring a strict construction of powers to condemn is not applicable here, because of the specific provision of § 31 that the Act shall be "liberally construed" to carry out its broad purposes. P. 551.

3. In construing the Act, a court should not break one inseparable transaction into separate units but should view the entire transaction as a single integrated effort on the part of T. V. A. to perform its functions. Pp. 552, 553.

4. It is the function of Congress to decide what type of taking is for public use and the agency authorized to do the taking may do so to the full extent of its statutory authority. P. 551.

5. The provisions of the Act show a clear congressional purpose to grant T. V. A. all power needed to acquire by purchase or condemnation lands which it deems necessary for carrying out the purposes of the Act. P. 554.

6. Neither the fact that T. V. A. wanted to prevent a waste of public funds nor that it intended to cooperate with the National Park Service detracted from its power to condemn. P. 554.

150 F. 2d 613, reversed.

The United States instituted proceedings under the Tennessee Valley Authority Act to condemn certain land. The District Court dismissed the petition. The Circuit Court of Appeals affirmed. 150 F. 2d 613. This Court granted certiorari. 326 U. S. 714. *Reversed,* p. 555.

Joseph C. Swidler argued the cause for petitioner. With him on the brief were *Solicitor General McGrath* and *Charles J. McCarthy.*

McKinley Edwards argued the cause and filed a brief for respondent in No. 528.

George H. Ward argued the cause for respondents in Nos. 529 to 533, inclusive. With him on the brief was *G. L. Jones.*

---

ex rel. Tennessee Valley Authority v. *Rust et al.;* and No. 533, *United States ex rel. Tennessee Valley Authority* v. *Hyatt et al.,* on certiorari to the same court, argued and decided on the same dates.

MR. JUSTICE BLACK delivered the opinion of the Court.

The United States, on behalf of the Tennessee Valley Authority, filed petitions in the District Court to condemn six tracts of land located in North Carolina and owned by the several respondents. It asserted that the power to condemn the land in question was conferred upon the Authority by the provisions of the Tennessee Valley Authority Act as amended. 48 Stat. 58 as amended, 16 U. S. C. 831–831dd. The District Court held that the Act did not authorize condemnations under the facts shown by the evidence and dismissed the petitions. The Circuit Court of Appeals affirmed. 150 F. 2d 613. Since the grant of power to condemn needed properties is an essential part of the Act, we granted certiorari.

The following basic facts form the background of this proceeding: Congress in 1942, in order to meet pressing power needs for war production, empowered the Authority to construct Fontana Dam, on the Little Tennessee River in North Carolina. H. Rep. 1470, 77th Cong., 1st Sess., 25. The dam is one of the world's largest and creates a reservoir twenty-nine miles long. Between this reservoir and the Great Smoky Mountains National Park lie forty-four thousand acres of mountainous land, including the tracts which the Government wants to condemn here. When Congress authorized construction of the dam, two hundred and sixteen families occupied this area. Their only convenient means of ingress and egress, except for foot trails, was North Carolina Highway No. 288, a road approximately fifty miles in length. When the dam was built the reservoir flooded most of the highway, rendering it useless for travel. As a result the area remained practically isolated.

As events have shown, the problem this situation created could not be easily solved. Any solution had to take into consideration the interests of the United States, of North Carolina, and of Swain County, N. C., as well as the in-

terests of the individuals affected. The United States' interest was that of the T. V. A. and the National Park Service. The T. V. A. had a dual interest. First, the isolated area, while not actually submerged by the reservoir, was a part of the watershed. Left in private hands it could be used to frustrate some of the objectives of T. V. A. legislation. Second, the fact that the dam had caused the highway to be flooded created a serious problem for the inhabitants and landowners in the area who had been damaged by the project. It was the statutory duty of the T. V. A. to attempt to bring about proper adjustments in order to alleviate resulting hardship and inconvenience. At the same time, the T. V. A. was not supposed to waste the money of the United States. The United States' interest in the land through the National Park Service was due to the fact that this particular area had been included in the Great Smoky Mountains Park project. Had this land been actually owned by the United States for park purposes it would have been easier to subject it to servitudes in the interest of the T. V. A. development. North Carolina was interested in the land because it was its duty to continue to hold and maintain a highway so long as its citizens continued to live within the area. Swain County had a similar interest. It had issued bonds to finance building the highway. Part of the bond issue was still outstanding.

Conferences between the interested groups brought to light facts which led to the solution ultimately adopted. It was agreed on all sides that the old road was narrow, dangerous, and far below modern standards for useful highways. Investigation showed that replacement of the old road with the same undesirable type of highway would cost about $1,400,000.00, while the cost of building an improved highway would greatly exceed that amount. All parties felt that the United States had neither a legal nor moral duty to build a new road of the superior type

and quality needed. This meant that type of road could only be built if North Carolina would bear the additional expense. Since the highway carried no through traffic and serviced so few people, the State was not willing to pay for the added cost and all parties agreed that such an expenditure would be wasteful and unjustifiable. The War Production Board presented further obstacles. It was of the opinion that the road was not sufficiently essential to warrant use of the materials and manpower its construction would require. For these and other reasons North Carolina objected to the T. V. A.'s settling the controversy by a mere payment of damages to it for injury to the road and by the payment of damages to individual owners for destroying their access to the area. The State contended that this would leave the area in private hands with no adequate roads to serve the people and would impose unwise, if not impossible burdens, on the State and County in connection with providing schools, police protection, health services, and other necessary facilities.

After a year and a half of negotiations a solution was worked out. After the proposed solution was approved by the Governor, the Council of the State, and the Legislature of North Carolina, it was embodied in a settlement agreement between the State, the County, the National Park Service, and the T. V. A. Under that agreement the T. V. A. with the aid of a $100,000 contribution by the State was to acquire all the land in the isolated area, either by purchase or condemnation, so as to relieve the State from further responsibility for maintaining a highway to that section; Swain County was to be paid $400,000 by the Authority to help retire its outstanding road bonds; and the Authority was to transfer all the area lands to the National Park Service for inclusion within the Great Smoky Mountains National Park but reserving to the T. V. A. all rights required to carry out the T. V. A. program. The agreement, thus, satisfied the interests of the

State, the County, the T. V. A., and the National Park Service. The cost to the United States was several hundred thousand dollars less than the cost of rebuilding the old road. And all the landowners in the area, except these six respondents who refused to sell, have received full compensation for their property.

The courts below have held that T. V. A. had no power under the Act to condemn the tracts of these respondents as contemplated by the agreement. The District Court reached this conclusion by limiting the Authority's power so that it can condemn only those lands which are needed for the dam and reservoir proper. It reasoned that the common law rule of construction requires that statutory powers to condemn be given a restrictive interpretation. But § 31 of the Act expressly provides that the Act shall be "liberally construed to carry out the purposes of Congress to provide . . . for the national defense, improve navigation, control destructive floods and promote interstate commerce and the general welfare." In the face of this declaration, the District Court erred in following the asserted common law rule.

The Circuit Court of Appeals, without expressly relying on a compelling rule of construction that would give the restrictive scope to the T. V. A. Act given it by the District Court, also interpreted the statute narrowly. It first analyzed the facts by segregating the total problem into distinct parts and, thus, came to the conclusion that T. V. A.'s purpose in condemning the land in question was only one to reduce its liability arising from the destruction of the highway. The court held that use of the lands for that purpose is a "private" and not a "public use" or, at best, a "public use" not authorized by the statute. We are unable to agree with the reasoning and conclusion of the Circuit Court of Appeals.

We think that it is the function of Congress to decide what type of taking is for a public use and that the agency

authorized to do the taking may do so to the full extent of its statutory authority. *United States* v. *Gettysburg Electric R. Co.,* 160 U. S. 668, 679. It is true that this Court did say in *Cincinnati* v. *Vester,* 281 U. S. 439, 446, that "It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one." But the Court's judgment in that case denied the power to condemn "excess" property on the ground that the state law had not authorized it. And in *Hairston* v. *Danville & Western R. Co.,* 208 U. S. 598, 607, this Court, referring to the "rule" later stated in the *Vester* case, said that "No case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses in conformity with its laws." And see *Madisonville Traction Co.* v. *Mining Co.,* 196 U. S. 239, 257, 260–261. But whatever may be the scope of the judicial power to determine what is a "public use" in Fourteenth Amendment controversies, this Court has said that when Congress has spoken on this subject "Its decision is entitled to deference until it is shown to involve an impossibility." *Old Dominion Co.* v. *United States,* 269 U. S. 55, 66. Any departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields. See *Case* v. *Bowles,* 327 U. S. 92, 101; *United States* v. *New York,* 326 U. S. 572. We hold that the T. V. A. took the tracts here involved for a public purpose, if, as we think is the case, Congress authorized the Authority to acquire, hold, and use the lands to carry out the purposes of the T. V. A. Act.

In passing upon the authority of the T. V. A. we would do violence to fact were we to break one inseparable trans-

action into separate units. We view the entire transaction as a single integrated effort on the part of T. V. A. to carry on its congressionally authorized functions. Cf. *United States* v. *Commodore Park,* 324 U. S. 386, 392. And we find not only that Congress authorized the Authority's action, but also that the T. V. A. has proceeded in complete accord with the congressional policy embodied in the Act. That Act does far more than authorize the T. V. A. to build isolated dams. The broad responsibilities placed on the Authority relate to navigability, flood control, reforestation, marginal lands, and agricultural and industrial development of the whole Tennessee Valley. The T. V. A. was empowered to make contracts, purchase and sell property deemed necessary or convenient in the transaction of its business, and to build dams, reservoirs, transmission lines, power houses, and other structures. It was particularly admonished to cooperate with other governmental agencies—federal, state, and local—specifically in relation to the problem of "readjustment of the population displaced by the construction of dams, the acquisition of reservoir areas, the protection of watersheds, the acquisition of rights-of-way, and other necessary acquisitions of land, in order to effectuate the purposes of the Act." All of the Authority's actions in these respects were to be directed towards "development of the natural resources of the Tennessee River drainage basin and of such adjoining territory as may be related to or materially affected by the development consequent to this Act . . . all for the general purpose of fostering an orderly and proper physical, economic, and social development of said areas . . ." To discharge its responsibilities the T. V. A. was granted "such powers as may be necessary or appropriate" for their exercise. Section 4 (h) of the Act gives the T. V. A. the very broad power to "exercise the right of eminent domain . . ." Section 4 (i) of the Act empowers the Authority to condemn certain specified

types of property and concludes by referring to "all property that it [the Authority] deems necessary for carrying out the purposes of this Act . . ." To make clear beyond any doubt the T. V. A.'s broad power, Congress in § 25 authorized the Authority to file proceedings, such as the ones before us, "for the acquisition by condemnation of any lands, easements, or rights of way which, in the opinion of the Corporation, are necessary to carry out the provisions of this Act."

All of these provisions show a clear congressional purpose to grant the Authority all the power needed to acquire lands by purchase or by condemnation which it deems necessary for carrying out the Act's purposes. These proceedings were preceded by a T. V. A. resolution that it did deem these acquisitions necessary for such purposes. Despite Congress' clear expression of its purpose to grant broad condemnation power to T. V. A. we are asked to hold that the Authority's power is less than the powers to condemn granted other governmental agencies, which under 40 U. S. C. 257 have been held to have a power to condemn coextensive with their power to purchase. *Hanson Co.* v. *United States,* 261 U. S. 581, 587. Neither the fact that the Authority wanted to prevent a waste of government funds, nor that it intended to cooperate with the National Park Service detracted from its power to condemn granted by the Act. The cost of public projects is a relevant element in all of them, and the Government, just as anyone else, is not required to proceed oblivious to elements of cost. Cf. *Old Dominion Co.* v. *United States, supra.* And when serious problems are created by its public projects, the Government is not barred from making a common sense adjustment in the interest of all the public. *Brown* v. *United States,* 263 U. S. 78. Where public need requires acquisition of property, that need is not to be denied because of an individual's unwillingness to sell. *Kohl* v. *United States,* 91 U. S. 367, 371. When the need

arises individuals may be required to relinquish ownership of property so long as they are given that just compensation which the Constitution requires. *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527, 531. Such compensation can be awarded these respondents by the District Court.

Reversed.

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

MR. JUSTICE REED, concurring.

I agree that the TVA has authority to condemn the tracts of land which the Authority seeks to acquire by these proceedings.

This authority flows from the power of eminent domain granted by §§ 4 and 25 of the Tennessee Valley Authority Act, 48 Stat. 58, as amended. The grant which allows condemnation of all property that the Authority "deems necessary for carrying out the purposes of this Act," is in sufficiently broad terms, it seems to me, to justify these condemnations. When the Authority was faced with the problem of justly compensating the occupants of the forty-four thousand acre area between the Fontana Dam lake and the Great Smoky Mountains National Park, North Carolina and Swain County for the destruction of Highway No. 288, it could within its delegated powers purchase or condemn the lands affected or build a substitute highway whichever appeared cheaper. The United States is not barred from the exercise of good business judgment in its construction work. *Brown* v. *United States*, 263 U. S. 78. See *United States* v. *Meyer*, 113 F. 2d 387; *Old Dominion Land Co.* v. *United States*, 296 F. 20, 269 U. S. 55, 66. Such action is not "outside land speculation." 263 U. S. at 84. It follows that having this power, the Authority could contract, as it did, to reduce its expenditures

by the contract arrangements of July 30, 1943, with Swain County and North Carolina. With the Authority's power to turn over its lands to the National Park, we are not here concerned. Under the contract the public rights in Highway No. 288 were acquired by the Authority and it agreed to acquire the lands here in controversy. The acquisition of the whole area was a factor in these arrangements and the condemnation of these smaller tracts is a part of the transaction.

I do not join in the opinion of the Court because of certain language, *ante,* pp. 551–554, which implies to me that there is no judicial review of the Authority's determination that acquisition of these isolated pieces of private property is within the purposes of the TVA Act. The Court seems to accept the Authority's argument that a good faith determination by it that property is necessary for the purposes of the Act bars judicial review as to whether the proposed use will be within the statutory limits. This argument of lack of judicial power properly was rejected by the Circuit Court of Appeals although, as explained above, I think that court erroneously held that the TVA Act did not authorize these condemnations. 150 F. 2d 613, 616. It is my opinion that the TVA is a creature of its statute and bound by the terms of that statute, and that its every act may be tested judicially, by any party with standing to do so, to determine whether it moves within the authority granted to it by Congress. *School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94; *Social Security Board* v. *Nierotko,* 327 U. S. 358, 369.

This taking is for a public purpose but whether it is or is not is a judicial question. Of course, the legislative or administrative determination has great weight but the constitutional doctrine of the Separation of Powers would be unduly restricted if an administrative agency could invoke a so-called political power so as to immunize its action against judicial examination in contests between

the agency and the citizen. The former cases go no further than this. *United States* v. *Gettysburg Electric R. Co.*, 160 U. S. 668, 680; *Rindge Co.* v. *Los Angeles*, 262 U. S. 700, 709; *Old Dominion Land Co.* v. *United States*, 269 U. S. 55, 66; *Cincinnati* v. *Vester*, 281 U. S. 439, 446.

Once it is admitted or judicially determined that a proposed condemnation is for a public purpose and within the statutory authority, a political or judicially non-reviewable question may emerge, to wit, the necessity or expediency of the condemnation of the particular property. These are the cases that led the TVA, erroneously in my view, to assert the action of its Board could "not be set aside by a court." *Adirondack R. Co.* v. *New York*, 176 U. S. 335, 349; *Bragg* v. *Weaver*, 251 U. S. 57, 58; *Joslin Co.* v. *Providence*, 262 U. S. 668, 678; *Rindge Co.* v. *Los Angeles*, 262 U. S. 700, 708.

The CHIEF JUSTICE joins in this opinion.

MR. JUSTICE FRANKFURTER, concurring.

I join in the opinion of the Court for I do not read it as does my brother REED. The Bill of Rights provides that private property shall not "be taken for public use, without just compensation." U. S. Const., Amend. V. This Court has never deviated from the view that under the Constitution a claim that a taking is not "for public use" is open for judicial consideration, ultimately by this Court. It is equally true that in the numerous cases in which the issue was adjudicated, this Court never found that the legislative determination that the use was "public" exceeded Constitutional bounds. But the fact that the nature of the subject matter gives the legislative determination nearly immunity from judicial review does not mean that the power to review is wanting. All the cases cited in the Court's opinion sustaining a taking recognize and accept the power of judicial review. I assume that in citing these cases the Court again recognizes

the doctrine that whether a taking is for a public purpose is not a question beyond judicial competence.

S. R. A., INC. *v.* MINNESOTA.

CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

Nos. 254 and 255. Argued January 3, 1946.—Decided March 25, 1946.

Real estate, which had been acquired by the United States for public purposes with the consent of a State and over which the United States had exercised exclusive legislative jurisdiction pursuant to Art. I, § 8, cl. 17 of the Constitution, was sold to a private party under a contract of sale giving the purchaser possession but retaining legal title in the United States until payment of the balance of the purchase price in installments. The contract contained no express provision retaining sovereignty in the United States; there was no express retrocession by Congress to the State; and the original act of cession contained no requirement for return of sovereignty to the State when the property was no longer used for federal purposes. While much of the purchase price was still not due and unpaid, the State levied taxes on the property "subject to fee title remaining in the United States." Under the state law, as construed by the Supreme Court of the State, the equitable interest alone could be sold for taxes, leaving the fee of the United States in its position of priority over any interests which might be transferred by the tax sale. *Held:*

1. The contract transferred the equity in the land to the purchaser, leaving in the United States only a legal title as security—the equivalent of a mortgage. Pp. 565, 569.

2. When the purchaser took possession of the property, it became subject to the territorial jurisdiction of the State. P. 565.

3. The construction by the state supreme court of the law of the State as to the effect of a tax sale of the purchaser's interest on the interest of the United States is binding on this Court. P. 565.

4. The property is not immune from taxation by the State. *Van Brocklin* v. *Tennessee,* 117 U. S. 151, distinguished; *New Brunswick* v. *United States,* 276 U. S. 547, followed. Pp. 566–569.

5. The tax is not invalidated by the inclusion of the interest of the United States in the valuation of the land, since its interest is for security purposes only and is not beneficial in nature. P. 570.

219 Minn. 493, 517; 18 N. W. 2d 442, 455, affirmed.

Minnesota levied taxes on certain real estate under contract of sale from the United States to a private party, the legal title being in the United States; but the assessment was expressly made "subject to fee title remaining in the United States." A state trial court held that the property was exempt from state taxation. The Supreme Court of Minnesota reversed the judgment. *In re S. R. A., Inc.,* 213 Minn. 487, 7 N. W. 2d 484. On retrial, the lower court held the property liable for the tax and declared a lien "upon such parcel of land as against the estate, right, title, interest, claim, or lien, of whatever nature, in law or equity, of every person, company, or corporation, subject however, to the prior rights, liens and interests of the United States of America." This judgment was affirmed on appeal. *In re S. R. A., Inc.,* 219 Minn. 493, 517, 18 N. W. 2d 442, 455. This Court granted certiorari. 326 U. S. 703. *Affirmed,* p. 570.

Roland J. Faricy argued the cause and filed a brief for petitioner.

Andrew R. Bratter argued the cause for respondent. With him on the brief were *J. A. A. Burnquist,* Attorney General of Minnesota, *Geo. B. Sjoselius,* Deputy Attorney General, and *James F. Lynch.*

Mr. Justice Reed delivered the opinion of the Court.

A question as to the power of the State of Minnesota to tax realty within the boundaries of that State, when the legal title remains in the United States, is presented by this writ of certiorari.[1] The State ceded jurisdiction over the realty in accordance with the exclusive legislation

[1] No. 255, *S. R. A., Inc.* v. *Minnesota,* is in all respects like No. 254, except that the state tax was laid for the year 1941. This opinion in No. 254 governs the result and the same judgment of affirmance is directed. See 219 Minn. 517, 18 N. W. 2d 455; certiorari granted, 326 U. S. 703.

clause of the United States Constitution, Article I, § 8, Clause 17.

The realty in question was conveyed to the United States in 1867 as a site for a building to house a post office, a customs office and offices for various departments and agencies of the United States. The building was eventually vacated and the property sold in 1939 by the Director of Procurement of the Department of the Treasury under the authority of an act for the disposal of surplus federal real estate. 49 Stat. 885.

It was purchased on public sale and improved by petitioner who was in full possession with right of user under an executory contract of sale between it and the United States at the time of the levy of the tax. That contract provided for a cash payment and annual instalments, possession by petitioner so long as it met the terms of the contract, and for repossession by the United States, with retention of prior instalments of the purchase price, upon the purchaser's failure to comply with any term or condition of the contract. Upon repossession, the United States was authorized to resell the realty and recover any resulting deficiency from the petitioner. All obligations due under the contract had been met. The major portion of the contract price had not fallen due and was unpaid. The contract permitted leases to others in subordination to the rights of the United States. The contract required the United States to execute and deliver a quit claim deed for the realty to the petitioner upon its completion of the requirements of the contract.

With the ownership of the property in the situation just described, taxes for general and special purposes were levied on the property for 1940 under the usual Minnesota procedure. The tax was stated in the assessment to be on the realty "subject to fee title remaining in the United States of America." Petitioner duly filed its objections in the proper state district court, pursuant to statute. [1]

Minn. Stat. (1941) Ch. 278. So far as concerns this review, the objection to the tax was based on a claimed exemption of the realty from state taxation because title to all of the premises was in the United States. The exemption was sustained by the trial court. The Supreme Court of Minnesota reversed that judgment and denied exemption. *In re S. R. A., Inc.,* 213 Minn. 487, 7 N. W. 2d 484. On retrial, the lower court held the realty liable for the tax and declared a lien "upon such parcel of land as against the estate, right, title, interest, claim, or lien, of whatever nature, in law or equity, of every person, company, or corporation, subject however, to the prior rights, liens and interests of the United States of America . . ." This second judgment was affirmed on appeal. *In re S. R. A., Inc.,* 219 Minn. 493, 18 N. W. 2d 442.

Certiorari was sought under § 237 (b) of the Judicial Code. It was granted because of the importance and uncertainty of the question of the right of a State to tax realty sold by the United States in possession of a buyer from the Government under a contract of sale with uncompleted conditions for execution and delivery of the muniments of title. 326 U. S. 703.[2]

The supremacy of the Federal Government in our Union forbids the acknowledgment of the power of any State to tax property of the United States against its will. Under an implied constitutional immunity, its property and operations must be exempt from state control in tax, as in other matters. *M'Culloch* v. *Maryland,* 4 Wheat. 316, 425, *et seq.; Van Brocklin* v. *Tennessee,* 117 U. S. 151, 177;

---

[2] Varying results have been reached by other courts in similar situations. *Lincoln County* v. *Pacific Spruce Corp.,* 26 F. 2d 435; *Ken Realty Co.* v. *Johnson,* 138 F. 2d 809; *Mint Realty Co.* v. *Philadelphia,* 218 Pa. 104, 66 A. 1130; *Copp* v. *State,* 69 W. Va. 439, 71 S. E. 580; *ABR Corp.* v. *Newark,* 133 N. J. L. 34, 42 A. 2d 296. See also *Bancroft Investment Corp.* v. *Jacksonville,* 157 Fla. 546, 27 So. 2d 162.

United States v. *Allegheny County*, 322 U. S. 174, 176–77. This postulate, as a matter of federal law, forces final decision of the validity of claimed exemptions under this immunity upon this Court. *United States* v. *Allegheny County, supra*, 183, and cases cited. The impact of state taxation on federal operations may be so close and threatening as to compel judicial intervention to declare the state tax invalid, as in the *M'Culloch* case, or so remote and incidental as to justify a federal court in refusing to relieve a taxpayer from a state tax. *Alabama* v. *King & Boozer*, 314 U. S. 1. The line of taxability is somewhat irregular and has varied through the years.[3]

The right of a State to tax realty directly depends primarily upon its territorial jurisdiction over the area. The realty of petitioner had been conveyed to and used by the United States for the essential governmental activities which authorized the exercise of its exclusive legislative jurisdiction.[4] Exclusive legislative power is in essence complete sovereignty.[5] That is, not only is the federal property immune from taxation because of the supremacy of the Federal Government but state laws, not adopted directly or impliedly by the United States, are ineffective

---

[3] Compare *Mayo* v. *United States*, 319 U. S. 441, with *Alabama* v. *King & Boozer, supra*, and *United States* v. *Allegheny County, supra*, p. 176, notes 1 and 2, and cases cited. See *Wilson* v. *Cook*, 327 U. S. 474.

[4] Art. I, § 8, Cl. 17:

"The Congress shall have Power . . .

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; . . ."

[5] *Fort Leavenworth R. Co.* v. *Lowe*, 114 U. S. 525, 532–33; *United States* v. *Unzeuta*, 281 U. S. 138; *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, 652–56; *Bowen* v. *Johnston*, 306 U. S. 19.

to tax or regulate other property or persons upon that enclave.[6] It would seem that the United States obtained this property in compliance with cession by Minnesota of exclusive sovereignty. Act of February 9, 1867, Minn. Laws 1867 Jan., Ch. LXXIX. The acceptance by the United States at that time of the power ceded is presumed.[7] This Court apparently has never directly passed upon the effect on federal sovereignty of the property's transfer by the United States to private hands.

In this instance there were no specific words in the contract with petitioner which were intended to retain sovereignty in the United States. There was no express retrocession by Congress to Minnesota, such as sometimes occurs.[8] There was no requirement in the act of cession for return of sovereignty to the State when the ceded territory was no longer used for federal purposes.[9] In the absence of some such provisions, a transfer of property held by the United States under state cessions pursuant to Article I, § 8, Clause 17, of the Constitution would leave numerous isolated islands of federal jurisdiction, unless the unrestricted transfer of the property

---

[6] *Stewart & Co.* v. *Sadrakula,* 309 U. S. 94; *Surplus Trading Co.* v. *Cook, supra,* note 5.

[7] *Fort Leavenworth R. Co.* v. *Lowe, supra,* p. 528; *Benson* v. *United States,* 146 U. S. 325, 330; *Mason Co.* v. *Tax Comm'n,* 302 U. S. 186, 207.

At the time of the purchase, 5 Stat. 468, later incorporated in R. S. § 355, was in force. As it required consent of the State of the situs before expenditures of public money by the United States on locations purchased for needful buildings, it is to be presumed that all requirements were satisfied. R. S. § 355 has been consistently construed to require full sovereignty in the United States. 8 Op. A. G. 102; 10 Op. A. G. 34; 20 Op. A. G. 611; 31 Op. A. G. 265; 38 Op. A. G. 341; 39 Op. A. G. 285. R. S. § 355 has been superseded. 40 U. S. C. § 255; *Adams* v. *United States,* 319 U. S. 312.

[8] 30 Stat. 668; 9 Stat. 35.

[9] Compare *Palmer* v. *Barrett,* 162 U. S. 399; *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 144.

to private hands is thought without more to revest sovereignty in the States. As the purpose of Clause 17 was to give control over the sites of governmental operations to the United States, when such control was deemed essential for federal activities, it would seem that the sovereignty of the United States would end with the reason for its existence and the disposition of the property. We shall treat this case as though the Government's unrestricted transfer of property to nonfederal hands is a relinquishment of the exclusive legislative power.[10] Recognition has been given to this result as a rule of necessity.[11] If such a step is necessary, Minnesota showed its acceptance of a supposed retrocession by its levy of a tax on the property. Under these assumptions the existence of territorial jurisdiction in Minnesota so as to permit state taxation depends upon whether there was a transfer of the property by the contract of sale.

In determining the meaning and effect of contracts to which the United States is a party, the governing rules of law must be finally declared by this Court. *United States* v. *Allegheny County, supra,* 183. Turning to the contract, we find in it no characteristics which differentiate it from the normal executory contract for the sale of land with partial payments. Normally, contracts between the United States and others are construed as contracts between private parties. *Lynch* v. *United States,* 292 U. S.

[10] Compare *Palmer* v. *Barrett, supra,* with *Arlington Hotel* v. *Fant,* 278 U. S. 439.

[11] *Fort Leavenworth R. Co.* v. *Lowe,* 114 U. S. 525, 542: "It is necessarily temporary, to be exercised only so long as the places continue to be used for the public purposes for which the property was acquired or reserved from sale. When they cease to be thus used, the jurisdiction reverts to the State."

The reference to federal control of "reserved" land probably relates to the supremacy of the United States for the management of governmental affairs in the absence of exclusive legislative power. See page 539.

571, 579. This Court has been of the opinion that contracts for the sale of land transfer to the purchaser the equity in the land. We think this contract did so. That equity is realty. It was owned by the vendee. The United States retains only a legal title as security. In substance it is in the position of a mortgagee.[12] Minnesota has the same rule. *In re S. R. A., Inc.*, 219 Minn. 493, 507; 213 Minn. 487, 495, 499. Therefore when petitioner entered into possession of this real estate under its contract of purchase, the taxed property by the transfer became subject to the territorial jurisdiction of Minnesota.[13]

Territorial jurisdiction in Minnesota does not dispose of this tax problem. The nub of this case, that is the immunity from state taxation of property to which the United States holds legal title, remains. Minnesota took care to leave unassessed whatever interest the United States holds. The levy and judgment was "subject to fee title remaining in the United States of America." 219 Minn. at 496. Although Minnesota real estate taxes are assessed on the parcel of land as a "unitary item" including "all rights and privileges," the State does not claim that a tax sale will divest the fee title of the United States. 213 Minn. at 493, 499. Apparently the State is of the view that the equitable interest alone may be sold under its laws, leaving the fee of the United States in its position of priority over any interests which may be transferred by the tax sale. 219 Minn. at 513. Such a construction of the state law is binding upon this Court. It

---

[12] *Lenman* v. *Jones*, 222 U. S. 51; *Gunton* v. *Carroll*, 101 U. S. 426, 430–31; *Bissell* v. *Heyward*, 96 U. S. 580; *Secombe* v. *Steele*, 20 How. 94, 103–104. Compare 8 Thompson, Real Property, § 4579; 2 Sugden, Vendors (14th Ed.), 375. See *Lowery* v. *Peterson*, 75 Ala. 109. Compare Restatement, Conflict of Laws, § 209.

[13] We intimate no view as to the legislative status of this property, if it is repossessed by the United States. See the cases cited in note 10, *supra*.

does not impinge upon federal rights. So long as that situation exists, the determination of the State cannot be challenged here. The possibility of repossession by the United States is not enough to block a tax sale in which the paramount rights of the United States are protected. *Baltimore Shipbuilding Co.* v. *Baltimore,* 195 U. S. 375, 381–82; *New Brunswick* v. *United States,* 276 U. S. 547, 556; *United States* v. *Alabama,* 313 U. S. 274, 282.[14]

Petitioner's argument goes beyond the question of the enforcement of the assessed tax. It is bottomed on the implied constitutional immunity from state taxation of property for which the United States holds title subject to unfulfilled conditions. In *Van Brocklin* v. *Tennessee,* 117 U. S. 151, that State sought to tax realty of the United States which was not held for the purposes or under the authority of the Cession Clause. Certain lots had been purchased by and conveyed to the United States pursuant to a federal tax sale. 12 Stat. 423, § 7. These lots were later transferred by deed or certificate of release to private owners. 17 Stat. 330; 18 Stat. 313. Tennessee assessed its own taxes upon the entire property for the years during which title to the lots was in the United States and attempted to collect them from the private owners after the transfer. Tennessee's claim was founded on the absence of state cession. This Court refused to permit the State's action, saying at page 179:

> "While the United States owned the land struck off to them for the amount of the taxes because no one would pay more for it, and until it was sold by the United States for a greater price, or was redeemed by

[14] As the case was tried below on the theory of direct or implied immunity because the fee was in the United States, we neither consider nor decide the effect of a tax sale of petitioner's rights on its contract with the United States. See *Wilson* v. *Cook,* 327 U. S. 474, 483. Compare 41 U. S. C. § 15 with *Freedman's Saving Co.* v. *Shepherd,* 127 U. S. 494.

> the former owner, the United States held the entire title as security for the payment of the taxes; and it could not be known how much, if anything, beyond the amount of the taxes the land was worth. To allow land, lawfully held by the United States as security for the payment of taxes assessed by and due to them, to be assessed and sold for State taxes would tend to create a conflict between the officers of the two governments, to deprive the United States of a title lawfully acquired under express acts of Congress, and to defeat the exercise of the constitutional power to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States."

The posture of the land sought to be taxed in the *Van Brocklin* case differentiates it from that presently under consideration. The United States there held complete title upon the assessment dates as a purchaser at a tax sale. The entire bundle of rights in the property was assessed by Tennessee. As a matter of grace, the United States had granted a right to the taxpayer to redeem. It was like an option to purchase. The statute might have authorized the sale of the land to any purchaser without consideration for the former owner. The United States, here, as we have demonstrated above, had transferred at the time of the assessment equitable ownership to the purchaser and has only a legal title as security for the unpaid purchase price. See *United States* v. *Allegheny County*, 322 U. S. 174, 188.

Petitioner presses various land grant cases upon us as announcing the controlling rule.[15] The principle which petitioner extracts from these cases is that alienation of United States property does not pass an interest to the vendee taxable by a State until all conditions precedent for

---

[15] *Railway Co.* v. *Prescott*, 16 Wall. 603; *Railway Co.* v. *McShane*, 22 Wall. 444; *Northern Pacific R. Co.* v. *Traill County*, 115 U. S. 600; *Irwin* v. *Wright*, 258 U. S. 219.

the delivery of the deed have been complied with. In the present case, petitioner asserts, the full amount of the purchase price must be paid before the State can tax. Such a rule can be extracted by the literal reading of certain phrases in the land grant cases.[16] The reason for the rule was said, in the earlier cases, to be that a state tax sale would defeat the government lien for surveying or other costs because the state sale would pass a title free from lien of the United States.[17] As heretofore shown, *ante*, p. 565, this ground for refusing power to Minnesota to tax is not present in this case, since Minnesota holds that the lien of the United States will remain paramount.

Irwin v. *Wright* involved the taxability by a State of property occupied by an entryman under the Reclamation and Homestead Acts who had not received his required final certificate of land clearance, pages 227, 228, 232. The reason for the rule against state taxation until the equitable title passes from the United States to the entryman was there placed upon the policy of the Government to require those who sought government land to perform the required conditions of residence or improvement before beneficial title, subject to state taxation, passes from the United States to the locator. This transfer was said not to take

---

[16] *Irwin* v. *Wright, supra,* 228, 229, 232, 233; *Northern Pacific R. Co.* v. *Traill County, supra,* at 609; *Railway Co.* v. *McShane, supra,* at 462.

[17] 16 Wall. at 608; 22 Wall. at 462; 115 U. S. at 610. See also *Colorado Co.* v. *Commissioners,* 95 U. S. 259. In the *McShane* case, itself, which clearly set out the above reason for non-taxability, it was recognized that the federal right of pre-emption for the benefit of settlers would not be affected by a state tax sale. This Court therefore reversed its former judgment in the *Prescott* case that land held by the railroads subject to this pre-emption could not be taxed by a State. 22 Wall. at 461. Congress promptly terminated the land tax exemption after the Traill County decision by subjecting railroad land grants to state taxation before payment of conveyancing costs. 43 U. S. C. § 882.

place until the certificate was issued. Page 232. The prohibition of state taxation until the certificate was issued was one of the means by which the Government furthered its public policy of land settlement. After compliance with the condition and before patent, the State could tax.[18]

We think the public policy of national development and federal tax collection justify the limitation on state taxing power announced by the foregoing decisions. We do not, however, conclude that their rationale leads to an exemption from state taxation of all lands in which the United States holds legal title as security for the purchase price. To say that the payment of the purchase price is a necessary condition precedent to the loss of federal immunity is to make the rule too mechanical. It should be sufficiently flexible to subject real private rights, disentangled from federal policies, to state taxation. This has been the holding in mining claims.[19] Where beneficial interest has passed to a vendee, the retention of legal title does not give a significant difference from the situation of a deed with a lien retained or a mortgage back to secure the purchase money.

That was the interpretation given the facts in *New Brunswick* v. *United States,* 276 U. S. 547.[20] The City of New Brunswick, under authority of New Jersey, sought to tax lots in the possession of purchasers from the Housing Corporation, a corporation wholly owned by the United States and therefore treated as the United States. These purchasers had paid enough of the purchase price—ten per cent—to entitle them to deeds under their contracts but had not paid the entire purchase price. The deeds had not been delivered nor the mortgages executed for the balance as required by the purchase agreement. This

[18] *Bothwell* v. *Bingham County,* 237 U. S. 642, 647.

[19] *Elder* v. *Wood,* 208 U. S. 226.

[20] But see *ABR Corp.* v. *Newark,* 133 N. J. L. 34.

Court said: "In equity the situation was then the same as if the Corporation had conveyed title to the purchasers, as owners, and they had mortgaged the lots to the Corporation to secure the unpaid purchase money." Page 555. The Court sustained the tax subject to the paramount lien of the United States. We think the petitioner's Minnesota property is in a similar position. Ownership of the beneficial interest has passed to the petitioner with legal title retained by the United States for security purposes. This should not put this private property in an exempt class.

There is a suggestion that to hold United States property subject to state taxation pending the completion of payment will injuriously affect its salability and therefore interfere with the Government's handling of its affairs. Our recent cases have disposed of this economic argument in a way which is contrary to petitioner's contention. *Alabama* v. *King & Boozer,* 314 U. S. 1, and cases cited.

The only other contention of petitioner which we need mention is that the State has included the interest of the United States in the valuation of the land, and has therefore subjected that interest to taxation. But no deduction need be made for the interest of the Government since that interest is for security purposes only and is not beneficial in nature. The whole equitable ownership is in the petitioner and the value of that ownership may be ascertained on the basis of the full value of the land. *New Brunswick* v. *United States, supra,* at 555–56.

Affirmed.

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

MR. CHIEF JUSTICE STONE, with whom MR. JUSTICE FRANKFURTER joins, concurring.

I concur in the result, but I do not join in so much of the opinion of the Court as undertakes to discuss the ter-

ritorial jurisdiction of the State of Minnesota over the land in question. The territorial jurisdiction of the state to lay the tax, said to be a novel question, was not raised in the state courts, by the petition for certiorari, or in argument or briefs in this Court. Under our decisions we are therefore not free to decide it. *McGoldrick* v. *Compagnie Generale,* 309 U. S. 430, 434–5; *Wilson* v. *Cook,* 327 U. S. 474, 483–484, and cases cited; see also Rule 38, par. 2 of the Rules of this Court; *Flournoy* v. *Wiener,* 321 U. S. 253, 259. Since the opinion of the Court expresses no disapproval of these authorities, I take it that everything said on the question of Minnesota's territorial jurisdiction to tax is dictum. Our opinion should be confined to the single question which the petitioner presents for our decision, whether the retention by the United States of the legal title to the taxed land precludes its taxation to petitioner, which, under its contract with the Government, has acquired possession and right to possession. As I have no doubt on this question, I agree the judgments should be affirmed.

MR. JUSTICE FRANKFURTER, concurring.

The Government sold a piece of surplus property located in St. Paul, Minnesota. It put the vendee in possession but retained the legal title, with the right of re-entry, as security for portions of the purchase price remaining due under the contract of sale. The decisive question before us is whether the interest thus retained by the United States bars Minnesota, under a general non-discriminatory law, from taxing the vendee's interest in the property. The Constitution itself furnishes no answer in terms. But the considerations governing the appropriate adjustment between national and state powers of taxation, where the incidence of taxation may affect the property or functions of one another, do not require that entire immunity from state taxation be afforded this piece of property because

of the interest which the United States retained to secure the unpaid purchase price. Since the Government's security is left untouched by Minnesota, what remains of the Government's relation to the property is too attenuated to withdraw it entirely from Minnesota's taxing power.

The matter would hardly be open to question but for a series of cases arising under land grant legislation. As the opinion of the Court persuasively shows, these decisions rest upon considerations of policy not relevant to the immediate situation.

I agree with the Chief Justice that our disposition of this case should be confined to the only question raised by the record, that of the State's power to tax, unembarrassed by any issue as to territorial jurisdiction. The Chief Justice gives conclusive ground for such abstention. Moreover, even as to property indisputably owned by the Government, there may be "uncertainty and confusion" whether jurisdiction belongs to the Federal Government or to a State. See *Bowen* v. *Johnston,* 306 U. S. 19, 27; and *Pacific Coast Dairy* v. *Dept.,* 318 U. S. 285, 299. Taxability and territorial jurisdiction are not correlative. We ought not to borrow trouble.

Counsel for Parties.

KENNECOTT COPPER CORP. *v.* STATE TAX COMMISSION ET AL.

NO. 424. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.*

Argued January 30, 31, 1946.—Decided March 25, 1946.

1. A suit by a taxpayer against the State Tax Commission of Utah and individuals constituting the Commission to recover taxes paid under protest, the money being segregated under § 80–11–13 of the Utah Code Anno. 1943, and held for determination of the taxpayer's rights with provision for any deficiency for interest or costs to be paid by the State, is a suit against the State. P. 576.
2. Section 80–11–11, Utah Code Anno. 1943, authorizing any taxpayer who has paid taxes under protest to bring suit "in any court of competent jurisdiction" against the officer to whom the tax was paid "or against the state" to recover the tax, does not grant consent to suits against the State in the federal courts. *Great Northern Ins. Co.* v. *Read,* 322 U. S. 47; *Ford Co.* v. *Department of Treasury,* 323 U. S. 459, followed. Pp. 577–579.

150 F. 2d 905, affirmed.

A nonresident taxpayer brought suit in a federal District Court against the State Tax Commission of Utah and individuals constituting the Commission to recover taxes paid under protest. The District Court gave judgment for the plaintiff. 60 F. Supp. 181. The Circuit Court of Appeals reversed, with directions to dismiss without prejudice, on the ground that it was a suit against the State without its consent. 150 F. 2d 905. This Court granted certiorari. 326 U. S. 711. *Affirmed,* p. 580.

C. C. Parsons and *Charles A. Horsky* argued the cause for petitioners. With *Mr. Parsons* on the brief was *H. Thomas Austern.*

---

*Together with No. 425, *Silver King Coalition Mines Co.* v. *State Tax Commission et al.,* on certiorari to the same court, argued and decided on the same dates.

Arthur H. Nielsen and *Zar E. Hayes,* Assistant Attorneys General of Utah, argued the cause for respondents. With them on the brief were *Grover A. Giles,* Attorney General, and *Wayne Christoffersen.*

Mr. Justice Reed delivered the opinion of the Court.

Whether Utah has submitted itself to suit in the United States District Court for the District of Utah for the recovery of taxes alleged to be wrongfully exacted by that State is the ultimate issue brought here by these writs of certiorari. Preliminarily, we must decide if the present proceeding is a suit against Utah.

Petitioners, corporations and citizens of New York and Nevada respectively, carry on mining businesses in Utah. That State imposes on those there engaged in the mining business an occupation tax equal to one per cent of the gross amount received for or the gross value of metalliferous ore sold during the preceding calendar year. The State Tax Commission administers the Act. Utah Code Annotated (1943) §§ 80–5–65 to 80–5–82, inclusive. For the purposes of this opinion, it need only be said as to the facts which give rise to this litigation, that petitioners seek recovery of that portion of their occupation taxes for 1944 which was calculated by the Tax Commission by including in the gross amount received by petitioners for their ore certain subsidies for war production paid to petitioners by the United States pursuant to an order of the Office of Price Administration, dated February 9, 1942, No. P. M. 2458. Petitioners assert that this subsidy should not be included in their occupational tax base. As the Tax Commission did include the subsidies in the base after administrative rulings which denied petitioners' claims, petitioners each paid the total tax levied, protested that portion thereof which was based upon the subsidy and brought suit in the United States District Court for the District of Utah against the State Tax Commission, and

the individuals "constituting" it as "members," for the recovery of the protested amount under sections of the Utah Code (1943), set out below, which petitioners claim authorize these proceedings.[1]

The causes present identical questions. They were consolidated for trial in the District Court and separate judgments were entered for plaintiffs against the "State Tax Commission, et al." for the amounts claimed. 60 F. Supp. 181. Separate appeals were perfected to the Circuit Court of Appeals. The cases were there briefed, argued and decided together but with separate judgments reversing the District Court with directions to dismiss without prejudice since it was a suit against the State without its consent. *State Tax Commission* v. *Kennecott Copper Corp.*, 150 F. 2d 905. On account of the importance of the issues, we granted certiorari to determine whether the basis of the decisions in *Great Northern Ins. Co.* v. *Read*, 322 U. S. 47, and *Ford Co.* v. *Department of*

[1] Utah Code Anno. 1943, 80–5–76:

"No court of this state except the supreme court shall have jurisdiction to review, alter, or annul any decision of the tax commission or to suspend or delay the operation or execution thereof; *provided*, any taxpayer may pay his occupation tax under protest and thereafter bring an action in any court of competent jurisdiction for the return thereof as provided by section 80–11–11, Revised Statutes of Utah, 1933."

Id., 80–11–11 (this is identical with Revised Statutes of Utah, 1933):

"In all cases of levy of taxes, licenses, or other demands for public revenue which is deemed unlawful by the party whose property is thus taxed, or from whom such tax or license is demanded or enforced, such party may pay under protest such tax or license, or any part thereof deemed unlawful, to the officers designated and authorized by law to collect the same; and thereupon the party so paying or his legal representative may bring an action in any court of competent jurisdiction against the officer to whom said tax or license was paid, or against the state, county, municipality or other taxing unit on whose behalf the same was collected, to recover said tax or license or any portion thereof paid under protest."

Treasury, 323 U. S. 459, encompassed the circumstances of these cases. A single opinion suffices here also.

Federal jurisdiction is claimed under diversity of citizenship and because the controversy arises under the Constitution and laws of the United States. The claim is that the inclusion of the subsidy in the tax base interferes with the War Power of Congress and the Emergency Price Control Act of 1942, 50 U. S. C. §§ 901, 902 (e), by taxing the subsidy on surplus production over fixed quotas with the result that a part of the subsidy was diverted from its sole purpose of insuring the maximum necessary production. See Revenue Act of 1942, §§ 209, 735, 56 Stat. 904, 907.

As we conclude that these suits are suits against Utah and that Utah has not consented to be sued for these alleged wrongful tax exactions in the federal courts, we express no opinion upon the merits of the controversy.

This is a suit against the State. Utah has established an adequate procedure for the recovery of taxes illegally collected. When the State collects a tax under protest, the money is segregated and held for the determination of the taxpayers' rights with provision for any deficiency for interest or costs to be paid by the State.[2] The Mining Occu-

[2] Utah Code Anno. 1943, 80–11–13:

"In case any tax or license shall be paid to the state under protest, said tax or license so paid shall not be covered into the general fund but shall be held and retained by the state treasurer and shall not be expended until the time for the filing of an action for the recovery of said tax or license shall have expired, and in case an action has been filed, until it shall have been finally determined that said tax or license was lawfully or was unlawfully collected. If in any such action it shall be finally determined that said tax or license was unlawfully collected, the officer collecting said tax or license shall forthwith approve a claim for the amount of said tax or license adjudged to have been unlawfully collected, together with costs and interest as provided by law, and any excess amount in excess of said tax required to pay said claim, including interest and costs, shall be repaid out of any unappropriated funds in the hands of the state treasurer, or, in case it is necessary, a deficit for said amount shall be authorized."

pation Tax makes the State Tax Commission the state agency for administration and collection of the Utah tax. The petitioners paid their taxes to the Commission under protest and brought these actions to recover the contested portion.

Petitioners alleged compliance with the Act's requirements for reports, assessments and administrative remedies with payment under protest of the controverted sums for Utah to the "State Tax Commission" only. The Commission, alone, is charged to have "exacted final payment" and to have acquiesced in plaintiffs' demand in accordance with statutory requirements to show payment and protest on the Commission's books with resultant segregation of the funds collected from Utah's general funds.

As the suits were against the Commission and the members as "constituting" such Commission, were based upon the payment to the Commission as collector for Utah and sought recovery of the fund, sequestered by § 80–11–13, together with the interest and costs therein provided for, we are satisfied these are suits against Utah. *Mine Safety Appliances Co.* v. *Forrestal,* 326 U. S. 371; *Great Northern Ins. Co.* v. *Read,* 322 U. S. 47, 51; *Ford Co.* v. *Department of Treasury,* 323 U. S. 459, 462.

Upon the question of the consent of Utah to suit against itself in the federal courts for controversies arising under the Federal Constitution, little needs to be added to our discussion in the *Read* and *Ford* cases. These cases declare the rule that clear declaration of a State's consent to suit against itself in the federal court on fiscal claims is required. The reason underlying the rule, which is discussed at length in the *Read* and *Ford* cases, is the right of a State to reserve for its courts the primary consideration and decision of its own tax litigation because of the direct impact of such litigation upon its finances.

Petitioners point to distinctions between the present cases and those to which reference has just been made.

They call attention to the history of the section authorizing recovery of taxes unlawfully collected. Section 80–11–11 was enacted in 1896 without the inclusion of the State as a possible defendant. Laws of Utah 1896, Ch. CXXIX, § 180, p. 466. It was amended in 1933 when the words "state" and "or other taxing unit" were added. Petitioners urge that since the phrase "in any court of competent jurisdiction" had been assumed to permit suits in the federal courts that practice should be read into the word "state" when that entity was made subject to tax suits.[3]

It is also urged that "any court of competent jurisdiction" has long been construed in the federal statutes as including both state and federal courts.[4] Our attention is directed to § 80–5–76 limiting statutory review of administrative decisions of the Mining Occupation Tax to the Supreme Court of the State while allowing suits for recovery of unlawful taxes paid under protest to "any court of competent jurisdiction."

For these reasons petitioners contend that the Utah statutes indicate an intention to permit suits against the State in federal courts. Furthermore, petitioners find significance in variations between the state statutes in the *Read* case and the *Ford* case on one hand and the Utah statutes on the other. Petitioners show that we place reliance in both cases on the procedural requirements of the respective statutes of Oklahoma and Indiana.[5] We said in those cases that since state laws could not affect procedure in federal courts, it was to be inferred that only state courts were included in the States' consent to suit.

---

[3] These examples of suits in federal courts were cited: *Bassett* v. *Utah Copper Co.*, 219 F. 811 (§ 80–11–11 was then § 2684); *South Utah Mines* v. *Beaver County*, 262 U. S. 325 (§ 2684); *Salt Lake County* v. *Utah Copper Co.*, 294 F. 199; *Beaver County* v. *South Utah Mines & Smelters*, 17 F. 2d 577.

[4] *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505, 506.

[5] 322 U. S. at 55; 323 U. S. at 465–66.

The bases for inference advanced by petitioners might logically lead to a conclusion that Utah intended to submit the interpretation of its tax statutes to federal trial courts where the controversies arise under federal law. On the other hand, it may be cogently argued that the practice of treating the federal courts as courts of competent jurisdiction under § 80–11–11 before the addition of the State as a possible defendant resulted from the fact that consent was not necessary for suits against counties and municipalities.[6] It could be urged that grants of jurisdiction to courts of competent jurisdiction by federal legislation for the benefit of litigants other than the United States are not persuasive as to the intent of a State to consent to suits in federal courts.[7] We are informed that Utah employs explicit language to indicate, in other litigation, its consent to suits in federal courts.[8] It is to be noted that the cases under consideration illustrate the disadvantage of deducing from equivocal language a State's consent to suit in the federal courts on causes of action arising under state tax statutes. The disadvantage referred to is that, if the merits were to be passed upon, the initial interpretation of the meaning and application of a state statute would have to be made by a federal court without a previous authoritative interpretation of the statute by the highest court of the State. See *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101, 103–105.

We conclude that the Utah statutes fall short of the clear declaration by a State of its consent to be sued in

---

[6] *Lincoln County* v. *Luning*, 133 U. S. 529; *Chicot County* v. *Sherwood*, 148 U. S. 529. See *Hopkins* v. *Clemson College*, 221 U. S. 636.

[7] Compare *Minnesota* v. *United States*, 305 U. S. 382, 389.

[8] Utah Code Anno. 1943, 104–3–27:

"Upon the conditions herein prescribed the consent of the state of Utah is given to be named a party in any suit which is now pending or which may hereafter be brought in any court of this state or of the United States for the recovery of any property real or personal . . ."

the federal courts which we think is required before federal courts should undertake adjudication of the claims of taxpayers against a State.

Affirmed.

The CHIEF JUSTICE and MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER dissenting, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BURTON concur.

Even while the Civil War was raging Lincoln deemed it important to ask Congress to authorize the Court of Claims to render judgments against the Government. He did so on the score of public morality. "It is," wrote Lincoln in his First Annual Message, "as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals. The investigation and adjudication of claims in their nature belong to the judicial department." 7 Richardson, Messages and Papers of the Presidents, 3245, 3252. Both the United States and the States are immune from suit unless they agree to be sued. Though this immunity from suit without consent is embodied in the Constitution, it is an anachronistic survival of monarchical privilege, and runs counter to democratic notions of the moral responsibility of the State.

Not so long ago this Court acted on the realization that "the present climate of opinion . . . has brought governmental immunity from suit into disfavor." *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 391. Today the Court treats governmental immunity from suit as though it were a principle of justice which must be safeguarded even to the point of giving a State's authorization to be sued the most strained construction, whereby a federal court sitting in Utah is made to appear not a "court of competent jurisdiction." Thus, while during the last seventy-five years governmental immunity from suit, as a doctrine without

moral validity, has been progressively contracted, the Court now takes a backward step by enhancing a discredited doctrine through artificial construction.

In doing so the Court also disregards the historic relationship between the federal and the State courts. It treats a federal court sitting in a State as though it were the court of an alien power. The fact is that throughout our history the courts of a State and the federal courts sitting in that State were deemed to be "courts of a common country." *Minneapolis & St. Louis R. Co.* v. *Bombolis,* 241 U. S. 211, 222. As a result, federal rights were enforced in State courts and a federal court sitting in a State was deemed to be "a court of that State," even as to a litigation like that of a condemnation proceeding which would appear to be peculiarly confined to a State court. *Madisonville Traction Co.* v. *St. Bernard Mining Co.,* 196 U. S. 239, 255–56; *Ex parte Schollenberger,* 96 U. S. 369, 377; *Neirbo Co.* v. *Bethlehem Corp.,* 308 U. S. 165, 171.

A State may of course limit its consent to suit in its own courts. It may do so by explicit language or by implication through procedural requirements and restrictions which could not be satisfied by a federal court sitting in the State. Such were the grounds of the recent decisions in *Great Northern Life Insurance Co.* v. *Read,* 322 U. S. 47, and *Ford Motor Co.* v. *Department of Treasury,* 323 U. S. 459. These decisions, as the Court concedes, relied on procedural requirements of the respective statutes of Oklahoma and Indiana which the federal courts in these States could not meet. Therefore, those statutes impliedly granted the State's consent to be sued only in the State courts, for only these could meet the State's procedural requirements.

Utah made no restriction on the right to sue. The statute giving consent to suit merely requires the court in which suit may be brought to be a "court of competent jurisdiction." That the District Court for the District of

Utah is otherwise a "court of competent jurisdiction" is not gainsaid. How could the State include the United States District Court in its consent to be sued in a "court of competent jurisdiction" short of stating explicitly that a "court of competent jurisdiction" shall include the federal courts? The opinion does not say that nothing short of such specific authorization to sue in the federal court gives the State's consent to be sued there. But if such a formal requirement be the meaning of the present decision, it runs counter to a long course of adjudication and pays undue obeisance to a doctrine, that of governmental immunity from suit, which, whatever claims it may have, does not have the support of any principle of justice.

AMERICAN FEDERATION OF LABOR ET AL. *v.* WATSON, ATTORNEY GENERAL, ET AL.

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

No. 448. Argued February 8, 1946.—Decided March 25, 1946.

1. Section 24 (8) of the Judicial Code, granting federal district courts jurisdiction of all "suits and proceedings arising under any law regulating commerce," applies to a suit seeking to protect rights asserted under the National Labor Relations Act. P. 589.
2. Section 266 of the Judicial Code, providing that only a three-judge court may issue an interlocutory injunction suspending or restraining "the enforcement, operation, or execution of any statute of a State," applies to a suit in a federal court to enjoin the enforcement of a provision of a state constitution. P. 591.

   (a) The policy underlying § 266 admits no distinction between state action to enforce a constitutional provision and state action to enforce an act of the legislature. P. 592.

   (b) The word "statute" in § 266 is a compendious summary of various enactments, by whatever method they may be adopted, to which a State gives her sanction and is at least sufficiently inclusive to embrace constitutional provisions. P. 592.
3. Where a state attorney general has construed a provision of the state constitution as outlawing all closed-shop agreements with

labor unions, has ordered law enforcement agencies to enforce it by criminal prosecution of labor unions, their officers and agents, and of employers having closed-shop agreements, and has threatened and actually instituted *quo warranto* proceedings to cancel franchises of corporations having and observing closed-shop agreements with labor unions, the situation involves a threat of "irreparable injury which is clear and imminent," so as to justify a federal court of equity in interfering with the enforcement of the state law, notwithstanding § 267 of the Judicial Code forbidding the maintenance of suits in equity in the federal courts "in any case where a plain, adequate, and complete remedy may be had at law." P. 593.

(a) The disruption in collective bargaining which would be occasioned by holding closed-shop agreements illegal would be so serious as to make it futile to attempt to measure the loss in money damages and any remedy at law in the federal courts would be inadequate. P. 594.

(b) The announcement of the state attorney general of a policy to prosecute criminally all violators of the law involved and the actual institution of *quo warranto* proceedings against several corporations having closed-shop agreements make the threat real and imminent. P. 594.

(c) The allegation that there is an imminent threat to an entire system of collective bargaining which, if carried through, will have such repercussions on the relationship between capital and labor as to cause irreparable damage states a cause of action in equity. P. 595.

4. However, in such a situation, the federal district court should not pass on the merits of the controversy until the state constitutional provision has been authoritatively construed by the state courts. Pp. 595–599.

(a) If it is construed so as to eliminate any conflict with the National Labor Relations Act, one of the constitutional questions alleged to exist in this case will disappear. P. 598.

(b) If it is construed as doing no more than to grant an individual working man a cause of action if he is denied employment unless he joins a union or to make closed-shop agreements unenforceable between the parties, no case or controversy raising the due process question would be presented by this suit, in which no individual working man is asserting rights against unions or employers and no union is seeking to enforce a closed-shop agreement against an employer. P. 598.

(c) If it is construed not to be self-executing, suits seeking to raise any constitutional question would be premature until the State supplies sanctions for its enforcement. P. 598.

5. In such circumstances, the district court should retain the bill until a definite determination of the local law questions can be made by the state courts. P. 599.

6. Notwithstanding the fact that one of the principal grounds asserted for equitable relief is the continuance of litigation in the state courts, the purpose of a suit to enjoin enforcement of the state law will not be defeated by retaining the bill pending determination of proceedings in the state courts, since the resources of equity are not inadequate to deal with the problem so as to avoid unnecessary friction with state policies while selective cases go forward in the state courts for an orderly and expeditious adjudication of the state law questions. P. 599.

60 F. Supp. 1010, reversed and the cause remanded.

Appellants sued to enjoin enforcement of a provision of the Florida constitution (quoted in the opinion) on the ground that it violated the First Amendment, Fourteenth Amendment, and the Contract Clause of Article I, § 10 of the Federal Constitution and was in conflict with the National Labor Relations Act and the Norris-LaGuardia Act.

A district judge granted a temporary restraining order and caused a three-judge court to be convened pursuant to § 266 of the Judicial Code.

The district court concluded that it had jurisdiction of the controversy; but, without determining whether there was equity in the bill or whether the case should be held until an authoritative interpretation of the Florida law by the courts could first be obtained, proceeded at once to a consideration of the constitutional questions. It held that the Florida law did not violate the First or Fourteenth Amendment or the Contract Clause of Article I, § 10 of the Federal Constitution and that it would be time to consider any conflict with the National Labor Relations Act if and when it arose, since that Act and the Florida law did not on their face appear to be in conflict. It accord-

ingly vacated the temporary restraining order and dismissed the bill. 60 F. Supp. 1010.

Reversed and remanded, with directions to retain the bill pending determination of proceedings in the state courts in conformity with the opinion of this Court. P. 599.

Herbert S. Thatcher argued the cause for appellants. With him on the brief were *Joseph A. Padway, Edward J. Brown, Pat Whitaker* and *Tom Whitaker.*

J. Tom Watson, Attorney General of Florida, *Sumter Leitner* and *Howard S. Bailey,* Assistant Attorneys General, argued the cause and filed a brief for appellees. *Ray C. Brown* filed a motion to dismiss for the Cigar Manufacturers Association of Tampa, appellee.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In 1944 Florida adopted an amendment to her Constitution [1] which reads as follows:

> "The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer."

Shortly thereafter this suit was instituted to enjoin the enforcement of that provision on the ground that it violated the First Amendment, Fourteenth Amendment, and the Contract Clause of Article I, § 10 of the Federal Constitution and was in conflict with the National Labor

[1] The amendment, designated as House Joint Resolution No. 13, was passed by the regular session of the legislature in 1943 (L. 1943, p. 1134) and was ratified by the people at the general election held on November 7, 1944.

Relations Act (49 Stat. 449, 29 U. S. C. § 151) and the Norris-LaGuardia Act. 47 Stat. 70, 29 U. S. C. § 101.

The appellants (plaintiffs below) are various national and local labor organizations operating in Florida, individual employee members of those organizations who are citizens of the United States, and three employers doing business in Florida.[2] Appellees are the Attorney General and other officials of Florida charged with duties of law enforcement and various employers.[3] The theory of the bill is that the law in question outlaws any agreement which requires membership in a labor organization as a condition of employment, all of which we refer to herein as the closed shop. It is alleged that the appellant labor organizations or their affiliates have been designated as the collective bargaining representatives of employees of numerous employers in Florida and that a large number of those local and national unions either have,[4] or desire

---

[2] McCloskey & Co., a Delaware corporation in the business of building ships at Tampa, Florida; R. J. Gould, engaged in general welding and structural steel building work in Tampa, Florida, and doing business under the name of Gould Welding & Erecting Co.; Tampa Florida Brewery, Inc., a Florida corporation, engaged in the brewery business at Tampa, Florida.

[3] Tampa Shipbuilding Co. and St. Johns River Shipbuilding Co., Florida corporations, engaged in the building and construction of ships at Florida ports; Weir's Dry Cleaners & Laundry, Inc., a Florida corporation, engaged in the dry cleaning and laundry business in Tampa, Florida; National Container Corp., a Florida corporation, manufacturing paper containers in Jacksonville, Florida; Cigar Manufacturers Assoc. of Tampa, a voluntary association of Tampa cigar manufacturers.

These parties were joined as defendants because they had collective bargaining agreements with various of appellant labor organizations. They are called nominal defendants since no relief was sought against them.

[4] It is alleged that some of these agreements are for periods of one year with automatic renewal clauses for additional one-year periods,

or are about to become parties to, closed-shop agreements with Florida employers. It is alleged that the closed-shop agreement constitutes the most effective means possessed by organized labor to attain economic security, to deter practices destructive of public policy and the interests of wage earners, and effectively to bargain collectively. It is alleged that all of the defendant employers and two of the three plaintiff employers are parties to closed-shop agreements with some of the appellant unions which expire at various dates in the year 1945 and thereafter continue in effect on a year-to-year basis. These contracts are alleged to be valuable property rights of the appellant unions and their members. It is alleged that one appellant employer (R. J. Gould) and some of the appellant unions are desirous of entering into closed-shop agreements but are prevented from doing so by the Florida law. It is alleged that the same problem obtains with respect to other employers in Florida.

The bill alleges that appellee law enforcement officials have taken the position that closed-shop agreements violate the Florida law and that they intend to enforce compliance with it by civil and criminal proceedings. The bill alleges that appellee Watson threatens to institute *quo warranto* proceedings against various companies with whom appellant unions have collective bargaining agreements containing closed-shop agreements, whereby it will be sought to cancel their corporate franchises unless the

---

others for periods of years up to five, some for the duration of the war, and others for periods about to expire.

The constitutions of some of the appellant unions require that all persons who desire to obtain or retain memberships in the unions shall work only with union members.

It is alleged that membership in appellant unions is open to all who can meet the requirements of skill prescribed for the work, who will submit to the discipline and by-laws of the unions, and who are of good character.

closed-shop provisions of the agreements are not observed. And appellants' motion for a restraining order alleges that *quo warranto* proceedings have been instituted for that purpose against a number of such companies, including three of the corporate appellees. The bill further alleges that appellee Watson has threatened appellant unions and their officers and agents and the individual appellants with criminal prosecutions unless they give up the closed-shop agreements and refrain from renewing or entering into any such agreements. It alleges that he has ordered law enforcement agencies to institute such prosecutions immediately and that they are in process of being prepared.

Irreparable injury is alleged as follows: the threatened actions (a) will result in interminable litigation and multiplicity of prosecutions and legal proceedings; (b) will cause widespread disruption of employment relations and production; (c) will deprive appellants of the benefits of existing contracts; (d) will cause appellant unions to lose present and prospective members and imperil the security of the unions and their members; (e) will make it impossible for one of the appellant employers (R. J. Gould) to obtain sufficient skilled labor to conduct his business; and (f) will cause a cessation of collective bargaining relations between the appellant unions and employers and will result in the disorganization and disintegration of the unions.

The prayer was for a temporary and permanent injunction. A motion to dismiss was made which, though denying a showing of irreparable damage, raised no issue of fact, other than the question whether the amount involved in the controversy exceeds $3,000.

The district judge granted a temporary restraining order and pursuant to a prayer of the bill caused a three-judge court to be convened. § 266 Judicial Code, 28 U. S. C. § 380. The District Court concluded that it had juris-

diction of the controversy. But without determining whether there was equity in the bill (*Douglas* v. *Jeannette,* 319 U. S. 157, 162–163) or whether, pursuant to the rule of *Railroad Commission* v. *Pullman Co.,* 312 U. S. 496; *Chicago* v. *Fieldcrest Dairies,* 316 U. S. 168; *Spector Motor Co.* v. *McLaughlin,* 323 U. S. 101, the case should be held until an authoritative interpretation of the Florida law by the Florida courts could first be obtained, it proceeded at once to a consideration of the constitutional questions. It held that this Florida law did not violate the First or Fourteenth Amendment nor the Contract Clause of Article I, § 10 of the Federal Constitution. It held that it would be time to consider any conflict with the National Labor Relations Act if and when it arose, since that Act and the Florida law did not on their faces appear to be in conflict. It accordingly vacated the temporary restraining order and dismissed the complaint. 60 F. Supp. 1010. The case is here on appeal.

The initial question is whether the District Court had jurisdiction as a federal court to hear and decide the merits.[5] The federal district courts have jurisdiction of all suits of a civil nature, at common law or in equity where the matter in controversy exceeds, exclusive of interest and costs, $3,000 and "arises under the Constitution or laws of the United States . . ." Judicial Code § 24 (1), 28 U. S. C. § 41 (1). The allegations are that if the Florida law becomes effective there will be an immediate decrease in the membership of appellant unions and the dues collected by them will decrease far in excess of $3,000. Similar allegations are made to the effect that enforcement of the Florida law will result in such decimation of the membership of these unions, both local and national, as to cause reduction in income greatly in excess

[5] The case has not been argued on the merits here, as we limited the argument, when we noted probable jurisdiction, to jurisdictional questions.

of $3,000 jeopardizing the ability of the unions to function. Supporting affidavits were filed by a union official showing that appellant unions have about 500 contracts with Florida employers containing closed-shop agreements and affecting about 100,000 employees; and averring that if those contracts are nullified the loss in dues will greatly exceed $3,000, with resulting injury to the unions far in excess of that amount. The answer of one of the appellees, the sheriff of Hillsborough County, admitted that the matter in controversy exceeded $3,000. But, as we have said, the motion to dismiss filed by appellee Watson challenged the showing of the necessary jurisdictional amount. No counter affidavits, however, were filed. The District Court held it had jurisdiction under § 24 (1) of the Judicial Code. None of the parties challenges that finding here. The District Court also held that it had jurisdiction under § 24 (14) of the Judicial Code, 28 U. S. C. § 41 (14). That provision[6] gives the district courts of the United States jurisdiction over suits brought under the Civil Rights Act[7] without allegation of any jurisdictional amount. See *Hague* v. *C. I. O.*, 307 U. S. 496; *Douglas* v. *Jeannette, supra,* pp.

[6] It provides that the district courts shall have original jurisdiction "Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

[7] Sec. 1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13, has been continued without substantial change as R. S. § 1979, 8 U. S. C. § 43, which reads as follows: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

161–162. We do not pass on the question whether the District Court had jurisdiction under § 24 (1) or § 24 (14) of the Judicial Code. For it is the view of a majority of the Court that jurisdiction is found in § 24 (8) of the Judicial Code, 28 U. S. C. § 41 (8), which grants the federal district courts jurisdiction of all "suits and proceedings arising under any law regulating commerce." As we have said, the bill alleges a conflict between the Florida law and the National Labor Relations Act. The theory of the bill is that labor unions, certified as collective bargaining representatives of employees under that Act, are granted as a matter of federal law the right to use the closed-shop agreement [8] or, alternatively, that the right of collective bargaining granted by that Act includes the right to bargain collectively for a closed shop. Whether that claim is correct is a question which goes to the merits. It is, however, a substantial one. And since the right asserted is derived from or recognized by a federal law regulating commerce, a majority of the Court conclude that a suit to protect it against impairment by state action is a suit "arising under" a federal law "regulating commerce." Cf. *Mulford* v. *Smith*, 307 U. S. 38, 46; *Peyton* v. *Railway Express Agency*, 316 U. S. 350; *Parker* v. *Brown*, 317 U. S. 341, 349; *Tunstall* v. *Brotherhood of Firemen*, 323 U. S. 210, 213.

Another preliminary question is whether this is a proper case for a three-judge court. The statute provides that only a three-judge court may issue an interlocutory injunction suspending or restraining "the enforcement, oper-

[8] Sec. 8 (3) of that Act provides that "nothing in this Act . . . or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made."

ation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute . . ." § 266 of the Judicial Code, 28 U. S. C. § 380. The question is whether within the meaning of that section "statute" is restricted to legislative enactments or includes provisions of state constitutions as well. It is sometimes used to embrace all enactments, however adopted, to which a State gives the force of law. See *Stevens* v. *Griffith,* 111 U. S. 48, 50. In speaking of § 266 we recently said,

> "To bring this procedural device into play—to dislocate the normal operations of the system of lower federal courts and thereafter to come directly to this Court—requires a suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an 'administrative board or commission.' The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy. This was the aim of Congress and this is the reconciling principle of the cases."

Phillips v. *United States,* 312 U. S. 246, 251. And see *Sterling* v. *Constantin,* 287 U. S. 378, 393. It would, as the court below stated, be somewhat incongruous to hold that a single judge, while prohibited from enjoining action under an act of the state legislature, would be free to act if the state constitution alone were involved. The policy underlying § 266 admits no distinction between state action to enforce a constitutional provision and state action to enforce an act of the legislature. There is no suggestion in the history of § 266 that Congress was willing to give the federal courts a freer hand when state constitutional provisions were involved. In our view the word "statute" in § 266 is a compendious summary of various enactments, by whatever method they may be adopted, to which a

State gives her sanction and is at least sufficiently inclusive to embrace constitutional provisions.

But even though a district court has authority to hear and decide the case on the merits, it should not invoke its powers unless those who seek its aid have a cause of action in equity. *Douglas* v. *Jeannette, supra,* pp. 162–163. The power of a court of equity to act is a discretionary one. *Pennsylvania* v. *Williams,* 294 U. S. 176, 185. Where a federal court of equity is asked to interfere with the enforcement of state laws, it should do so only "to prevent irreparable injury which is clear and imminent . . ." *Douglas* v. *Jeannette, supra,* p. 163; *Spielman Motor Co.* v. *Dodge,* 295 U. S. 89; *Di Giovanni* v. *Camden Fire Ins. Assn.,* 296 U. S. 64; *Watson* v. *Buck,* 313 U. S. 387.

That is a strict test. But we think appellants satisfy it. We reach that conclusion on the basis of the allegations concerning the disruption of the collective bargaining processes and the injury to the unions and to the employers alike, if the closed-shop agreement is outlawed. As we have said, it is averred that there are about 500 contracts with Florida employers containing closed-shop agreements and affecting about 100,000 employees. Each contract is affected if the closed-shop agreement is held unlawful. Some of those contracts have expired and it is desired to renew them. Others are sought to be negotiated. Thus, in case of plaintiff, R. J. Gould, it is alleged that although he is anxious and willing to enter into such a contract, he is prevented from doing so by the threats of appellees. As a result, it is alleged, he is and has been unable to secure sufficient skilled labor to conduct his business. It is alleged that there are numerous other situations of the same character. And it is shown that one employer, against whom *quo warranto* proceedings have been instituted, already has given notice of the suspension of the closed-shop agreement which it had with one of the appellant unions. Allegations are made that outlawry of closed-shop agree-

ments will cause a disruption in production and the decimation of union membership. It is fair to say on a reading of the bill that from the viewpoint both of the appellant unions and the appellant employers the disruption in collective bargaining which would be occasioned by holding closed-shop agreements illegal would be so serious as to make it futile to attempt to measure the loss in money damages. The allegations certainly state a cause of action in equity no less clear than that sustained in *Utah Fuel Co.* v. *National Bituminous Coal Comm'n*, 306 U. S. 56. The loss in bargaining position by the unions, the disruption of harmonious relationships between the union and the employers, the almost certain decrease in union membership—these are matters involving intangible values. Sec. 267 of the Judicial Code, 28 U. S. C. § 384, forbids the maintenance of suits in equity in the courts of the United States "in any case where a plain, adequate, and complete remedy may be had at law." But in view of the character of the intangible interests at stake, we cannot see how any remedy at law in the federal courts [9] would be adequate. A legal cause of action in the federal courts, which involves the point, may be slow in developing. Meanwhile, collective bargaining of the kind alleged to be permitted or secured by the National Labor Relations Act may be disastrously affected. We, of course, do not intimate an opinion on the question whether the alleged conflict exists. Whether the bill makes out a case to determine the issue is the only question now before us.

Moreover, the threat to enforce the Florida law is real and imminent. *Quo warranto* proceedings have been instituted against several of the corporations who are parties to the suit on the basis that they have closed-shop agreements with the unions. And appellee Watson has an-

[9] The inadequacy of the relief at law is measured by the character of the relief afforded by the federal not the state courts. *Di Giovanni* v. *Camden Fire Ins. Assn., supra,* p. 69.

nounced a policy to prosecute criminally all violators of the Florida law. The threat of multiplicity of prosecutions which is here alleged would not alone be sufficient to establish a cause of action in equity. *Matthews* v. *Rodgers*, 284 U. S. 521, 529–530; *Spielman Motor Co.* v. *Dodge, supra; Beal* v. *Missouri Pacific R. Co.*, 312 U. S. 45, 49–50; *Douglas* v. *Jeannette, supra,* pp. 163–165. But we mention the matter here to show that the threat of irreparable injury is real not fanciful, immediate not remote. The crux of the matter is the allegation that there is an imminent threat to an entire system of collective bargaining, a threat which, if carried through, will have such repercussions on the relationship between capital and labor as to cause irreparable damage. We conclude for that reason that the bill states a cause of action in equity.[10]

As we have said, the District Court passed on the merits of the controversy. In doing so at this stage of the litigation, we think it did not follow the proper course. The merits involve substantial constitutional issues concerning

---

[10] We do not pass on the question whether an interlocutory injunction should issue. That will be open on our remand of the cause. Sec. 266 provides in part: "if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case." As to the findings necessary to support such relief, see *Lawrence* v. *St. Louis-San Francisco R. Co.*, 274 U. S. 588, 595–596; *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310.

the meaning of a new provision of the Florida constitution which, so far as we are advised, has never been construed by the Florida courts. Those courts have the final say as to its meaning. When authoritatively construed, it may or may not have the meaning or force which appellees now assume that it has. In absence of an authoritative interpretation, it is impossible to know with certainty what constitutional issues will finally emerge. What would now be written on the constitutional questions might therefore turn out to be an academic and needless dissertation.

There is, in the first place, some question whether this new provision of Florida's constitution is self-executing [11] or requires legislation for its enforcement.[12] The District Court itself took the view that it is not self-executing and noted that no enforcing legislation has been enacted. If, on the other hand, it be assumed, as Florida's Attorney General asserts, that this constitutional provision is self-executing, we do not know what sanctions Florida will afford for its enforcement. It provides that "The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization . . ." It is asserted that this provision outlaws the closed-shop agreement and makes those who enter into one criminally liable,[13] or, in case of corpo-

---

[11] *Tampa* v. *Tampa Waterworks Co.*, 45 Fla. 600, 628–629, 34 So. 631; *Coleman* v. *State*, 118 Fla. 201, 159 So. 504; *Lummus* v. *Miami Beach Congregational Church*, 142 Fla. 657, 195 So. 607.

[12] See *Porter* v. *First National Bank*, 96 Fla. 740, 119 So. 130, 519; *State* v. *Alsop*, 120 Fla. 628, 163 So. 80; *State* v. *Jones*, 121 Fla. 216, 163 So. 590; *Draughon* v. *Heitman*, 124 Fla. 24, 168 So. 838; *State* v. *Emerson*, 126 Fla. 576, 171 So. 663; *American Bakeries Co.* v. *Haines City*, 131 Fla. 790, 180 So. 524; *Miami* v. *State*, 139 Fla. 598, 190 So. 774; *Bryan* v. *Miami*, 139 Fla. 650, 190 So. 772.

[13] Here, too, there is doubt whether the constitutional provision is self-executing. Appellee Watson apparently takes the position that those who enter into closed-shop agreements violate an old Florida

rations, subjects them to *quo warranto* proceedings.[14] So far as we know, however, it may not have that effect but do no more than give to an individual working man a cause of action in case the rights granted him are denied or abridged. Or as in the case of contracts in restraint of trade at common law, it may make closed-shop agreements unlawful only in the sense that courts will not enforce them.[15] The proviso itself raises questions of interpretation which when authoritatively settled may put the constitutional issues now sought to be raised in quite a different light or even eliminate some of them. The proviso states that "this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer." The bill alleges that the right to bargain collectively granted by the National Labor Relations Act includes the right to a

---

statute (22 Fla. Stats. Ann. § 833.02) which provides: "If two or more persons shall agree, conspire, combine or confederate together for the purpose of preventing any person from procuring work in any firm or corporation, or to cause the discharge of any person from work in such firm or corporation; or if any person shall verbally or by written or printed communication, threaten any injury to life, property or business of any person for the purpose of procuring the discharge of any workman in any firm or corporation, or to prevent any person from procuring work in such firm or corporation, such persons so combining shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by fine not exceeding five hundred dollars each, or by imprisonment not exceeding one year." But in *Jetton-Dekle Lumber Co.* v. *Mather*, 53 Fla. 969, 43 So. 590, the Supreme Court of Florida said that that statute "will not be applied to the case of union laborers who strike in order to secure all the labor for themselves."

[14] On *quo warranto* under Florida law see *State* v. *Tampa Water Works Co.*, 57 Fla. 533, 48 So. 639; *State* v. *Duval County*, 105 Fla. 174, 141 So. 173; *State* v. *Prevatt*, 110 Fla. 29, 148 So. 578; *State* v. *S. H. Kress & Co.*, 115 Fla. 189, 155 So. 823.

[15] See *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1892] A. C. 25, 39; *Attorney General* v. *Adelaide Steamship Co.*, [1913] A. C. 781, 797.

closed-shop agreement.[16] Conceivably the proviso may be construed to make this Florida law applicable only to enterprises not subject to the National Labor Relations Act. Or the right to bargain collectively, recognized by the proviso, may be construed to mean the right which is granted by the National Labor Relations Act.

We give these illustrations to indicate how uncertain it is what constitutional issues will emerge once the Florida law receives an authoritative interpretation. A decision today on the constitutionality of this Florida law would be based on a preliminary guess concerning its meaning, not on an authoritative construction of it. We have already noted that this law may be so construed as to eliminate any conflict alleged to exist between it and the National Labor Relations Act. If so, one of the constitutional questions presented by this case would disappear. It is suggested, however, that the due process question is ripe for adjudication no matter how the Florida law is construed. But if the law does no more than to grant an individual working man a cause of action in case he is denied employment unless he joins a union, or if it goes no further than to make closed-shop agreements unenforceable between the parties, no case or controversy raising the due process question would be presented for decision by the present bill. For individual working men are not here asserting rights against unions or employers. Nor does the present case involve litigation by unions to enforce closed-shop agreements against employers. Furthermore, if, as the District Court thought, this Florida law is not self-executing, suits seeking to raise the due process question or any other constitutional question would be premature until Florida supplied sanctions for its enforcement. A decision today on the merits might, therefore, amount to no more than an advisory opinion. In *Railroad Commission*

[16] See note 8, *supra*.

v. *Pullman Co., supra; Chicago* v. *Fieldcrest Dairies, supra;* and *Spector Motor Co.* v. *McLaughlin, supra,* we held that under such circumstances the proper course was for the District Court to retain the bill until a definite determination of the local law questions could be made by the state courts. The doubts concerning the meaning of the Florida law indicate that such a procedure is peculiarly appropriate here. *Quo warranto* proceedings presently pending in the Florida courts may resolve the doubts. And other actions, such as suits for a declaratory judgment,[17] would seem to be available in the state courts.

It is said that since the continuance of litigation in the state courts is the only ground asserted for equitable relief, the entire purpose of the present suit will be defeated by retaining the bill pending determination of proceedings in the state courts. But the problem is not unique. It was implicit in *Railroad Commission* v. *Pullman Co., supra.* Moreover, the case for equitable relief rests not merely on the presence of a few cases in the state courts but also on the threat of wholesale prosecutions under a state law which the chief law enforcement official of the State maintains outlaws contracts for collective bargaining which labor and management have widely made. The resources of equity are not inadequate to deal with the problem so as to avoid unnecessary friction with state policies, while selective cases go forward in the state courts for an orderly and expeditious adjudication of the state law questions.

We reverse the judgment of the District Court and remand the cause to it with directions to retain the bill pending the determination of proceedings in the state courts in conformity with this opinion.

By consent of the parties the Cigar Manufacturers Association of Tampa was dismissed as a party defendant in

---

[17] See 5 Fla. Stats. Ann., § 62.09; *Sheldon* v. *Powell,* 99 Fla. 782, 128 So. 258.

the District Court. Accordingly, its motion to dismiss this appeal as against it is granted.

So ordered.

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

MR. CHIEF JUSTICE STONE, dissenting.

I think the suit should be dismissed for want of jurisdiction in equity.

A criminal prosecution or other litigation conducted in state courts by a state official, within the scope of his authority as such, may, it is true, cause apprehension on the part of those who are alleged to be lawbreakers. Such apprehensions and those of others may lead to changes in business practices to the injury of the alleged lawbreakers. But the conduct of such proceedings, in good faith and in conformity to law, is not actionable at law or in equity. Damage or loss to one's business or pocketbook, resulting from such proceedings, is but an incident to the necessary performance of a public function of state government. It is *damnum absque injuria*. *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, 95, and cases cited; *Beal* v. *Missouri Pacific R. Co.*, 312 U. S. 45, 49, 50, and cases cited. And even when the threatened injury is attributable to the state court proceeding to enforce a state statute which is asserted to be unconstitutional, it does not follow that equity will or should exercise its jurisdiction to restrain the prosecution.

Congress has adopted the policy of leaving to the courts of the states the trials for criminal violations of state law and of *quo warranto* proceedings against their own corporations. Federal courts of equity, in the exercise of their sound discretion, conform to that policy by refusing to interfere with proceedings in the state courts except where unusual circumstances clearly call for equitable relief. Hence it is well recognized that measures taken by state

officials to enforce state laws said to be unconstitutional may be enjoined by federal courts only to prevent "irreparable injury," and not merely to avoid that harm which is inseparable from the litigation of the mooted issues whether in a state or a federal court. *Ex parte Young,* 209 U. S. 123, 155, 156, 166; *Cavanaugh* v. *Looney,* 248 U. S. 453, 456; *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497, 500; *Fenner* v. *Boykin,* 271 U. S. 240, 243; *Massachusetts State Grange* v. *Benton,* 272 U. S. 525, 527; *Spielman Motor Co.* v. *Dodge, supra; Di Giovanni* v. *Camden Fire Ins. Assn.,* 296 U. S. 64; *Douglas* v. *Jeannette,* 319 U. S. 157, and cases cited. It is not enough to show that the injury to appellants is only that which is a normal incident of the state's assertion of its authority to enforce its laws. No person is immune from any good faith prosecution by the state for his unlawful acts. Neither the imminence of the prosecution nor the incidental injury which may flow from it is a ground for equity relief, since the constitutionality of the statute may be ascertained by the proceeding in the state courts with appellate review by this Court, as readily as by a suit in the federal courts. *Spielman Motor Co.* v. *Dodge, supra,* 95, and cases cited; *Beal* v. *Missouri Pacific R. Co., supra,* 49, and cases cited; *Watson* v. *Buck,* 313 U. S. 387; *Williams* v. *Miller,* 317 U. S. 599; *Douglas* v. *Jeannette, supra.*

Until the state questions here mooted are authoritatively settled by the state courts, and the constitutional questions which it is asserted they raise are settled by this Court, the threat to the closed shop will continue to embarrass labor unions and employers who have or seek to have closed-shop contracts. That embarrassment can be removed only by the process of adjudication which the state is constitutionally entitled to pursue, so long as the state and its officials proceed according to law. *Davis & Farnum Mfg. Co.* v. *Los Angeles,* 189 U. S. 207; *Fenner* v. *Boykin, supra; Spielman Motor Co.* v. *Dodge, supra,* 95.

Hence the arrest by federal courts of the processes of the civil or criminal law of the state, and the determination of questions of civil or criminal liability under state law, must be predicated not only upon a showing of unlawful or unconstitutional action on the part of the state, but upon some showing of a resulting immediate and irreparable injury which can be avoided or prevented only by the federal court's transferring the trial of the state questions from the state courts to itself. *Douglas* v. *Jeannette, supra,* 164.

There is no contention here that the state officials are acting outside their authority as such, that they are not acting in good faith, *Beal* v. *Missouri Pacific R. Co., supra,* 49; *Douglas* v. *Jeannette, supra,* 164, or that they threaten to make oppressive or malicious use of the legal processes of the state. Cf. *Gumbel* v. *Pitkin,* 124 U. S. 131. Nor is there any showing that the litigation of pending questions in the federal courts will be any less embarrassing or injurious to appellants than the litigation of suits already pending in the state courts with review by this Court. *Douglas* v. *Jeannette, supra,* 164.

There are no allegations which would take this case out of the rule that in general a federal court of equity will not exercise its power to stay litigation lawfully proceeding in state courts, or at all except where it is plain that by the exercise of its jurisdiction and its decision of the issue pending in the state courts it will avoid some immediate and irreparable injury to a plaintiff. The case is to be distinguished from those sustaining federal equity jurisdiction where the acts sought to be enjoined, which are asserted to be unlawful, do not involve any resort by an enforcement officer to the courts, where their lawfulness would, as here, be determined. *Utah Fuel Co.* v. *Coal Comm'n,* 306 U. S. 56; *Hague* v. *C. I. O.,* 307 U. S. 496.

It is not suggested that appellants will be forced to comply with the Act because the penalties attending its violation are cumulative or so great that appellants may not,

without risk of irreparable loss, continue their closed-shop contracts in order to test the constitutionality of the Act. Cf. *Ex parte Young, supra,* 144; *Missouri Pacific R. Co.* v. *Tucker,* 230 U. S. 340, 349; *Terrace* v. *Thompson,* 263 U. S. 197, 212, 214–216; *Beal* v. *Missouri Pacific R. Co., supra,* 51. Nor does the complaint allege that any of the persons, other than appellants, with whom appellants deal, employers or employees, have, because of the threats of appellees, broken or threatened to break their existing closed-shop agreements or have refused to enter into such agreements.* Cf. *Kessler* v. *Eldred,* 206 U. S. 285. So far as the complaint shows such persons have refused to recognize the applicability or validity of the Florida amendment and are prepared to contest it. Thus there is no showing of threatened injury to applicants which would afford any basis for an injunction. True, it is alleged that appellant Gould, an employer, to his irreparable damage,

*It is stated in the papers on appellants' motion in the district court for a restraining order, which now stands denied, that one employer, against whom *quo warranto* proceedings have been brought, has suspended the closed-shop agreement which it had with one of appellants' unions, and further, that appellees have filed *quo warranto* proceedings against several corporations having closed-shop agreements with appellants, that "there will not be any bona fide defense made in said suits, or most of them," and that the "prayers contained in the petitions" filed by appellees for a declaration "to the effect that the Constitutional Amendment here under attack is legal and valid and the closed shop provisions of the contracts invalidated" will be granted. No such averments appear in the complaint, the allegations of which alone supply the test of the equity jurisdiction. *Massachusetts State Grange* v. *Benton,* 272 U. S. 525, 528; *Williams* v. *Miller,* 317 U. S. 599. Further, assuming that statements in the motion papers may supply essential allegations lacking in the complaint, no reason appears why the employee appellants cannot test the validity of the Florida laws and constitution by suits against their employers who have broken their closed-shop contracts. There is no allegation on the motion that any employer has refused to enter into a closed-shop contract because of the threats of appellees.

has not been able to enter into closed-shop agreements although anxious to do so. But it is not said that any of the other appellants are, or have been, damaged by his failure to enter into such agreements, and Gould himself may test the law in Florida proceedings by refusing to comply with the alleged threats of appellees. It does not appear that his damage will be any different or greater if the litigation proceeds in the state instead of the federal courts, or that it is more than an unavoidable incident to litigation wherever conducted where the lawfulness of a business practice is drawn in question. There is no showing that appellants have sought or been denied the right to intervene in pending *quo warranto* proceedings, compare Florida Stats. § 63.09; *Switow* v. *Sher,* 136 Fla. 284, 186 So. 519; *Daugherty* v. *Latham,* 139 Fla. 477, 190 So. 742; *Riviera Club* v. *Belle Mead Develop. Corp.,* 141 Fla. 538, 194 So. 783; *Carr* v. *Carlisle,* 146 Fla. 201, 200 So. 529; *Tallentire* v. *Burkhart,* 150 Fla. 137, 7 So. 2d 326, although the Attorney General of the state has taken the position in the pending proceedings, as he does here, that he does not oppose the granting of applications for intervention by the appellant labor unions.

We cannot assume that the pending suits in *quo warranto,* with review by this Court of the federal questions involved, will not settle all pending legal questions, state and federal, as readily as a suit in the federal court, or that the parties will not abide by the result. The bill of complaint is not framed on the theory of a bill of peace. Cf. *Cleveland* v. *Cleveland City R. Co.,* 194 U. S. 517; *Boise Artesian Water Co.* v. *Boise City,* 213 U. S. 276; *Beal* v. *Missouri Pacific R. Co., supra,* 50. It does not allege that repeated, groundless or otherwise vexatious suits will be brought. *McDaniel* v. *Traylor,* 212 U. S. 428; *Di Giovanni* v. *Camden Fire Ins. Assn., supra,* 68. It does not seek to join all parties threatened by the prosecution of suits or show such singleness of issue of decisive questions as will

permit the adjudication of all in a single suit. *Francis* v. *Flinn,* 118 U. S. 385; *Scott* v. *Donald,* 165 U. S. 107, 115; *Hale* v. *Allinson,* 188 U. S. 56, 77 *et seq.; St. Louis, I. M. & S. R. Co.* v. *McKnight,* 244 U. S. 368, 375; *Kelley* v. *Gill,* 245 U. S. 116, 120; *Matthews* v. *Rodgers,* 284 U. S. 521, 530.

And, finally, the determination of the constitutional questions, which is the only purpose of the suit, must turn on the authoritative decision of the numerous and novel state questions presented. Cf. *Hygrade Provision Co.* v. *Sherman, supra; Cline* v. *Frink Dairy Co.,* 274 U. S. 445; *Spielman Motor Co.* v. *Dodge, supra; Beal* v. *Missouri Pacific R. Co., supra,* 50. The presence of such state questions in the suit is itself a sufficient ground for our declining to decide the constitutional questions in advance of authoritative determination of the state questions by the state courts. Cf. *Alabama State Federation* v. *McAdory,* 325 U. S. 450; *C. I. O.* v. *McAdory,* 325 U. S. 472; see *Spector Motor Co.* v. *McLaughlin,* 323 U. S. 101.

Further, since the whole aim of appellants' suit is to enjoin the appellees from proceeding in the state courts, this Court's direction to the district court to retain the bill pending the determination of proceedings in the state courts defeats the entire purpose of the present suit and permits the continuance of state litigation which is the only ground asserted for equitable relief. If appellees should at any time make oppressive use of legal processes of the state, bring repeated, groundless suits, or otherwise threaten irreparable damage to appellants, the federal courts are open to them upon their making allegations sufficient to justify intervention by equity. But the mere chance that such irreparable damage may be threatened at some indefinite time in the future, although it is not now, is no reason for the district court to retain the bill which wholly fails to show any ground for equitable relief. There being no showing of damage to the appellants, actual or

potential, save that which is a necessary incident to the state's exercise of its constitutional power to enforce its constitution and laws, which this Court now permits, it is our plain duty to dismiss the suit.

MR. JUSTICE MURPHY, dissenting in part.

I dissent from that part of the Court's opinion that holds that the District Court erred in passing upon the merits of the controversy presented by this case.

It may well be that there are serious questions as to how and against whom Florida's new constitutional provision will be enforced. And the provision may be construed so as not to conflict with the National Labor Relations Act. Such matters must wait for authoritative action by the Florida courts. But there are federal constitutional issues inherent on the face of this provision that do not depend upon any interpretation or application made by Florida courts. Those issues were raised and decided in the court below. And they should be given appropriate attention by this Court.

The Court today holds that there is a very real and imminent threat to the entire system of collective bargaining in Florida growing out of the current attempts to enforce the Florida law. It should not be and is not difficult to discover the federal constitutional issues that are involved in that threat. True, we cannot say what constitutional issues may arise out of the law as subsequently interpreted and applied by the Florida courts. But we can say what issues are apparent on the face of the law itself, the law that has given rise to the grave threat to collective bargaining in Florida. Either the provision does or does not violate due process as guaranteed in the Fourteenth Amendment; either it falls outside or inside the permissible scope of the police power of the state; either it is in accord or in conflict on its face with the National Labor Relations Act. Those are the issues the parties have raised and the court

below has decided. Those are the issues that are obviously involved in relation to the Florida law. I do not believe that a federal court is incapable of recognizing or deciding those issues. Nor do I believe that it should close its eyes to those issues merely because they are difficult or highly controversial. In short, appellants' claims are ripe for adjudication.

Moreover, the Court remands the case to the District Court with directions to retain the case until the Florida courts interpret the provision in the Florida constitution. The efficacy of this disposition of the case is less real than apparent. It affords little if any protection to the appellants so far as the issues now in dispute are concerned. They are left unprotected against the very threat which this Court states is real and imminent. And should the Florida courts ultimately decide these issues adversely to appellants' contentions they will have no effective recourse in the District Court, which already has expressed itself fully and adversely relative to those contentions.

I dissent, therefore, from a procedure depriving appellants of a full hearing and a determination of the issues they have properly raised in the District Court and denying them the right to secure the protection the federal equitable power might give them.

JACOB SIEGEL CO. *v.* FEDERAL TRADE COMMISSION.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 605. Argued March 4, 1946.—Decided March 25, 1946.

In proceedings under § 5 of the Federal Trade Commission Act, the Commission found that the use by petitioner of the trade name "Alpacuna" in the marketing of its coats was deceptive and misleading and ordered petitioner to cease and desist from using it, apparently without considering whether qualifying language would eliminate the deception and satisfy the purposes of the Act without destroying the trade name. On review the Circuit Court of Appeals held that the Commission's findings were supported by substantial evidence and affirmed the order; but stated that the prohibition was "far too harsh" and that it would modify the order to permit use of the trade name with qualifying language, if it had authority to do so. *Held:*

1. Section 5 (c) of the Federal Trade Commission Act does not limit the reviewing court to affirmance or reversal of the Commission's order, but authorizes it to modify the order as well. P. 611.

2. The power to modify extends to the remedy. *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212. P. 611.

3. While judicial review of such orders is limited, it extends to the question whether the Commission abused its discretion in concluding that no change short of excision of the trade name would give adequate protection. Pp. 611, 612.

4. Since trade names are valuable business assets, their destruction should not be ordered if less drastic means will accomplish the same result. *Federal Trade Commmission* v. *Royal Milling Co.*, *supra*. P. 612.

5. The test is whether some change other than the excision of the trade name would be adequate in the judgment of the Commission. P. 613.

6. Since the Commission seems not to have considered this point, the courts are not ready to pass on the question whether the limits of its discretion have been exceeded in the choice of the remedy until an administrative determination is made. P. 614.

7. The judgment is reversed and the cause is remanded to the Circuit Court of Appeals for further proceedings in conformity with this opinion. P. 614.

150 F. 2d 751, reversed.

The Federal Trade Commission ordered petitioner to cease and desist from using a trade name which it found deceptive and misleading. 36 F. T. C. 563. The Circuit Court of Appeals affirmed. 150 F. 2d 751. This Court granted certiorari. 326 U. S. 715. *Reversed,* p. 614.

Robert T. McCracken argued the cause for petitioner. With him on the brief were *Leo Weinrott* and *C. Russell Phillips.*

Ralph F. Fuchs argued the cause for respondent. With him on the brief were *Solicitor General McGrath, Assistant Attorney General Berge, Charles H. Weston* and *W. T. Kelley.*

Seymour M. Klein filed a brief on behalf of a group of retail stores, as *amici curiae,* urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The alpaca and the vicuna are animals whose fleece is used in the manufacture of fabrics. The fleece of the vicuna is, indeed, one of the finest and is extremely rare; and fabrics made of it command a high price. Petitioner manufactures overcoats and topcoats and markets them under the name Alpacuna. They contain alpaca, mohair, wool, and cotton but no vicuna.

The Federal Trade Commission in proceedings under § 5 of the Federal Trade Commission Act (52 Stat. 111, 15 U. S. C. § 45) found that petitioner had made certain misrepresentations in the marketing of its coats. It found, for example, that the representations that the coats contained imported angora and guanaco were false. It also found that the name Alpacuna is deceptive and misleading to a substantial portion of the purchasing public, because it induces the erroneous belief that the coats contain vicuna. But there was no finding that petitioner had

made representations that Alpacuna in fact contained vicuna. It accordingly issued a cease and desist order[1] which, among other things, banned the use of the word Alpacuna to describe petitioner's coats. 36 F. T. C. 563. The Circuit Court of Appeals affirmed. 150 F. 2d 751. It held that the Commission's findings respecting the use of the name Alpacuna were supported by substantial evidence. It was of the view, however, that the prohibition of the use of the name was far too harsh; and it stated that it would have modified the order to permit Alpacuna to be used with qualifying language had it thought that *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, was still a controlling authority. But it concluded that that case had been so limited by subsequent decisions of the Court, involving other administrative agencies, that control of the remedy lay exclusively with the Commission. The case is here on a petition for a writ of certiorari which we granted because of the importance of the question presented.

---

[1] It ordered petitioner to cease and desist from

"1. Representing that respondent's coats contain guanaco hair.

"2. Representing that the Angora goat hair or mohair used in respondent's coats is imported from Turkestan or any other foreign country.

"3. Representing through the use of drawings or pictorial representations, or in any other manner, that respondent's coats contain fibers or materials which they do not in fact contain.

"4. Representing that coats made of fabrics which have a cotton backing are composed entirely of wool or of wool and hair.

"5. Using any advertising matter or causing, aiding, encouraging, or promoting the use by dealers of any advertising matter which purports to disclose the constituent fibers or materials of coats composed in part of cotton, unless such advertising matter clearly discloses such cotton content along with such other fibers or materials.

"6. Using the word 'Alpacuna,' or any other word which in whole or in part is indicative of the word 'vicuna,' to designate or describe respondent's coats; or otherwise representing, directly or by implication, that respondent's coats contain vicuna fiber."

By the Federal Trade Commission Act Congress made unlawful "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce . . ." § 5 (a). It provided that when the Commission's cease and desist orders were challenged in the courts, the findings of the Commission "as to the facts, if supported by evidence, shall be conclusive." § 5 (c). But it did not limit the reviewing court to an affirmance or reversal of the Commission's order. It gave the court power to modify the order as well.[2]

The power to modify extends to the remedy as *Federal Trade Commission* v. *Royal Milling Co., supra,* indicates. In that case, the Commission barred the use of the words "milling company" since the company, though blending and mixing flour, did not manufacture it. The Court concluded that a less drastic order was adequate for the evil at hand and remanded the case so that the Commission might add appropriate qualifying words which would eliminate any deception lurking in the trade name. On the other hand, the excision of a part of the trade name was sustained in *Federal Trade Commission* v. *Algoma Lumber Co.,* 291 U. S. 67. In that case, "California white pine" was being used to describe what was botanically a yellow pine. The Commission prohibited the use of the word "white" in conjunction with "pine" to describe the product. The Court sustained the order.

The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce. Here, as in the case of orders of other administrative agencies under com-

[2] Sec. 5 (c) provides that the court "shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed . . ."

parable statutes,[3] judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy. As applied to this particular type of case, it is whether the Commission abused its discretion in concluding that no change "short of the excision" of the trade name would give adequate protection. *Federal Trade Commission* v. *Algoma Lumber Co., supra,* pp. 81–82. The issue is stated that way for the reason that we are dealing here with trade names which, as *Federal Trade Commission* v. *Royal Milling Co., supra,* p. 217, emphasizes, are valuable business assets. The fact that they were adopted without fraudulent design or were registered as trade-marks does not stay the Commission's hand. *Federal Trade Commission* v. *Algoma Lumber Co., supra,* p. 79; *Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission,* 143 F. 2d 676, 679. But the policy of the law to protect them as assets of a business indicates that their destruction "should not be ordered if less drastic means will accomplish the same result." *Federal Trade Commission* v. *Royal Milling Co., supra,* p. 217. The problem is to ascertain whether that policy and the other policy of preventing unfair or deceptive trade practices can be accommodated. That is a question initially and primarily for the Commission. Congress has entrusted it with the administration of the Act and has left the courts with only limited powers of review. The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed.

---

[3] See *International Association of Machinists* v. *Labor Board,* 311 U. S. 72, 82; *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 194; *Virginia Electric Co.* v. *Labor Board,* 319 U. S. 533, 543; *Franks Bros. Co.* v. *Labor Board,* 321 U. S. 702, 704–705; *Board of Trade* v. *United States,* 314 U. S. 534, 548; *Federal Security Adm'r* v. *Quaker Oats Co.,* 318 U. S. 218, 227–229; *Northwestern Electric Co.* v. *Federal Power Commission,* 321 U. S. 119, 123–124.

It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.

But in the present case, we do not reach the question whether the Commission would be warranted in holding that no qualifying language [4] would eliminate the deception which it found lurking in the word Alpacuna. For the Commission seems not to have considered whether in that way the ends of the Act could be satisfied and the trade name at the same time saved.[5] We find no indication that the Commission considered the possibility of such an accommodation. It indicated that prohibition of the use of the name was in the public interest since the cease and desist order prohibited the further use of the name.[6] But we are left in the dark whether some change of name short of excision would in the judgment of the Commission be adequate. Yet that is the test, as the *Algoma Lumber Co.* and the *Royal Milling Co.* cases indicate. Its application involves the exercise of an in-

---

[4] Petitioner now uses labels reading "Alpacuna Coat—contains no vicuna" and specifies the fibre content of the cloth. See 54 Stat. 1128, 15 U. S. C. § 68.

[5] The opinion of the Commission goes no further than to find that "the name 'Alpacuna' is misleading and deceptive to a substantial portion of the purchasing public in that it represents or implies" that the coats contain vicuna; and that as a result substantial trade is diverted to respondent from its competitors.

[6] This appears not from the opinion but from the paragraph following the order entered by the Commission:

> "Commissioner Freer dissents from so much of the order as wholly prohibits the continued use of the trade name 'Alpacuna' for the reason that this trade name, which has been in use for more than thirteen years, is a valuable business asset, and is neither deceptive per se, nor is the testimony concerning its tendency or capacity to deceive sufficiently clear and convincing as to render such prohibition of its use necessary in the public interest.
>
> "A majority of the Commission do not agree with either Commissioner Freer's statements of fact or his conclusions of law."

formed, expert judgment. The Commission is entitled not only to appraise the facts of the particular case and the dangers of the marketing methods employed (*Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483, 494) but to draw from its generalized experience. See *Republic Aviation Corp.* v. *Labor Board*, 324 U. S. 793, 801–805. Its expert opinion is entitled to great weight in the reviewing courts. But the courts are not ready to pass on the question whether the limits of discretion have been exceeded in the choice of the remedy until the administrative determination is first made.

The judgment is reversed and the cause is remanded to the Circuit Court of Appeals for further proceedings in conformity with this opinion.

Reversed.

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

M. KRAUS & BROS., INC. *v.* UNITED STATES.

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

No. 198. Argued December 14, 1945.—Decided March 25, 1946.

1. Section 1429.5 of Revised Maximum Price Regulation No. 269 (issued December 18, 1942, under the Emergency Price Control Act)—which provides that the price limitations on poultry prescribed by the regulation shall not be evaded by any method, direct or indirect, whether in connection with any offer or sale of a price-regulated commodity alone "or in conjunction with any other commodity," or by way of any trade understanding "or otherwise"—*held* not to forbid all tie-in sales but only those which involve secondary products that are worthless or that are sold at artificial prices. Pp. 622–626.
2. Where the information in a criminal prosecution for violations of Revised Maximum Price Regulation No. 269 charged that the

accused "unlawfully, wilfully and knowingly evaded the provisions of" the regulation "by demanding, compelling and requiring" the retail buyer to purchase chicken feet or chicken skins at a specified price as a condition of the sale of poultry and there was evidence that the chicken skins and feet sold had value and were sold at their market price, a charge by the trial judge that the "one" question in the case was whether the sale of chicken parts was a necessary condition to the purchase of the poultry was a reversible error; since the jury may well have disregarded as irrelevant the evidence of value as to the secondary product and convicted solely on the ground that there was a tie-in sale. P. 626.

3. In order to sustain a criminal conviction, regulations prescribed by the Price Administrator under § 2 (g) of the Emergency Price Control Act to prevent circumvention or evasion of price limitations must be explicit and unambiguous and must adequately inform those who are subject to their terms what conduct will be considered evasive—the dividing line between unlawful evasion and lawful action can not be left to conjecture. P. 621.
4. A prosecutor in framing an indictment, a court in interpreting the Administrator's regulations, or a jury in judging guilt can not supply that which the Administrator failed to do by express word or fair implication. P. 622.
5. Nor can the Administrator's interpretations of his own regulations cure an omission or add certainty and definiteness to otherwise vague language of a regulation. P. 622.
6. A criminal conviction for violation of an administrative regulation ought not to rest upon an administrative interpretation reached by the use of policy judgment rather than by the inexorable command of relevant language of the regulation itself. P. 626.
7. Where correct statements in a charge to a jury are so intertwined with incorrect statements as to negative the effect of the correct statements, the charge is a reversible error; since a conviction ought not to rest on an equivocal direction to the jury on a basic issue. *Bollenbach* v. *United States,* 326 U. S. 607. Pp. 626, 627.

Petitioner was convicted of violating Revised Maximum Price Regulation No. 269, promulgated by the Price Administrator pursuant to the Emergency Price Control Act. The Circuit Court of Appeals affirmed. 149 F. 2d 773. This Court granted certiorari. 326 U. S. 699. *Remanded* for new trial. P. 627.

Thomas Turner Cooke argued the cause for petitioner. With him on the brief was *I. Jonas Speciner.*

W. Marvin Smith argued the cause for the United States. With him on the brief were *Solicitor General McGrath, Robert S. Erdahl* and *Beatrice Rosenberg.*

MR. JUSTICE MURPHY announced the conclusion and judgment of the Court.

The problem here is whether the petitioner corporation was properly convicted of a crime under the Emergency Price Control Act of 1942.[1]

The petitioner is engaged in the wholesale meat and poultry business in New York City. Poultry is a commodity subject to the provisions of Revised Maximum Price Regulation No. 269,[2] promulgated by the Price Administrator pursuant to § 2 (a) of the Emergency Price Control Act of 1942. Two informations, each containing six counts, were filed against petitioner. Each count alleged that, as an integral part of a specified sale of poultry on a day during the Thanksgiving season in November, 1943, the petitioner "unlawfully, wilfully and knowingly evaded the provisions of said Revised Maximum Price Regulation No. 269, Sec. 1429.5, by demanding, compelling and requiring" the retail buyer to purchase chicken feet or chicken skin at a specified price as a condition of the sale of the poultry. Petitioner's president was named as a co-defendant in the first information and the two informations were consolidated for trial purposes.

The theory of the Government is that the petitioner was guilty of an evasion of the price limitations set forth in this particular regulation if it required the purchase of chicken feet and skin as a necessary condition to obtaining the primary commodity, the poultry. This practice is

[1] 56 Stat. 23; 50 U. S. C. App. § 901 *et seq.*

[2] 7 Fed. Reg. 10708; reissued with amendments, 8 Fed. Reg. 13813.

commonly known as a "combination sale" or a "tying agreement." It is argued that the petitioner thereby received for the poultry the ceiling price plus the price of the secondary commodities, the chicken parts.

The evidence was undisputed that the poultry was billed by petitioner at ceiling prices fixed by the Price Administrator and that no ceiling prices had been set for chicken feet or chicken skin. It was also undisputed that the demand for poultry during the Thanksgiving season far exceeded the supply and that petitioner voluntarily imposed a rationing system among its customers.

The Government's case rested primarily upon the testimony of seven retail butchers who had purchased poultry and poultry parts from petitioner during the period in question. Only one of them testified explicitly that the sale of poultry to him had been conditioned upon the sale of poultry parts which he did not want and for which there was no consumer demand. His testimony, however, was disbelieved by the jury since it acquitted the petitioner on the two counts involving sales to him. With two exceptions, the other butchers testified either that the feet and skins were loaded on their trucks without previous order or solicitation along with the poultry or that they were billed for both the poultry and the parts without comment. Five of them stated that they sold a small amount of the chicken parts and gave away the balance; one remarked that he could not sell any parts and was forced to dump them. There was no explicit evidence that any of the butchers protested, sought to return the chicken parts or asked to buy the poultry separately. It was reasonable, however, for the jury to find that the sale of poultry was conditioned upon the simultaneous sale of the chicken parts and no contrary claim is made before us.

Several times the petitioner tried to introduce testimony establishing that there was a demand for chicken parts and that they were of value. Petitioner's counsel

stated that "The government has inferred through all of its testimony that chicken skin and chicken feet are so much waste, that they are dumped; that they are not used and they have opened up the door to this type of testimony." But the trial judge ruled that the Government had not put that matter in issue and that the "only thing we are concerned with is whether or not the witnesses who testified purchased chicken feet to meet a demand in their stores." He accordingly refused to admit the proffered testimony from petitioner's witnesses, stating to petitioner's counsel that "I direct you not to put them on the stand . . ."

On cross examination, however, petitioner's president was questioned as to the resale value of chicken skins from the retailer to the general public. He stated that the value was from 25 to 30 cents a pound and that the skin was used to make chicken fat. He also testified that chicken feet had a resale value of from 12 to 16 cents a pound and were used in making soup and gelatin. He further stated that the demand for chicken feet came from retail butchers such as had been on the stand. Petitioner's counsel then recalled one of the retail butchers whose testimony previously had been excluded by the court. He testified that he had bought chicken feet from the petitioner, had "created a demand" for them in his store, and had sold them for from 15 to 20 cents a pound. No further witnesses were called in regard to the retail value of chicken feet and skins.

In submitting the case to the jury, the judge stated that "what these defendants are charged with having done is imposing as a necessary condition to the purchase of turkeys the simultaneous purchase of gizzards, chicken feet or chicken skin, that were utterly useless and valueless to the purchasers. In order to violate the law these defendants must have made more than the fixed price of 37½ cents on the chickens, or the turkey price of 40 to 45

cents. And the testimony about the use of these additional articles sold, the use that can be made of them, will enable you to determine that they were sold at prices—and the prices are on all these slips that are in evidence—entirely out of line with any value that attaches to them, so that it is almost entirely profit to these defendants, and in doing that, by making the purchase of these things at the prices fixed, the defendants both realized a greater consideration than the Office of Price Administration allows for the commodity sold." He also told the jury that the "one question in the case is whether the sale of the chicken skin and feet was a necessary condition to the purchase of the other [poultry]."

The jury acquitted petitioner's president but convicted the petitioner on nine counts. Petitioner was fined $2,500 on each count, a total of $22,500. The conviction was affirmed by the court below, one judge dissenting because of the exclusion of petitioner's proffered testimony. 149 F. 2d 773. In our opinion, however, the conviction must be set aside.

Section 205 (b) of the Emergency Price Control Act of 1942 imposes criminal sanctions on "Any person who willfully violates any provision of section 4 of this Act . . ." Section 4 (a) of the Act in turn provides that "It shall be unlawful . . . for any person to sell or deliver any commodity, . . . in violation of any regulation or order under section 2 . . ." Section 2 (a) authorizes the Price Administrator under prescribed conditions to establish by regulation or order such maximum prices "as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act." Section 2 (g) further states that "Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof."

The Price Administrator, pursuant to § 2 (a), issued Revised Maximum Price Regulation No. 269 on Decem-

ber 18, 1942,[3] which regulation was in effect at the time the poultry sales in question were made. Section 1429.5 of this regulation, referred to in the informations, stems from § 2 (g) of the Act. It is entitled "Evasion" and reads as follows: "Price limitations set forth in this Revised Maximum Price Regulation No. 269 shall not be evaded whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to, the commodities prices of which are herein regulated, alone or in conjunction with any other commodity, or by way of commission, service, transportation, or other charge, or discount, premium, or other privilege or other trade understanding or otherwise."

The manifest purpose of Congress in enacting this statute was to preserve and protect the economic balance of the nation during a period of grave emergency, thereby achieving the prevention of inflation and its consequences enumerated in § 1. *Yakus* v. *United States,* 321 U. S. 414, 423. That aim was implemented by criminal sanctions to be imposed on those who deliberately choose to ignore the national welfare in this respect by selling commodities at prices above established levels. As appears from a combined reading of §§ 205 (b), 4 (a) and 2 (a), criminal liability attaches to any one who willfully sells commodities in violation of a regulation or order of the Price Administrator establishing maximum prices.[4] Cf. *United States* v. *Eaton,* 144 U. S. 677. Recognizing that

[3] Reissued with amendments on October 8, 1943. See note 2.

[4] Section 205 (b) is somewhat inartistically drawn. It does not specifically impose criminal liability on those who violate the regulations and orders of the Administrator. But the hurdle of *United States* v. *Eaton,* 144 U. S. 677, is cleared by the reference in § 205 (b) to § 4, which makes it unlawful, among other things, to sell or deliver any commodity in violation of any regulation or order. See *In re Kollock,* 165 U. S. 526; *United States* v. *Grimaud,* 220 U. S. 506; *United States* v. *George,* 228 U. S. 14; *Singer* v. *United States,* 323

sales at above-ceiling prices may be accomplished by devious as well as by direct means, Congress in § 2 (g) authorized the Administrator to make provisions against circumvention and evasion of maximum prices. Hence one who willfully sells commodities at prices above the maximum in an evasive manner specified by the Administrator subjects oneself to criminal liability. These statutory warnings are clear and unambiguous. When incorporated with such definite and clear regulations and orders as the Administrator may promulgate, the provisions of the Act leave no doubt as to the conduct that will render one liable to criminal penalties.

This delegation to the Price Administrator of the power to provide in detail against circumvention and evasion, as to which Congress has imposed criminal sanctions, creates a grave responsibility. In a very literal sense the liberties and fortunes of others may depend upon his definitions and specifications regarding evasion. Hence to these provisions must be applied the same strict rule of construction that is applied to statutes defining criminal action. In other words, the Administrator's provisions must be explicit and unambiguous in order to sustain a criminal prosecution; they must adequately inform those who are subject to their terms what conduct will be considered evasive so as to bring the criminal penalties of the Act into operation. See *United States* v. *Wiltberger*, 5 Wheat. 76, 94–96. The dividing line between unlawful evasion and lawful action cannot be left to conjecture. The elements of evasive conduct should be so clearly expressed by the

---

U. S. 338. Congress has subsequently emphasized this reference even more clearly when, in adding § 204 (e) (1) to the Emergency Price Control Act, it spoke of a criminal proceeding "brought pursuant to section 205 involving alleged violation of any provision of any regulation or order issued under section 2 . . ." § 107 (b), Stabilization Extension Act of 1944, 58 Stat. 639. See also § 6, Act of June 30, 1945, c. 214, 59 Stat. 306, 308, amending § 204 (e) (1) of the Emergency Price Control Act.

Administrator that the ordinary person can know in advance how to avoid an unlawful course of action.

In applying this strict rule of construction to the provisions adopted by the Administrator, courts must take care not to construe so strictly as to defeat the obvious intention of the Administrator. Words used by him to describe evasive action are to be given their natural and plain meaning, supplemented by contemporaneous or long-standing interpretations publicly made by the Administrator. But patent omissions and uncertainties cannot be disregarded when dealing with a criminal prosecution. A prosecutor in framing an indictment, a court in interpreting the Administrator's regulations or a jury in judging guilt cannot supply that which the Administrator failed to do by express word or fair implication. Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language. The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act. Congress has warned the public to look to that source alone to discover what conduct is evasive and hence likely to create criminal liability. *United States* v. *Resnick*, 299 U. S. 207.

In light of these principles we are unable to sustain this conviction of the petitioner based upon § 1429.5 of Revised Maximum Price Regulation No. 269. For purposes of this case we must assume that the Administrator legally could include tying agreements and combination sales involving the sale of valuable secondary commodities at their market value among the prohibited evasion devices. Any problem as to his power so to provide would have to be raised initially in a proceeding before the Emergency Court of Appeals. *Lockerty* v. *Phillips*, 319 U. S. 182; *Yakus* v. *United States*, 321 U. S. 414, 427–431; *Bowles* v. *Seminole Rock Co.*, 325 U. S. 410, 418–419;

Case v. *Bowles*, 327 U. S. 92, 98. The only issue bearing upon the regulation which is open in this criminal proceeding is whether the Administrator did in fact clearly and unmistakably prohibit tying agreements of this nature by virtue of the language he used in § 1429.5. That issue we answer in the negative.[5]

Section 1429.5, so far as here pertinent, provides that price limitations shall not be evaded by any method, direct or indirect, whether in connection with any offer or sale of a price-regulated commodity alone "or in conjunction with any other commodity," or by way of any trade understanding "or otherwise." No specific mention is made of tying agreements or combination sales.

It is urged by the Government that this language fits the type of tying agreement allegedly used by petitioner. The contention is that petitioner received for the primary commodity not only the ceiling price but also the price of the secondary commodities which the retailers were required to buy. Conversely, the retailers were compelled to pay not only the ceiling price but also the price of the secondary commodities in order to secure the primary commodity, the poultry. Under this theory it is immaterial whether the secondary products, the chicken parts, had any value to the retailers or whether their price was a reasonable one. Reference is made in this respect to § 302 (b) of the Act, defining price as "the consideration demanded or received in connection with the sale of a commodity." Hence it is concluded that the price limitation on the primary commodity was evaded "in conjunction with any other commodity" within the meaning of § 1429.5. This argument, moreover, represents the consistent interpretation of the Administrator.[6]

---

[5] Cf. *United States* v. *George F. Fish, Inc.*, 154 F. 2d 798.

[6] The Price Administrator has consistently maintained the position that compulsion to purchase a secondary product is an evasion of the maximum prices fixed for the primary product. Thus, in an inter-

But we do not believe that, under the strict rule of construction previously discussed, such an interpretation of § 1429.5 is dictated by its plain language. It prohibits evasions through sales of price-regulated commodities "in conjunction with any other commodity." That clearly and undeniably prohibits evasions through the use of tying agreements where the tied-in commodity is worthless or is sold at an artificial price, thereby hiding an above-ceiling price for the primary commodity. But to say that the language covers more, that it also applies to a case where the secondary product has value and is sold at its ceiling or market price, is to introduce an element of conjecture and to give effect to an unstated judgment of policy.

The language of § 1429.5 is appropriate to and consistent with a desire on the Administrator's part to prohibit only those tying agreements involving tied-in commodities that are worthless or that are sold at artificial prices.

---

pretation issued November 5, 1943, applicable to all maximum price regulations, the Administrator, in discussing violations and evasions, made the following interpretation as to tying agreements:

"(a) *As to freeze regulations:* A purchaser may not be required to buy a combination of commodities if he was not required to do so during the base period, because such an arrangement is a tying agreement which results in the seller receiving a larger consideration for his commodity than he charged during the base period.

"(b) *As to regulations other than base period freeze regulations:* OPA has also consistently held that any arrangement by which a seller conditions the sale of a commodity in any manner upon the purchase by the buyer of any other commodity is a tying agreement, and constitutes a violation.

"*For example,* it is a violation for a seller to compel a purchaser of a load of corn to also purchase a load of alfalfa, even though the total price for the corn, plus the alfalfa, does not exceed the aggregate of the ceiling price for each item, or another example: It is a violation for a seller to compel a purchaser of nylon hose to also purchase a war bond."

O. P. A. Service (Pike & Fischer) vol. I, p. 2: 812.

The Administrator may have thought that other tied-in sales did not constitute a sufficient threat to the price economy of the nation to warrant their outlawry, or that they were such an established trade custom that they should be recognized. But we are told that he had no such thought, that prohibition of all tying agreements is essential to prevent profiteering, and that this blanket prohibition is the only policy consistent with the purposes of the Act. All of this may well be true. But these are administrative judgments with which the courts have no concern in a criminal proceeding. We must look solely to the language actually used in § 1429.5. And when we do we are unable to say that the Administrator has made his position in this respect self-evident from the language used.

The Administrator's failure to express adequately his intentions in § 1429.5 is emphasized by the complete and unmistakable language he has used in other price regulations to prohibit all tying agreements, including those involving the sale of valuable secondary products. Thus he has inserted in the meat regulation a provision prohibiting evasion of price limitations by "offering, selling or delivering beef, veal or any processed product on condition that the purchaser is required to purchase some other commodity." § 1364.406, Revised Maximum Price Regulation No. 169, as amended March 30, 1943, 8 Fed. Reg. 4099. And in the clothing regulation, the Administrator has provided that "No manufacturer shall make a sale of garments which is conditioned directly or indirectly on the purchase of any other commodity or service." § 15, Revised Maximum Price Regulation No. 287, issued June 29, 1943, 8 Fed. Reg. 9126. See also § 1389.555, Maximum Price Regulation No. 330, as amended August 7, 1943, 8 Fed. Reg. 11041.

The very definiteness with which tying agreements of all types were prohibited in regard to many other com-

modities and the absence of any such prohibition in § 1429.5 of Revised Maximum Price Regulation No. 269 might well have led a reasonable man to believe that tying agreements involving the sale of a valuable secondary commodity at its market price were permissible in the poultry business when the transactions in question took place. Certainly the language used by the Administrator did not compel the opposite conclusion. And certainly a criminal conviction ought not to rest upon an interpretation reached by the use of policy judgments rather than by the inexorable command of relevant language.

In view of these considerations we interpret § 1429.5 as prohibiting only those tying agreements involving secondary products that are worthless or that are sold at artificial prices. It follows that the conviction below cannot stand. While the informations can be interpreted as charging a crime under § 1429.5 as we have read it, the trial judge's charge to the jury was clearly erroneous. There was evidence, at first excluded but later admitted, that the chicken parts which the petitioner sold did have value and were sold at their market price. If the jury believed such evidence it was entitled to acquit the petitioner. But the trial judge charged that the "one" question in the case was whether the sale of the chicken parts was a necessary condition to the purchase of the poultry. On the basis of that charge the jury may well have disregarded as irrelevant the evidence of value as to the secondary products and convicted solely on the ground that there was a tie-in sale. Such a charge is thus reversible error.

There were additional statements in the charge to the jury, to be sure, that the petitioner was charged with having compelled, in connection with the purchase of poultry, the simultaneous purchase of chicken parts "that were utterly useless and valueless to the purchasers" and at prices "entirely out of line with any value that attaches

to them." While such statements tended to charge a violation of § 1429.5, as properly interpreted, they were so intertwined with the incorrect charge as to negative their effect. "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Bollenbach* v. *United States,* 326 U. S. 607, 613.

The case must therefore be remanded for a new trial, allowing full opportunity for the introduction of evidence as to the value of the chicken parts and charging the jury in accordance with the proper interpretation of § 1429.5.

It is so ordered.

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

MR. JUSTICE DOUGLAS, concurring.

If a retailer sold meat or any other commodity to a consumer only on condition that he purchase and pay for a wholly worthless article, it would be clear that price ceilings had been violated. For the attribution of value to the worthless article would be nothing more than an evasive method of increasing the ceiling price on the other commodity. I can see no difference where the additional commodity, although it has value, has no value to the purchaser.

But this case is different in both respects or so the jury might find. First, chicken gizzards, chicken skin, or chicken feet are not wholly worthless articles. There is demand for them and they have a value. Second, they were tied-in with sales to retailers who constitute the market for chicken gizzards, chicken skin, and chicken feet. If in fact they had no value on that market, evasion of price ceilings would be established. But since they apparently had some value on the retail market, no violation of price ceilings occurred unless the price charged for them in fact exceeded that market value. That might

be shown either by proof of the fact that the market value was lower or by showing that the quantity forced on the retailers was in excess of the quantity which the market could absorb.

The case should be remanded for a new trial on that basis. For the trial court ruled that the additional articles sold were valueless and that the "one question in the case is whether the sale of the chicken skin and feet was a necessary condition to the purchase of the other." That ruling took from the jury the basic issue in the case.

I think there was evidence that these chicken gizzards, chicken skin, and chicken feet were valueless to some of the retailers and that a conviction would be warranted. But it is not enough that we conclude on the whole record that a defendant is guilty. *Bollenbach* v. *United States*, 326 U. S. 607. The jury under our constitutional system is the tribunal selected for the ascertainment of guilt.

MR. JUSTICE RUTLEDGE, concurring.

I am in agreement with the result and substantially so with MR. JUSTICE MURPHY'S opinion. I do not think that administrative regulations, given by statute the function of defining the substance of criminal conduct, should have broader or more inclusive construction than statutes performing the same function. If the regulations involved here had been enacted specifically by Congress in statutory form, I do not think they could properly be construed to forbid tie-in sales of these commodities *per se*.

As the opinion points out, the regulations, with reference to other commodities, expressly prohibited tie-in sales, regardless of whether the tied-in commodity had value. Persons dealing in those commodities were specifically informed by the regulations, therefore, that such sales would be in violation of the Act. There was no such specific prohibition applicable at the time of the sales in question to sales of poultry. However the general pro-

hibition against evasion contained in § 1429.5 of Revised Maximum Price Regulation No. 269 might be interpreted, if there had been no regulations specifically forbidding tie-in sales of other commodities, in view of their existence and the absence of any similar provision relating to poultry, I do not think it permissible to construe § 1429.5 as covering the same ground. Persons reading the regulations to determine what conduct had been forbidden were entitled in my opinion to conclude that the Administrator, whenever he thought tie-in sales were *per se* evasive or in violation of the Act's policy, had expressly so stated and conversely that where he had not expressly forbidden the practice, it was not to be understood as prohibited by general language applicable to many other types of situation but not specifically to this one. This view, I think, would be required if the regulations had been enacted in statutory form. As regulations they cannot be given broader content.

Accordingly I agree with the conclusion that tie-in sales were not forbidden at the time of these sales, as to poultry. I also agree that the trial court, both in its instructions and in some of its rulings upon the admissibility of evidence, went on a conception of the law inconsistent with this view. I therefore concur in the Court's disposition of the cause.

MR. JUSTICE FRANKFURTER, although agreeing with the opinion of MR. JUSTICE MURPHY, also joins in this opinion.

MR. JUSTICE BLACK, dissenting.

We were at war in 1943. Scarcity of food had become an acute problem throughout the nation. To keep the public from being gouged the Government had set ceiling prices on food items. Congress had made it a crime to sell food above these ceiling prices. When Thanksgiving Day approached there were not enough turkeys to supply

the demand of the many American families who wanted to celebrate in the customary style.

The information filed in the District Court charged that the petitioner "unlawfully, wilfully and knowingly evaded the provisions of . . ." Revised Maximum Price Regulation No. 269, § 1429.5, by compelling and requiring the buyer to purchase chicken feet, chicken skin, or gizzards at a specified price, as a condition of the sale of poultry to them. During peace times the petitioner had ordinarily done a gross business of seven-and-a-half million dollars a year. In 1943, presumably due to the meat shortage incident to the war, the petitioner's gross business was not quite four million dollars. This meat shortage was felt acutely during the Thanksgiving season, when petitioner instead of his usual 100 to 150 cars of turkeys received only one car. When the retail butchers and poultry market proprietors came clamoring for their share of the small supply (which the defendant rationed among them) they found that along with the turkeys which they wanted so badly petitioner gave and charged them for large amounts of chicken feet, skins and gizzards which they had not asked for at all and which for the most part they had never before sold as separate items. While the butchers paid in addition to the ceiling price charged for the turkeys the price charged for the chicken skins and feet, they did so only because they understood that unless they bought these unwanted items they could get no turkeys. Only one of the butchers sold all the chicken skins to his customers. He explained that he operated his store in a poor neighborhood where the food shortage had become so acute that people were willing to buy anything they could get. As to the rest of the butchers, some simply dumped the chicken skins and feet while others, after diligent efforts, sold a few pounds and then gave the rest away either to their customers, or to charitable institutions. Certainly these particular butchers forced to buy

these unwanted items for the first time were not the regular retail outlet for disjointed chicken feet and peeled chicken skins, if there ever was such an outlet on a voluntary basis. It is clear therefore that as a result of petitioner's forcing his customers to buy the feet and skins along with the turkeys, the retailers' cost price of the turkeys was in effect increased beyond the ceiling.

In my opinion petitioner's practice in forcing the butchers to buy unwanted chicken feet in order to get wanted turkeys amounted to a direct violation of the Price Control Act. It certainly was no less a violation of the Administrator's regulation against evasion. In promulgating this regulation the Administrator could not possibly foresee every ingenious scheme or artifice the business mind might contrive to shroud violations of the Price Control Act. The regulation does not specifically describe all manner of evasive device. The term "tying agreement" nowhere appears in it and a discussion of such agreements is irrelevant. We need not decide whether what petitioner did would have violated every possible hypothetical regulation the Administrator might have promulgated. The regulation here involved prohibits every evasion of the Price Control Act. It thus condemns all actions that are "on the wrong side of the line indicated by the policy if not by the mere letter of the law." *Bullen* v. *Wisconsin*, 240 U. S. 625, 631. What petitioner did here is on the wrong side of both letter and policy. The Court does not deny that there was ample evidence to support the jury's finding that petitioner did what the information charged it with doing. In my opinion that was a crime.

Had butchers been required to buy bags of stones as a condition to buying turkeys, I think it would have been hard to persuade them, or anybody else, that the seller who forced them to do so was not guilty of violating and evading the law. Had people who wanted and needed bacon,

at the time when bacon was almost impossible to purchase, been required to buy hog hoofs and hog skins with each purchase of a pound of bacon, I think the sellers would have violated the law. If the wholesaler can require the retailer to purchase unwanted items the retailer can force the ordinary consumer to do the same thing. A restaurant could then force its customers to purchase used kitchen fats along with their meals. It would be little consolation to a customer forced to do so to learn that soap factories can use these fats and would be willing to purchase them. He would pay the price, and either dump the fat into the nearest ash can or tell the waiter to take the smelly substance away. The result would be increased cost of meals in that restaurant. Thinly disguised subterfuges like the one here adopted should not be sanctioned by courts. Once they are sanctioned, laws enacted by Congress for the public welfare are no longer respected.

When food is scarce and people are hungry it is a violation, both of the letter and spirit of the Price Control laws, to require consumers or retail stores where they make their purchases, to buy things that they neither need nor want as a condition to obtaining articles which they must have. I dissent from the Court's disposition of this case.

MR. JUSTICE REED and MR. JUSTICE BURTON join in this opinion.

UNITED STATES *v.* CARBONE ET AL.

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

No. 474. Argued February 26, 27, 1946.—Decided March 25, 1946.

1. The Kickback Act of June 13, 1934 provides that "whoever" shall induce any person employed on any federally financed work "to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever," shall be subject to the penalty therein prescribed. Appellees, union officials, were indicted for conspiring to violate the Act. The indictment charged *inter alia* that, by agreement between appellees and contractors engaged in construction of federal buildings, the contractors agreed to employ as laborers only such persons as were approved by appellees and to discharge any such employees at appellees' request. Appellees approved for employment, besides union members, only such persons as paid appellees the sum of $5, which was to be regarded as an installment upon the union initiation fee. Payment to appellees of $5 per week thereafter was required until the full initiation fee had been paid, "or the person would not be permitted to continue work upon the said construction." Appellees, contrary to union rules, did not account to the union for moneys received from laborers who quit the employment before paying the initiation fee in full. *Held* that the indictment did not charge an offense punishable under the Kickback Act. P. 637.
2. The Kickback Act must be construed in the light of the evils which it was designed to remedy. P. 637.
3. The Kickback Act was not intended to affect legitimate union activity; nor to punish unlawful acts, though committed by union officials in violation of union rules, which are not in the nature of kickbacks. P. 639.
4. On appeal under the Criminal Appeals Act, this Court is bound by the District Court's interpretation of the indictment as dealing with ordinary union initiation fees rather than with kickbacks. P. 641.

61 F. Supp. 882, affirmed.

Appeal under the Criminal Appeals Act from a judgment dismissing an indictment of the respondents for conspiring to violate the Kickback Act. *Affirmed,* p. 642.

Frederick Bernays Wiener argued the cause for the United States. With him on the brief were *Solicitor General McGrath, Robert S. Erdahl* and *Irving S. Shapiro.*

Hammond E. Chaffetz argued the cause for Carbone et al., appellees, and *Michael Carchia* argued the cause for DiNunno, appellee. With them on the brief was *Walter F. Levis.*

MR. JUSTICE MURPHY delivered the opinion of the Court.

This case comes to us under the Criminal Appeals Act[1] directly from the United States District Court for the District of Massachusetts. It raises an important question as to the meaning and scope of § 1 of the Act of June 13, 1934,[2] commonly known as the Kickback Act, making it unlawful to prevent anyone employed in construction or repair work of a public nature or financed in whole or in part by the United States from receiving the full compensation to which he is entitled.

Three of the appellees are officers of Local 39 of the International Hod Carriers' Building and Common Laborers' Union of America; the fourth appellee is president of the Eastern Massachusetts Laborers District Council and is also employed by Local 39. They were indicted for conspiring to violate § 1 of the Kickback Act. It was charged

---

[1] Act of March 2, 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271; 18 U. S. C. § 682.

[2] Section 1 of the Act provides: "Whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both." 48 Stat. 948; 40 U. S. C. § 276b.

that during the period of the alleged conspiracy, October 1, 1940, to March 30, 1941, two contractors were engaged in the construction of various public buildings for the United States at Fort Devens, Massachusetts. The appellees, by virtue of their positions with Local 39, made an agreement with the contractors whereby the latter undertook to employ as laborers only such persons as were approved by appellees and to discharge any such employees at appellees' request. The contractors also agreed to employ forty persons named by the appellees, known as stewards, to perform such duties as the appellees might direct, and to provide an office for the appellees on the site of the construction. About 7,500 laborers were employed during the course of the construction.

Pursuant to this agreement, the appellees approved to the contractors for employment as laborers members of Local 39 or of other locals of the International Union and only such other persons as paid the appellees the sum of $5.00. The appellees represented to the latter persons that this payment would be regarded as an installment upon the initiation fee of Local 39 and the International Union and that each such employee would be required to pay the appellees $5.00 per week until the total initiation fee was paid "or the person would not be permitted to continue work upon the said construction." Receipts were given for each weekly payment. The initiation fee was originally $50.00, but it was later reduced to $40.00 and then to $20.00.

It was further charged that the appellees directed the stewards each week to go among the laborers and demand of each nonmember of the union either that he display a receipt showing that he had paid the $5.00 for the current week or that he immediately pay that sum to the stewards or to the appellees "under threat of procuring his dismissal from his employment" if he did not do so. The appellees allegedly were able to carry out this threat by reason of

their agreement with the contractors, the appellees "well knowing, and intending, that the laborers would pay the said five dollars out of the compensation to which they were entitled under their contracts of employment with the said contractors."

The indictment also stated that the appellees kept no records of those who made payments to them. But if a laborer should present receipts showing payment of the initiation fee in full, his name was recorded and sent to the headquarters of the International Union with the sum of $5.35, representing the share of the fee to which the International was entitled under its rules. And the appellees "made no report to the Local 39, or to anyone, of the amount they had received from laborers paying less than the full initiation fee as aforesaid, or the total sums they had collected in this way, nor did they cause any of the sums collected in this way and received by them to be recorded in the Financial Secretary's book as the rules of the said International Union require: The defendants [appellees] well knowing that the majority of those who paid the initial five dollars would not and did not complete payment of the full initiation fee."

The indictment concluded by charging that the appellees acted in concert in these matters, that they induced the laborers to give up part of the compensation to which they were entitled under their contracts, that they represented that they were acting for Local 39 and the International, and that they concealed from these organizations the sums they thus collected from laborers who did not pay the initiation fee in full.

The appellees moved to dismiss the indictment, alleging as one ground that it did not state an offense cognizable in law. Relying upon this Court's decision in *United States* v. *Laudani*, 320 U. S. 543, the District Court granted the motions. 61 F. Supp. 882. It plainly was of the view that the facts as alleged in the indictment fell

outside the scope of the Kickback Act. It stated that it did not believe that "either the history or the purpose of the Kickback legislation warrants an extension of its scope to include these defendants. . . . The closed shop is within the legitimate objectives of trade unionism. Implementation of this objective by the means used by these defendants should not expose them to the risk of criminal prosecution." From this judgment the United States appeals.

We agree with the District Court. Section 1 of the Kickback Act punishes "whoever" induces another person employed on a federally financed project "to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever . . ." The United States contends that this provision applies to the instant situation inasmuch as the appellees induced certain workers on a federal project to give up part of the compensation to which they were entitled by threatening to procure dismissal from their employment. Emphasis is placed upon the allegation in the indictment that the appellees had power to enforce this threat by reason of the closed-shop agreement with the contractors and upon the further allegation that the appellees neglected to report or to turn over to Local 39 of the International Union all of the money collected, as required by the rules of those organizations.

But as is apparent from our discussion in the *Laudani* case, not every person or act falling within the literal sweep of the language of the Kickback Act necessarily comes within its intent and purpose. That language must be read and applied in light of the evils which gave rise to the statute and the aims which the proponents sought to achieve. When that is done the inapplicability of the Act to the facts set forth in the indictment becomes clear.

The statute grew out of an investigation of so-called rackets by a subcommittee of the Senate Committee on Commerce pursuant to S. Res. 74, 73d Cong., 2d Sess. This investigation "revealed that large sums of money have been extracted from the pockets of American labor, to enrich contractors, subcontractors, and their officials." S. Rep. No. 803, 73d Cong., 2d Sess. It was found that laborers, especially those pursuing the building trades, often were paid the prevailing rate of wages but were compelled by their employers to give back or kick back a percentage of the pay which they had lawfully earned and received. Discharge was threatened unless they complied with the demands for kickbacks. The employers were thereby enabled to evade the scale of wages imposed by the Government on its construction projects, to the detriment of the workers. Such was the evil at which the Act was directed. As stated by the House committee in reporting the bill that became the law, "This bill is aimed at the suppression of the so-called 'kick-back racket' by which a contractor on a Government project pays his laborers wages at the rate the Government requires him to pay them, but thereafter forces them to give back to him a part of the wages they have received." H. Rep. No. 1750, 73d Cong., 2d Sess.[3]

[3] Senator Copeland, in charge of the bill in the Senate, explained its purposes as follows: "I should be unwilling to have the bill passed without the Senate understanding its purpose. Much has been said on the floor recently about what is known as the 'kick-back' where employers or sub-employers have indecently and immorally taken from employees a part of the wage which it was supposed they were being paid. The testimony before our committee investigating crime is so startling as to indicate that as much as 25 percent of the money supposed to be paid out of Federal funds for employment is actually repaid to employers in this improper manner. The purpose of the bill is to attempt to put some check upon that practice." 78 Cong. Rec. 7401. Senator Copeland also quoted from a letter from Mr. William Green, President of the American Federation of Labor, stating, "It has been a common practice for contractors constructing Fed-

It is thus apparent that the purpose of the Act is to insure that workers on federal projects shall receive the full wages to which they are entitled from their employers, many of whom had been found to be depriving the workers of their rights in this respect. And the sanctions of the Act are directed toward that problem. There is nothing in the legislative history to support the thesis that the statute was intended to affect legitimate union activities. Nor was it intended to be used to punish unlawful acts, including those committed by union officials in violation of union rules, that are not in the nature of kickbacks.[4] We need not here attempt to delineate the

---

eral buildings to pay the employees the prevailing rate as determined by the Secretary of Labor, and then have them return a certain amount to the contractor. That is a most vicious practice." *Id.*

Representative Sumners, the chairman of the House committee in charge of the bill, referred to the bill as follows: "May I suggest to gentlemen on both sides of the House that we are going to attempt to call up on the first opportunity S. 3041, which is known as the 'kickback' bill, preventing contractors from compelling workmen to return a part of their salaries." 78 Cong. Rec. 10521.

[4] The United States points to certain isolated references in the legislative hearings concerning dishonest union practices. Hearings, Subcommittee of Senate Committee on Commerce, S. Res. 74, 73d Cong., 2d Sess., Vol. 1, pp. 35, 82, 808, 814, 826. But these relate to general "racketeering" in labor unions or to connivance between union officials and contractors on the matter of kickbacks, neither of which is involved in this case. Thus Adolph Dzik, attorney for the anti-racketeering committee of the American Federation of Labor building trade unions in New York, testified as follows (*Id.*, pp. 808, 814):

> Mr. Daru [counsel for Senate Subcommittee]. Do you think it is usually a dishonest contractor or an employee, superintendent, or otherwise, who is sandwiching in between there and getting the "kickback"?
>
> Mr. Dzik. I think it is the contractor and some of the officials of the unions.
>
> The Chairman. Is it your opinion that there is connivance between the contractor or his representative and certain officials?
>
> Mr. Dzik. I think so.
>
> . . . . .
>
> The Chairman. I take it from what you say that you are placing responsibility largely upon the contractors, or do you also

degree, if any, to which the Act applies to the activities of trade unions and their officers. Nor need we question the fact that such officers on occasion may make unwarranted use of their powers, thereby reflecting adversely upon the reputation of unionism. It is enough to note that this Act was designed solely to prevent workers from wrongfully being deprived of their full wages and that evils relating to the internal management of unions were matters with which Congress did not concern itself in enacting the Kickback Act. Accordingly the broad language of the statute must be interpreted and applied with that background in mind.

From a superficial standpoint, the facts in the indictment would indicate that the appellees did induce the laborers to give up part of their lawful wages by threatening to procure their dismissal. But the facts as charged must be considered in light of the closed-shop agreement between the appellees and the contractors. That agreement, so far as appears, was a lawful one, giving the appellees the power as union representatives to insist that all laborers be or become members of Local 39 and the International Union. The initiation fee which was assessed is a normal and usual assessment by a union on a person seeking a union job or membership in the union. There is no claim in this instance that the fee was unauthorized, excessive or otherwise improper; in fact, it is admitted that when the full amount of the initiation fee was paid the laborer became enrolled as a member of both

---

include in your criticism, collusion between the contractors and the officers of various unions?

Mr. Dzik. I will say that primarily the contractors themselves are responsible, and that they corrupt the officials of the unions and in that manner are able to do it without being exposed. I will tell you why I say that, Senator. I say that if the officials and labor unions were really interested in this racket, they would immediately pass a resolution suspending the operation of the rule of the union punishing the laborers that exposed it.

See 46 Col. L. Rev. 326.

Local 39 and the International Union. The indictment is directed only to those payments made by laborers who discontinued working before they paid the last installment. As to such installments, there is no allegation that the failure to return them was unauthorized by union rules or was in any other way unlawful. Moreover, the fact that the assessments were accompanied by a threat and a power to procure dismissal for failure to pay is but an ordinary incident of the apparently legal closed-shop agreement. The sum of these facts, therefore, fails to reveal any of the evils which gave rise to the Kickback Act. All that appears are the normal methods used to implement the legitimate objective of a closed shop. The District Court so viewed the facts. It interpreted the indictment as dealing only with ordinary union initiation fees rather than with kickbacks, as that word is used in the context of this statute. We are bound by that interpretation on this appeal. *United States* v. *Borden Co.*, 308 U. S. 188.

The crucial fact relied upon by the United States, however, is the alleged failure of the appellees to report or to account to the unions as to those payments made by laborers who quit before making the last installment. But if that fact be true it cannot operate retroactively to make the assessments illegal or to give them the character of kickbacks. It must be assumed from the indictment as construed below that the assessments were lawful when made and that the appellees had the right to make them on behalf of the unions. If the appellees thereafter converted the money to their own use in violation of union rules, the evil falls outside the scope of the Kickback Act. Embezzlement and failure to obey union rules are matters vastly different from an unlawful demand upon an employee to return part of the wages he has earned. Congress has given no indication in this Act that it desired to deal with such matters.

The interpretative process would be abused and the legislative will subverted were we to deal with the broad

language of this statute in disregard of the narrow problem of kickbacks which Congress sought to remedy. See *Holy Trinity Church* v. *United States,* 143 U. S. 457; *Chatwin* v. *United States,* 326 U. S. 455. The judgment of the District Court must therefore be

Affirmed.

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

MR. JUSTICE FRANKFURTER dissenting, with whom MR. CHIEF JUSTICE STONE and MR. JUSTICE BURTON concur.

Until 1907 no review could be had from a judgment of a district—or the predecessor, circuit—court setting aside an indictment. By the Criminal Appeals Act of that year, 34 Stat. 1246, 18 U. S. C. § 682, this Court was given jurisdiction to review such a judgment, but only if the decision of the district court was based exclusively upon the invalidity or construction of the statute which gave rise to the indictment. If the district court construed an indictment as well as a statute, this Court could not entertain the appeal. *United States* v. *Hastings,* 296 U. S. 188. Accordingly, when the dismissal of an indictment involved an erroneous ruling in whole or in part upon the sufficiency of the indictment as a matter of pleading, the United States was without remedy. The upshot was that justice might be thwarted through a misconception by a district judge of the requirements of criminal pleading because time might bar a new indictment.

It was the purpose of the Act of May 9, 1942, 56 Stat. 271, 18 U. S. C., Supp. IV, § 682, to meet this situation. This Act authorized the Government to appeal to a circuit court of appeals from the decision of a district court in those cases where direct appeals to this Court do not lie. It also required this Court to remand to a circuit court of appeals a case wrongly brought here. Ac-

cordingly, when the terms of the dismissal of an indictment by a district court raise doubts as to the ground on which the dismissal was made, or is a blend of a finding of bad pleading and of a construction of the statute on which the indictment was based, this Court since the 1942 Act, is under duty not to affirm the district court but to remand the cause to the circuit court of appeals for that court's disposal of both issues—interpretation of the indictment and construction of the statute.

The Court applied this procedure in *United States* v. *Swift & Co.*, 318 U. S. 442, although, or perhaps because, there was a division here as to the meaning of the District Court's action. This course, in my judgment, should now be followed. The scope of the opinion below is certainly not unequivocal. Did the District Court mean that the indictment charged that the defendants acted exclusively as authorized agents of the union in collecting fees, but converted those fees to their own purposes? That may well be embezzlement under the Massachusetts law; but no one would contend that it comes within the terms of the "kick-back" statute. Or, did the District Court read the indictment to mean that that which the defendants did was outside the scope of their authority as union officials and was not done on behalf of the union, and hold that the "kick-back" statute does not apply to persons because they are officers of a union? Or, did the District Court read the indictment to mean that the union officials acted on their own and not for union purposes, but hold that such conduct is not covered by the "kick-back" statute because it applies exclusively to persons who work for the employer and who line their pockets by virtue of their power to assure or withhold employment? Instead of starting with an unequivocal construction of the indictment by the District Court, this Court is itself in effect construing the indictment when Congress has withheld from this Court the right to construe indictments.

In view of such doubts concerning the real meaning of what the District Court did, fair administration of the criminal law would seem to preclude affirmance of the judgment below on the assumption that the District Court read the indictment so as to bring into application a construction of the "kick-back" statute for which the Government does not contend. I would dismiss the appeal and remand the District Court's judgment to the Circuit Court of Appeals for the First Circuit for that court to review the judgment in view of the power of the Circuit Court of Appeals, not possessed by us, to construe the indictment as a preliminary to construing the statute.

But under the compulsion of the Court's decision the case is before us on the merits. See *Helvering* v. *Davis*, 301 U. S. 619, 640. The statute seems to be clear: "Whoever shall induce any person employed in the construction, . . . of any . . . work financed in whole or in part by loans or grants from the United States, . . . to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined . . . or imprisoned . . . or both." 48 Stat. 948, 40 U. S. C. § 276b. No legislative history is invoked to undo the scope of this language and to immunize what Congress has plainly condemned. What Congress has enacted should be enforced. The statutory phrase is "by any other manner whatsoever." The indictment does not describe a check-off or collection of union dues or initiation fees in a labor union. That, as the Government agrees, is not prohibited. The statute seeks to protect forays against wages derived from federal funds and does not touch diminution of such wages in connection with union membership. The statute is for the protection of the laboring man and the taxpayer. It should be so interpreted and enforced. It should not be interpreted so

as to protect those described in the indictments as collecting funds by coercion, through their control over jobs, for their own personal advantage at the expense of the wage earner, the labor union, and the taxpayer.

LAVENDER, ADMINISTRATOR, *v.* KURN ET AL., TRUSTEES, ET AL.

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 550. Argued March 6, 7, 1946.—Decided March 25, 1946.

1. In this action under the Federal Employers' Liability Act, the evidence of the defendants' negligence (detailed in the opinion) was sufficient to justify submission of the case to the jury; and the judgment of the appellate court setting aside the verdict for the plaintiff can not be sustained. P. 652.
2. There being a reasonable basis in the record for an inference by the jury that the injury resulted from the defendants' negligence, it is not within the province of the appellate court to weigh the conflicting evidence, judge the credibility of witnesses, and arrive at a conclusion opposite from that reached by the jury. P. 652.
3. In suits under the Federal Employers' Liability Act, the appellate court's function is exhausted when the evidentiary basis for the jury's verdict becomes apparent, it being immaterial that the court might draw a contrary inference or consider another conclusion more reasonable. P. 653.
4. Only when there is a complete absence of probative facts to support the conclusion reached by the jury does reversible error appear. P. 653.
5. The jury could reasonably have inferred from the evidence in this case that the place at which the employee of the carrier was working, though technically a public street, was unsafe and that this circumstance contributed in part to the employee's death. P. 653.
6. In actions under the Federal Employers' Liability Act, rulings on the admissibility of evidence must normally be left to the sound discretion of the trial judge. P. 654.

354 Mo. 196, 189 S. W. 2d 253, reversed.

In a suit brought in a state court under the Federal Employers' Liability Act by petitioner against the respond-

ents, a judgment for the petitioner was reversed by the Supreme Court of the State. This Court granted certiorari. 326 U. S. 713. *Reversed,* p. 654.

N. Murry Edwards argued the cause for petitioner. With him on the brief were *James A. Waechter* and *Douglas H. Jones.*

Cornelius H. Skinker, Jr. argued the cause for Kurn et al., respondents. With him on the brief were *Maurice G. Roberts* and *Alexander P. Stewart.*

Wm. R. Gentry argued the cause for the Illinois Central Railroad Co., respondent. With him on the brief were *C. A. Helsell* and *John W. Freels.*

MR. JUSTICE MURPHY delivered the opinion of the Court.

The Federal Employers' Liability Act permits recovery for personal injuries to an employee of a railroad engaged in interstate commerce if such injuries result "in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 45 U. S. C. § 51.

Petitioner, the administrator of the estate of L. E. Haney, brought this suit under the Act against the respondent trustees of the St. Louis-San Francisco Railway Company (Frisco) and the respondent Illinois Central Railroad Company. It was charged that Haney, while employed as a switch-tender by the respondents in the switchyard of the Grand Central Station in Memphis, Tennessee, was killed as a result of respondents' negligence. Following a trial in the Circuit Court of the City of St. Louis, Missouri, the jury returned a verdict in favor of petitioner and awarded damages in the amount of

$30,000. Judgment was entered accordingly. On appeal, however, the Supreme Court of Missouri reversed the judgment, holding that there was no substantial evidence of negligence to support the submission of the case to the jury. 354 Mo. 196, 189 S. W. 2d 253. We granted certiorari to review the propriety of the Supreme Court's action under the circumstances of this case.

It was admitted that Haney was employed by the Illinois Central, or a subsidiary corporation thereof, as a switch-tender in the railroad yards near the Grand Central Station, which was owned by the Illinois Central. His duties included the throwing of switches for the Illinois Central as well as for the Frisco and other railroads using that station. For these services, the trustees of Frisco paid the Illinois Central two-twelfths of Haney's wages; they also paid two-twelfths of the wages of two other switch-tenders who worked at the same switches. In addition, the trustees paid Illinois Central $1.87½ for each passenger car switched into Grand Central Station, which included all the cars in the Frisco train being switched into the station at the time Haney was killed.

The Illinois Central tracks run north and south directly past and into the Grand Central Station. About 2,700 feet south of the station the Frisco tracks cross at right angles to the Illinois Central tracks. A west-bound Frisco train wishing to use the station must stop some 250 feet or more west of this crossing and back into the station over a switch line curving east and north. The events in issue center about the switch several feet north of the main Frisco tracks at the point where the switch line branches off. This switch controls the tracks at this point.

It was very dark on the evening of December 21, 1939. At about 7:30 p. m. a west-bound interstate Frisco passenger train stopped on the Frisco main line, its rear some 20 or 30 feet west of the switch. Haney, in the performance of his duties, threw or opened the switch to permit

the train to back into the station. The respondents claimed that Haney was then required to cross to the south side of the track before the train passed the switch; and the conductor of the train testified that he saw Haney so cross. But there was also evidence that Haney's duties required him to wait at the switch north of the track until the train had cleared, close the switch, return to his shanty near the crossing and change the signals from red to green to permit trains on the Illinois Central tracks to use the crossing. The Frisco train cleared the switch, backing at the rate of 8 or 10 miles per hour. But the switch remained open and the signals still were red. Upon investigation Haney was found north of the track near the switch lying face down on the ground, unconscious. An ambulance was called, but he was dead upon arrival at the hospital.

Haney had been struck in the back of the head, causing a fractured skull from which he died. There were no known eyewitnesses to the fatal blow. Although it is not clear, there is evidence that his body was extended north and south, the head to the south. Apparently he had fallen forward to the south; his face was bruised on the left side from hitting the ground and there were marks indicating that his toes had dragged a few inches southward as he fell. His head was about 5½ feet north of the Frisco tracks. Estimates ranged from 2 feet to 14 feet as to how far west of the switch he lay.

The injury to Haney's head was evidenced by a gash about two inches long from which blood flowed. The back of Haney's white cap had a corresponding black mark about an inch and a half long and an inch wide, running at an angle downward to the right of the center of the back of the head. A spot of blood was later found at a point 3 or 4 feet north of the tracks. The conclusion following an autopsy was that Haney's skull was fractured by "some fast moving small round object." One of the

examining doctors testified that such an object might have been attached to a train backing at the rate of 8 or 10 miles per hour. But he also admitted that the fracture might have resulted from a blow from a pipe or club or some similar round object in the hands of an individual.

Petitioner's theory is that Haney was struck by the curled end or tip of a mail hook hanging down loosely on the outside of the mail car of the backing train. This curled end was 73 inches above the top of the rail, which was 7 inches high. The overhang of the mail car in relation to the rails was about 2 to 2½ feet. The evidence indicated that when the mail car swayed or moved around a curve the mail hook might pivot, its curled end swinging out as much as 12 to 14 inches. The curled end could thus be swung out to a point 3 to 3½ feet from the rail and about 73 inches above the top of the rail. Both east and west of the switch, however, was an uneven mound of cinders and dirt rising at its highest points 18 to 24 inches above the top of the rails. Witnesses differed as to how close the mound approached the rails, the estimates varying from 3 to 15 feet. But taking the figures most favorable to the petitioner, the mound extended to a point 6 to 12 inches north of the overhanging side of the mail car. If the mail hook end swung out 12 to 14 inches it would be 49 to 55 inches above the highest parts of the mound. Haney was 67½ inches tall. If he had been standing on the mound about a foot from the side of the mail car he could have been hit by the end of the mail hook, the exact point of contact depending upon the height of the mound at the particular point. His wound was about 4 inches below the top of his head, or 63½ inches above the point where he stood on the mound—well within the possible range of the mail hook end.

Respondents' theory is that Haney was murdered. They point to the estimates that the mound was 10 to 15 feet north of the rail, making it impossible for the mail

hook end to reach a point of contact with Haney's head. Photographs were placed in the record to support the claim that the ground was level north of the rail for at least 10 feet. Moreover, it appears that the area immediately surrounding the switch was quite dark. Witnesses stated that it was so dark that it was impossible to see a 3-inch pipe 25 feet away. It also appears that many hoboes and tramps frequented the area at night in order to get rides on freight trains. Haney carried a pistol to protect himself. This pistol was found loose under his body by those who came to his rescue. It was testified, however, that the pistol had apparently slipped out of his pocket or scabbard as he fell. Haney's clothes were not disarranged and there was no evidence of a struggle or fight. No rods, pipes or weapons of any kind, except Haney's own pistol, were found near the scene. Moreover, his gold watch and diamond ring were still on him after he was struck. Six days later his unsoiled billfold was found on a high board fence about a block from the place where Haney was struck and near the point where he had been placed in an ambulance. It contained his social security card and other effects, but no money. His wife testified that he "never carried very much money, not very much more than $10." Such were the facts in relation to respondents' theory of murder.

Finally, one of the Frisco foremen testified that he arrived at the scene shortly after Haney was found injured. He later examined the fireman's side of the train very carefully and found nothing sticking out or in disorder. In explaining why he examined this side of the train so carefully he stated that while he was at the scene of the accident "someone said they thought that train No. 106 backing into Grand Central Station is what struck this man" and that Haney "was supposed to have been struck by something protruding on the side of this train." The foreman testified that these statements were made by an

unknown Illinois Central switchman standing near the fallen body of Haney. The foreman admitted that the switchman "didn't see the accident . . ." This testimony was admitted by the trial court over the strenuous objections of respondents' counsel that it was mere hearsay falling outside the *res gestae* rule.

The jury was instructed that Frisco's trustees were liable if it was found that they negligently permitted a rod or other object to extend out from the side of the train as it backed past Haney and that Haney was killed as the direct result of such negligence, if any. The jury was further told that Illinois Central was liable if it was found that the company negligently maintained an unsafe and dangerous place for Haney to work, in that the ground was high and uneven and the light insufficient and inadequate, and that Haney was injured and killed as a direct result of the said place being unsafe and dangerous. This latter instruction as to Illinois Central did not require the jury to find that Haney was killed by something protruding from the train.

The Supreme Court, in upsetting the jury's verdict against both the Frisco trustees and the Illinois Central, admitted that "It could be inferred from the facts that Haney could have been struck by the mail hook knob *if* he were standing on the south side of the mound and the mail hook extended out as far as 12 or 14 inches." But it held that "all reasonable minds would agree that it would be mere speculation and conjecture to say that Haney was struck by the mail hook" and that "plaintiff failed to make a submissible case on that question." It also ruled that there "was no substantial evidence that the uneven ground and insufficient light were causes or contributing causes of the death of Haney." Finally, the Supreme Court held that the testimony of the foreman as to the statement made to him by the unknown switchman was inadmissible under the *res gestae* rule since the switchman spoke from what he had heard rather than from his own knowledge.

We hold, however, that there was sufficient evidence of negligence on the part of both the Frisco trustees and the Illinois Central to justify the submission of the case to the jury and to require appellate courts to abide by the verdict rendered by the jury.

The evidence we have already detailed demonstrates that there was evidence from which it might be inferred that the end of the mail hook struck Haney in the back of the head, an inference that the Supreme Court admitted could be drawn. That inference is not rendered unreasonable by the fact that Haney apparently fell forward toward the main Frisco track so that his head was 5½ feet north of the rail. He may well have been struck and then wandered in a daze to the point where he fell forward. The testimony as to blood marks some distance away from his head lends credence to that possibility, indicating that he did not fall immediately upon being hit. When that is added to the evidence most favorable to the petitioner as to the height and swing-out of the hook, the height and location of the mound and the nature of Haney's duties, the inference that Haney was killed by the hook cannot be said to be unsupported by probative facts or to be so unreasonable as to warrant taking the case from the jury.

It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and

arrive at a conclusion opposite from the one reached by the jury. See *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 67–68; *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 353–354; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 35. See also Moore, "Recent Trends in Judicial Interpretation in Railroad Cases Under the Federal Employers' Liability Act," 29 Marquette L. Rev. 73.

It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

We are unable, therefore, to sanction a reversal of the jury's verdict against Frisco's trustees. Nor can we approve any disturbance in the verdict as to Illinois Central. The evidence was uncontradicted that it was very dark at the place where Haney was working and the surrounding ground was high and uneven. The evidence also showed that this area was entirely within the domination and control of Illinois Central despite the fact that the area was technically located in a public street of the City of Memphis. It was not unreasonable to conclude that these conditions constituted an unsafe and dangerous working place and that such conditions contributed in part to Haney's death, assuming that it resulted primarily from the mail hook striking his head.

In view of the foregoing disposition of the case, it is unnecessary to decide whether the allegedly hearsay testimony was admissible under the *res gestae* rule. Rulings on the admissibility of evidence must normally be left to the sound discretion of the trial judge in actions under the Federal Employers' Liability Act. But inasmuch as there is adequate support in the record for the jury's verdict apart from the hearsay testimony, we need not determine whether that discretion was abused in this instance.

The judgment of the Supreme Court of Missouri is reversed and the case is remanded for whatever further proceedings may be necessary not inconsistent with this opinion.

Reversed.

The CHIEF JUSTICE and MR. JUSTICE FRANKFURTER concur in the result.

MR. JUSTICE REED dissents.

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

McALLISTER LIGHTERAGE LINE, INC. *v.* UNITED STATES ET AL.

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

No. 616. Argued March 5, 1946.—Decided March 25, 1946.

The conclusion of the Interstate Commerce Commission, upon an application for a certificate as a common carrier by water under the "grandfather" clause of § 309 (a) of Part III of the Interstate Commerce Act, that the interruption of bona fide operations since January 1, 1940, was not an interruption over which the applicant had no control—the applicant's restriction of its activities to exempt operations in New York harbor in wartime not being shown to have been other than voluntary—was supported by the findings and the evidence, and justified the Commission's denial of the application. P. 659.

Affirmed.

Direct appeal from a decree of a District Court of three judges dismissing a suit to set aside an order of the Interstate Commerce Commission which denied appellant's application for a certificate as a common carrier by water under the "grandfather" clause of § 309 (a) of Part III of the Interstate Commerce Act. *Affirmed,* p. 661.

Roman Beck argued the cause for appellant. With him on the brief was *Maurice A. Krisel.*

Walter J. Cummings, Jr. argued the cause for appellees. With him on the brief were *Solicitor General McGrath, Assistant Attorney General Berge, Edward Dumbauld, Daniel W. Knowlton* and *Edward M. Reidy.*

MR. JUSTICE MURPHY delivered the opinion of the Court.

The appellant applied to the Interstate Commerce Commission for a certificate as a common carrier by water under the "grandfather" clause of § 309 (a) of Part III

of the Interstate Commerce Act.[1] The authority sought was to continue a transportation service by tug and barge which appellant had performed at one time over routes along the Atlantic seaboard and certain inland waterways. The application was denied by the Commission. A specially-constituted District Court upheld the Commission's order, dismissing appellant's suit to set the order aside. The case comes to us by direct appeal from the District Court.

Under § 309 (a) appellant was entitled to a certificate without proof of public convenience or necessity if it could demonstrate that it or its predecessor in interest "was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control . . ."

The undisputed evidence submitted to the Commission revealed that appellant or its predecessors have been engaged in marine transportation since 1864 and that the business has been continuously owned by its founder or his descendants through four generations. Past activities have been extensive and varied and have included the freight services forming the subject matter of the application in issue.

Appellant conceded before the Commission, however, that from 1933 through 1939 its freight operations virtually ceased[2] and that its activities were confined pri-

[1] 49 U. S. C. § 909 (a).

[2] In 1937 machinery, airplanes, guns and parts were carried between New York harbor, Hudson River and Long Island Sound points but this service has not been repeated.

marily to operations in the New York harbor area which were of a type exempt from regulation under the Interstate Commerce Act.[3] Appellant claimed that it had bent every effort during these years to obtain freight customers and that the paucity of its operations resulted solely from the severe economic depression which prevailed during that period. It was argued that this interruption in freight service prior to January 1, 1940, was due to factors beyond appellant's control within the meaning of the proviso of § 309 (a), preventing a forfeiture of its "grandfather" rights.

Since January 1, 1940, appellant's fleet has been engaged almost exclusively within the New York harbor in the performance of lighterage and other work essential to the war effort. So great were its commitments for service within the harbor that it has been unable to accept other traffic when offered. Appellant's claim was that this diversion of its vessels to war work after January 1, 1940, was also an interruption in regular service beyond its control, further preventing a forfeiture of "grandfather" rights under § 309 (a).

Appellant thus admitted before the Commission that it was not entitled to a certificate under the "grandfather" clause unless the business depression and the war service constituted complete and involuntary interruptions in its regular freight service, thereby bringing the proviso of § 309 (a) into operation. After reviewing the evidence, the Commission made the following conclusions: "The evidence of record establishes the fact that applicant for a period of over 10 years has performed only an inconsequential amount of transportation of a kind that is now subject to the act, and that it is not holding itself out at

[3] Under § 303 (g) of the Act, transportation in interstate commerce by water solely within the limits of a single harbor is exempt from regulations under the Act, unless the Commission finds that the national transportation policy requires regulation.

the present time to perform such transportation. Obviously, the remote operations heretofore described do not establish bona fide operations on January 1, 1940, and since. Furthermore, applicant has considerable facilities available at the present time, the use of which it voluntarily has confined to exempt transportation within the limits of New York Harbor. We affirm the conclusion of the prior report that applicant has not established that it is entitled to 'grandfather' rights."

The District Court held that the Commission failed to make sufficiently definite findings that the interruption in service on or prior to January 1, 1940, either was or was not beyond the control of appellant and its predecessors. The Commission merely found the admitted fact that appellant did not perform a sufficient amount of bona fide operations on or prior to the crucial date. The District Court felt that if that finding were the sole basis of the Commission's action, there would be merit to appellant's contention that the case should be remanded to the Commission for a clarification of its findings. But this assumes that the proviso of § 309 (a) regarding interruption of service over which the applicant had no control relates to the service "on January 1, 1940," as well as to the service subsequent to that date. The Government contends, however, that the proviso refers only to the latter service and that if there is no proof of service on the "grandfather" date the applicant is not entitled to a certificate upon proof that such lack of service was due to circumstances beyond the applicant's control. Under this view the Commission's failure to make adequate findings as to interruption of service prior to January 1, 1940, becomes immaterial.

We deem it unnecessary at this time, however, to settle this problem of statutory construction, it being clear in any event that the proviso is applicable to interruptions after January 1, 1940. Failure to prove that such an interruption was beyond the applicant's control leads to a

forfeiture of "grandfather" rights. As to that issue we agree with the District Court that the Commission made adequate findings that appellant failed to show continuity of service subsequent to January 1, 1940, and that there was no recognizable excuse for the lack of service. The Commission expressly found that appellant "is not holding itself out at the present time to perform such transportation" and that it "has considerable facilities available at the present time, the use of which it voluntarily has confined to exempt transportation within the limits of New York Harbor." This clearly means that, in the Commission's view, the war emergency did not compel appellant to restrict its activities to exempt operations in the harbor area, thereby making the proviso of § 309 (a) inapplicable. That conclusion, we believe, is amply supported by the evidence and contravenes no statutory rule.

There was no evidence before the Commission that appellant's war work was other than voluntary in character. Appellant conceded the lack of any governmental order restricting its activities solely to the New York harbor area or prohibiting it from operating over the routes it now seeks to ply.[4] The major claim, without supporting

---

[4] Cf. *American-Hawaiian Steamship Company Common Carrier Application,* 250 I. C. C. 219, 222; *Bull Steamship Line Common Carrier Application,* 250 I. C. C. 317, 319; *Isthmian Steamship Company Common Carrier Application,* 250 I. C. C. 359, 362; *Southern Pacific Company Common Carrier Application,* 250 I. C. C. 457, 462; *Coast Transportation Co., Inc., Common and Contract Carrier Application,* 250 I. C. C. 469, 472; *Weyerhaeuser Steamship Co. Common Carrier Application,* 250 I. C. C. 477, 479; *American Range Lines, Inc., Contract Carrier Application,* 250 I. C. C. 510, 511; *Great Lakes Transit Corporation Applications,* 260 I. C. C. 9, 10; *Providence Steamboat Company Contract Carrier Application,* 260 I. C. C. 23, 24; *St. Johns River Line Co. Common Carrier Application,* 260 I. C. C. 74, 77; *Nicholson Transit Co. Contract Carrier Application,* 260 I. C. C. 232, 233.

evidence, was that the traffic in the New York harbor was so great during the war as to necessitate intensive utilization of every available tug, barge, lighter and scow in the movement of war cargoes. It was also alleged, without proof, that the Office of Defense Transportation beyond "the slightest doubt" would have frustrated any attempt by appellant to utilize a substantial portion of its fleet in freight service along the Atlantic coast and, if necessary, would have requested the War Shipping Administration to requisition appellant's vessels.[5] The speculative and insubstantial nature of these unsupported claims is obvious. They rest upon the questionable assumption that essential war work could be done only in the New York harbor and that there was no essential transportation service along the Atlantic coast or inland waterways in which appellant could have participated. They require one to guess what action governmental agencies would have taken under hypothetical situations. We do not imply, of course, that such claims are untrue or that, if proved, they might not adequately support appellant's position. But there is nothing in this record to substantiate the claims. Certainly an administrative order should be grounded upon something more definite and substantial than the surmises offered by appellant.

Appellant's activities had been confined to the New York harbor area since 1933, long before the outbreak of the war. In the absence of any attempt to expand the activities and in the absence of proof of any governmental restriction, it was reasonable to find that appellant voluntarily chose to continue its activities on a limited scale. Such a choice may well have been dictated by considerations of profit and convenience. That these limited ac-

[5] Appellant pointed out that the Government exerted control over all domestic shipping during the war. The Office of Defense Transportation, for example, confined barge movements along the Atlantic coast largely to the movement of coal.

tivities coincided with wartime needs does not necessarily prove that they were other than voluntary in nature. Much activity in recent years furthered the war effort although it was profitable and although it was done without compulsion by public authority.

The Commission was therefore justified in concluding that appellant's failure to engage in bona fide operations since January 1, 1940, was due to circumstances other than those over which appellant had no control. Appellant accordingly forfeited whatever "grandfather" rights it might have had.

Affirmed.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE dissent.

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

ELGIN, JOLIET & EASTERN RAILWAY CO. *v.* BURLEY ET AL.

ON REHEARING.

No. 160, October Term, 1944. Reargued December 3, 4, 1945.—Decided March 25, 1946.

1. On rehearing, the Court adheres to its previous decision in this case. *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711. P. 662.
2. As in its previous opinion, the Court expressly refrains from making any definitive statement as to what might be sufficient evidence of a collective agent's authority either to settle finally an aggrieved individual employee's claims or to represent him exclusively before the Adjustment Board. P. 663.
3. When an award of the Adjustment Board involving an employee's individual grievance is challenged in the courts, one who would upset it carries the burden of showing that it was wrong. P. 664.
4. The previous decision is not to be interpreted as meaning that an employee may stand by with knowledge or notice of what is going on with reference to his claim, either between the carrier and the union on the property, or before the Board on their submission,

allow matters to proceed to a determination by one method or the other, and then come in for the first time to assert his individual rights. P. 666.

Upon rehearing, 326 U. S. 801, of the decision of the Court at the 1944 Term in *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711. *Affirmed*, p. 667.

Paul R. Conaghan argued the cause and filed a brief for petitioner.

By special leave of Court *Robert L. Stern* argued the cause for the United States, as *amicus curiae*. With him on the brief was *Solicitor General McGrath*.

John H. Gately argued the cause and filed a brief for respondents.

Briefs were filed as *amici curiae* by *Ray T. Miller, Wayland K. Sullivan, Harold N. McLaughlin* and *W. A. Endle* for the Brotherhoods of Locomotive Engineers and Trainmen; by *Harold C. Heiss, Russell B. Day* and *V. C. Shuttleworth* for the Brotherhood of Locomotive Firemen and Enginemen et al.; and by *Lee Pressman, Eugene Cotton, Frank Donner, Willard Y. Morris, William Standard, David Scribner, Leon M. Despres, John J. Abt, Isadore Katz, M. H. Goldstein* and *Ben Meyers* for the Congress of Industrial Organizations et al., in support of petitioner.

Mr. Justice Rutledge delivered the opinion of the Court.

We adhere to our decision rendered in the opinion filed after the first argument. 325 U. S. 711.[1] That opinion

[1] The petition for rehearing, which resulted in setting the case for reargument, was supported by motions filed amicus curiae by various labor organizations and by the office of the Solicitor General. Upon granting of the motions, those organizations and the Solicitor General filed briefs amicus curiae and the latter participated in the argument. Various positions were taken upon the merits which we have considered but do not find it necessary to set forth.

expressly refrained from undertaking to make a definitive statement of what might be sufficient evidence of the collective agent's authority either to settle finally the aggrieved individual employee's claims or to represent him exclusively before the Adjustment Board. We do not attempt to do so now. For whether the collective agent has such authority is a question which may arise in many types of situations involving the grievances either of members of the union or of nonmembers, or both, and necessarily therefore no all-inclusive rule can be formulated for all such situations. But neither does this mean that an equally all-exclusive rule must be followed, namely, that authority can be given or shown only in some particular way.

The question whether the collective agent has authority, in the two pertinent respects, does not turn on technical agency rules such as apply in the simple, individualistic situation where P deals with T through A about the sale of Blackacre. We are dealing here with problems in a specialized field, with a long background of custom and practice in the railroad world. And the fact that § 3 First (i) provides that disputes between carriers and their employees arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions "shall be handled in the usual manner" up to and including the chief operating officer of the carrier, indicates that custom and usage may be as adequate a basis of authority as a more formal authorization for the union, which receives a grievance from an employee for handling, to represent him in settling it or in proceedings before the Board for its determination.[2]

[2] Furthermore, so far as union members are concerned, and they are the only persons involved as respondents in this cause, it is altogether possible for the union to secure authority in these respects within well established rules relating to unincorporated organizations and their relations with their members, by appropriate provisions in

Moreover, when an award of the Adjustment Board involving an employee's individual grievance is challenged in the courts, one who would upset it carries the burden of showing that it was wrong.[3] Its action in adjusting an individual employee's grievance at the instance of the collective bargaining agent is entitled to presumptive weight. For, in the first place, there can be no presumption either that the union submitting the dispute would undertake to usurp the aggrieved employee's right to participate in the proceedings by other representation of his own choice, or that the Board knowingly would act in disregard or violation of that right. Its duty, and the union's, are to the contrary under the Act.[4]

Furthermore, the Board is acquainted with established procedures, customs and usages in the railway labor world. It is the specialized agency selected to adjust these controversies. Its expertise is adapted not only to interpreting a collective bargaining agreement,[5] but also to ascer-

---

their by-laws, constitution or other governing regulations, as well as by usage or custom. There was nothing to the contrary in our former opinion. We only ruled that on the showing made in this respect, which included controverted issues concerning the meaning and applicability of the union's regulations, and the effects of custom and usage, we could not say as a matter of law that the disputed authority had been given.

[3] In a somewhat different connection, which however we think not without weight here, § 3 First (p) provides that the Board's award "shall be prima facie evidence of the facts therein stated" in the statutory suit provided for enforcement of awards.

[4] The contrary practice noted in our former opinion, 325 U. S. 732–733, has been due without question, we think, to the Board's erroneous conception, accepted generally also by the unions and strongly urged in this case especially upon the reargument, that the Act itself, notwithstanding the provisions particularly of § 3 First (j) and the proviso to § 2 Fourth, confers exclusive statutory power upon the collective agent to deal with the carrier concerning individual grievances and to represent the aggrieved employee in Board proceedings.

[5] We recently emphasized this in *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561, 567, in which we said: "Since all parties seek

taining the scope of the collective agent's authority beyond what the Act itself confers, in view of the extent to which this also may be affected by custom and usage.

We also pointed out that the Act imposes correlative affirmative duties upon the carrier, the collective agent and the aggrieved employee to make every reasonable effort to settle the dispute.[6] It would be entirely inconsistent for the Act to require the carrier and the union to negotiate concerning the settlement of the grievance and, while withholding power from them to make that settlement effective finally as against the employee, to relieve him altogether of obligation in the matter. Not only is he required to take affirmative steps. His failure to do so may result in loss of his rights.[7]

It is not likely that workingmen having grievances will be ignorant in many cases either of negotiations conducted between the collective agent and the carrier for their settlement or of the fact that the dispute has been submitted

---

to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood. The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress."

[6] See 325 U. S. 711 at notes 12, 18 and text. We said: "The obligation [to negotiate] is not partial. In plain terms the duty is laid on carrier and employees alike, together with their representatives; and in equally plain terms it applies to all disputes covered by the Act, whether major or minor." Note 18. Cf. *Virginian R. Co.* v. *System Federation,* 300 U. S. 515, 548; *Railroad Trainmen* v. *Toledo, P. & W. R. Co.,* 321 U. S. 50, 56 ff.

[7] Even the ordinary law of agency attributes authority to a representative to act when the principal stands by with knowledge or notice of his assumption of that authority and permits the third person to act to his injury upon the same assumption. Cf. Seavey, The Rationale of Agency (1920) 29 Yale L. J. 859, 873 *et seq.;* and other authorities cited in Mechem, Cases on the Law of Agency (3d ed.) 186, note. And of course the assumption that even so-called common law rules of agency allow no room for the play of usage and custom is, to say the least, naive.

by one or the other to the Adjustment Board for determination. Those negotiations, as the Act requires, are conducted on the property. § 2 Sixth. Ordinarily submissions are not, and the statute contemplates that they shall not be, made to the Board until after all reasonable efforts to reach an agreement have been exhausted in good faith.[8]

In view of these facts there cannot be many instances in which an aggrieved employee will not have knowledge or notice that negotiations affecting his claim are being conducted or, if they fail, that proceedings are pending before the Board to dispose of it.[9] Although under our ruling his rights to have voice in the settlement are preserved, whether by conferring with the carrier and, having seasonably done so, refusing to be bound by a settlement reached over his protest, or by having representation before the Board according to his own choice, we did not rule, and there is no basis for assuming we did, that an employee can stand by with knowledge or notice of what

---

[8] Cf. note 6 and authorities cited.

[9] We pointed out in the former opinion that § 3 First (j) expressly provides that "the several divisions of the Adjustment Board shall give due notice of all hearings *to the employee* or employees and the carrier or carriers involved in any dispute submitted to them," 325 U. S. at 731, 734, and this provision, with the emphasis we placed upon the phrase "to the employee" and the conjunction of the provision for "due notice" with the provision for representation "in person, by counsel, or by other representatives," was one of the statutory mainstays for our conclusion that the Act did not give the collective agent the exclusive powers over the settlement of grievances claimed for it.

But we did not undertake to define what was meant by "due notice," nor do we now. "Due notice" conceivably could be given or had in a variety of forms, more especially when account is taken of the generally informal procedure of the Board. It would require at the least, we think, knowledge on the aggrieved employee's part of the pendency of the proceedings or knowledge of such facts as would be sufficient to put him on notice of their pendency.

is going on with reference to his claim, either between the carrier and the union on the property, or before the Board on their submission, allow matters to be thrashed out to a conclusion by one method or the other, and then come in for the first time to assert his individual rights. No such ruling was necessary for their preservation and none was intended.

It may be, as we said previously, that respondents upon the further hearing will find it difficult to sustain their allegations, whether with reference to knowledge or notice in the material respects concerning which they have denied having it or otherwise. But whether this burden will be easy or impossible to carry, they are entitled to undertake it in the forum where such issues properly are triable.

The judgment is affirmed and the cause is remanded for further proceedings consistent with this opinion and the previous opinion filed in this cause.

MR. JUSTICE JACKSON took no part in the consideration or decision of this case on the reargument.

MR. JUSTICE FRANKFURTER, dissenting.

The CHIEF JUSTICE, MR. JUSTICE BURTON, and I are of opinion that the judgment should be reversed. Last Term a divided Court held that a determination by the Adjustment Board of a dispute brought before it by a union recognized as the collective bargaining agent on behalf of its members is not binding, and may be upset in a district court in an independent suit involving the construction of the collective agreement, but brought by an individual member on his own behalf. 325 U. S. 711. The dissent expressed the view that "to allow such settlements to be thus set aside is to obstruct the smooth working of the Act. It undermines the confidence so indispensable to adjustment by negotiation, which is the vital object of the Act." *Id.* at 755–56.

The Court now announces that it "adheres" to its decision. But as we read the Court's interpretation of its original opinion, it "adheres" to it by extracting from it almost all of its vitality. We say "almost" because the one thing that remains is the conclusion that the determination by the Adjustment Board that the recognized union represented its members is allowed to be reopened not before the Board but anew in the courts, State or federal, in an independent suit by a member of the union against the carrier. To be sure, the prospects for redetermination are largely illusory because the Court now erects a series of hurdles which will be, and we assume were intended to be, almost impossible for an employee to clear. But since litigation is authorized and hope springs eternal in a litigant's breast, the far-reaching mischief of unsettling nonlitigious modes of adjustment under the machinery of the Railway Labor Act largely remains. When peaceful settlements between carriers and the Brotherhoods are subject to such hazards, the carrier can hardly be expected to negotiate with a union whose authority is subject to constant challenge. It was this dislocation of settled habits in adjusting railroad labor relations which evoked a series of petitions for rehearing from the United States, the Brotherhoods, the Railway Labor Executives' Association, and the organizations of industrial and craft unions. All the interests primarily concerned and best informed on these matters were aroused because for them the opinion destroyed the capacity of the Railway Labor Act to fulfill its function, ignored the normal practices of the industry, and impaired the rights of collective bargaining generally. Because of this unsettling effect, not abated by the present decision's adherence to the prior by adding new complexities—complexities so inimical to healthy relations on the railroads—we deem it appropriate to add to what was said in the original dissent. 325 U. S. 711, 749.

That these mischiefs are real and potent is attested by the arguments presented by the *amici curiae*. The United States points out:

> "The result of last Term's decision has been and will be that a union's authority to settle a grievance involving a claim for accrued damages will always be subject to challenge by an individual who does not get all he wants, unless the union has previously obtained an exceedingly explicit power of attorney to act on his behalf. This means that the carriers will be likely to demand proof of such authorization from every individual involved before undertaking to negotiate a grievance case, since they might otherwise be liable to any employee dissatisfied with the settlement. As we shall see, this has been what has happened on the Adjustment Board.
>
> In many simple cases, of course, it will not be difficult for the organization to secure an authorization. In other types of cases, although many authorizations could probably be obtained, it might be impossible to obtain authority from every individual involved. And whether or not impossible, the process of securing necessary authorizations might be so prolonged as to prevent prompt disposition even of the many cases which would in the past have been speedily settled on the properties."

The Brotherhoods of Locomotive Engineers and of Railroad Trainmen thus summarize the effect of the Court's decision:

> "The impact of the Court's decision on the processes of grievance adjustment has already appeared in the suspension of the functioning of the National Railroad Adjustment Board and in indicated difficulties on various railroad properties. It is our conviction that unless this decision be reversed or substantially modified, the prompt and orderly settlement of such disputes will be impeded to a serious degree. The holding upsets long established techniques of grievance handling by employee represent-

atives and adversely affects the administration and enforcement of the collective agreements.

We point out, first, that the Court's decision construes the Railway Labor Act in a way which frustrates the purposes which Congress had in mind in providing for the settlement of grievance disputes."

"The shutting down of the Adjustment Board because of the difficulty or the impossibility of securing authorizations is only one development of the decision. We are advised that some managements are insisting that local chairmen furnish powers of attorney in day to day adjustments. Considering the various factors involved, such as the volume of the grievances, the extra burden placed on the committees, and the additional delays which would be encountered, the task of compliance with the technique required by the Court's decision seems calculated to cause a breakdown of grievance handling by employee representatives. It is obvious that handling by individuals or on an individual basis will not work. Such a breakdown, or even the impairment of collective handling as traditionally practiced, will be serious, as prior history shows."

"Second, the decision impairs the functioning of employee representatives under the Act, and has an adverse effect upon the maintenance of craft agreements. Representatives of employees have the statutory right and duty (1) to confer with management respecting *all* disputes (§ 2 Second) and specifically those arising out of grievances or out of the interpretation or application of agreements (§ 2 Sixth); and (2) to represent a craft or class for the purposes of the Act (§ 2 Fourth). The latter, of course, includes the right to negotiate craft agreements. Employees, acting through representatives, have the right to make and maintain agreements and to settle *all* disputes (§ 2 Fourth, § 1 First). These provisions, we believe, spell out collective bargaining rights with which the Court's decision interferes."

The Railway Labor Executives' Association and the American Federation of Labor make this analysis:

"In summary, therefore, we submit that the regulatory scheme of the Railway Labor Act requires for its effective operation a recognized authority in the collective bargaining representative to proceed in its own right to adjust disputes regarding the interpretation or application of agreements. A denial of that right will produce no real benefits to individual employees, will impair the effectiveness of representatives as stabilizing influences in this field, will deprive the carriers of any agency to which they may go to secure a final settlement of many vexatious labor controversies, and will bring about a general deterioration of relations between employees and management which will necessarily impair the paramount interest of the public in uninterrupted transportation.

We respectfully submit that these results already experienced or reasonably to be anticipated from the interpretation which has been given to the Railway Labor Act are inimical to the whole purpose of the statute and should not be maintained."

"The decision of the court in effect outlaws a method which has been successfully followed for a quarter of a century in the adjustment of disputes of the kind under consideration. Thousands of individual cases have been settled during this period and up to the time of the decision in this case, no one had questioned the authority of the employees' representatives to act in this connection. The existence of such authority has always been considered as an integral and essential part of the collective bargaining process as it has developed under federal regulation. We have no hesitancy in saying to the court that we believe that its decision denying the existence of such authority reduces the potency of collective bargaining as an instrumentality of peace in the railroad industry to a lower level than that prevailing in 1920. We feel that the court should be advised that since the announcement of its decision the National Railroad Adjustment Board has virtually ceased to function. . . . This brief is filed with the deep conviction that the whole process of the orderly adjustment of controver-

sies, which is the fruit of railroad labor legislation obtained after long effort on the part of all concerned, is now in serious jeopardy. The potentialities of this case were not fully recognized by us when it was originally before the court."

The Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors of America, and Switchmen's Union of North America united in this statement:

"We are compelled to conclude from this treatment of the problem that the Court proposes to apply a common-law standard, designedly suitable to the relatively simple relationship of principal and agent, as the test of the authority of a railway labor organization to handle and settle the host of grievances which must be expeditiously and effectively disposed of if the Congressional enjoinment 'to avoid any interruption to commerce or to the operation of any carrier engaged therein' is to be accomplished.

We wish to respectfully suggest to the Court that the entertainment of this proposed view could be commended as reasonable only if the problem under consideration were weighed wholly detached from the realities of its environment. If a strait-jacket of legal restrictions is not to shackle the railway labor organizations in the performance of the services expected of them by the Congress and the country at large as outlined in the Railway Labor Act, the mind of the Court must be accurately attuned to the practicalities of the problems faced by these representatives."

To these the Congress of Industrial Organizations on its own behalf and for its constituent unions[1] adds:

[1] United Steelworkers of America, United Railroad Workers of America, Amalgamated Clothing Workers of America, United Packinghouse Workers of America, Textile Workers Union of America, International Longshoremen's & Warehousemen's Union, United Office & Professional Workers of America, American Communications Association, American Newspaper Guild, Industrial Union Marine & Shipbuilding Workers of America, United Farm Equipment & Metal Workers of America, International Union of Mine, Mill & Smelter

"The Court holds that such *union settlements* are not permitted, that there must be settlement with the employees involved. It leaves open the question whether an *employee settlement* alone is sufficient or whether a *joint settlement* with employee and union is necessary (Slipsheet 20–21). It concedes that if employee settlements are permitted, then, as to most grievances at least, the union must be allowed to express its views (Slipsheet 20–21 and particularly note 35). We submit that the Act requires union settlements, with the right accorded to the employee to present grievances but not to participate in their disposition.

The disposition of grievances by employee settlements is precluded by the fact that such disposition, without consent of the union, whether of retrospective or prospective matters, introduces the very individual bargaining which Congress intended to eliminate (*supra*). That settlement of grievances is 'bargaining' was clearly recognized by the Court when it referred to the 'power to bargain concerning grievances, that is, to conclude agreements for their settlements' (Slipsheet 14). But if this 'bargaining' is to be conducted between the employer and the employee alone, it will be no more than a mockery. As the Court itself points out (Slipsheet 21, note 35), the 'carrier would be free . . . to bargain with each employee for whatever terms its economic power, pitted against his own, might induce him to accept.' "

"We earnestly urge upon the Court . . . that the collective bargaining process has always been viewed by the participants thereto as including the settlement of grievances and, more particularly, that employers and unions have always considered that they had the power to dispose of grievances on a large scale. We call to the attention of the Court the agreement

---

Workers, National Maritime Union of America, United Electrical, Radio & Machine Workers of America, United Automobile, Aircraft, Agricultural Implement Workers of America, Transport Workers Union of America, United Furniture Workers of America, United Transport Service Employees of America, State, County & Municipal Workers of America, Fur & Leather Workers Union.

involved in this very case, referred to by the Court in its opinion (Slipsheet 4, note 5), by which the union and the railroad tried to settle all similar claims then existing. We cannot overestimate the serious consequences of making such agreements ineffective. They are commonly made wherever collective bargaining is established. It will be extremely disturbing to employers and employees alike when employers discover that there is no way, short of settlement with each employee, whereby pending disputes and the possibility of future legal action can be eliminated."

Seldom if ever have the claims of policy been so marshalled on a single side of an issue requiring the interpretation of a statute which, at best, is sufficiently ambiguous to permit these considerations of policy to carry the day. The danger in "adhering" to the original decision is only too clear; it can hardly be lessened by an explanation that extracts meaning from the first opinion.

The results of the opinion of last Term, actual and potential, threatened not only the efficacy of the Railway Labor Act, but generally undermined the basis for all collective bargaining in regard to grievances. It is fair to say that the decision created havoc in the railroad world, for a proper adjustment of industrial relations on the railroads, as the whole course of railroad history shows, is absolutely dependent on appropriate machinery and process of adjustment. The machinery set in motion by the Act was stopped by the opinion. Immediately after the Court's decision of last Term, the two divisions of the Adjustment Board dealing with 94% of the cases under normal circumstances completely shut down. And when they were reopened, they functioned at only a fraction of their normal activity. These Boards are not operating in a vacuum. Their function is to settle by peaceful means employee-employer disputes that would otherwise be settled by a show of power on each side. The Brotherhoods point to the dangers cumulating in the unadjusted grievances. The Railway Labor Act becomes as ineffective as

it was prior to the 1934 amendments; and such a result might well have been anticipated from the destruction of a system that had become customary.

The Court says that it adheres to its previous opinion. Last Term it found that it could not say that the respondents had authorized the union to settle their grievances, and remanded the case for judicial redetermination of the Board's decision. Whatever requirements the Court meant to indicate as sufficient to establish authorization from members of the union to the union, the opinion surely conveyed doubt whether the respondents had given authority in a "legally sufficient" way, and encouraged the respondents' claim that they had not authorized their collective agent to settle their grievances. The Court now says that on the record it may be difficult for respondents to prove that they did not authorize the union to represent them. The difficulty becomes apparent as the Court's opinion proceeds. It disclaims that common law agency tests of authority are to be determinative, substitutes "custom and usage," and puts the burden of persuasion on the respondents, having against them the weight of the Board's "expertise," the presumption of regularity, and their own failure to disavow the proceedings before the Board. The hypothetical factors which the Court intimates would defeat respondents' right to sustain this suit are the normal factors in these disputes and are revealed by the record in this case. The way in which these grievances were handled was "the usual manner"; the Adjustment Board exercising its expertness did determine that the union had authority to represent respondents; the respondents did stand by doing nothing while their claims were presented to the Board and determined by it. If the custom of the railroad industry rather than the conventional law of agency is to govern, clearly the expert, centralized Board is the appropriate tribunal for ascertaining whether the authorized bargaining agency

is authorized to represent the grievances of its members before the Board, and not the multitudinous courts throughout the country with their varying understanding and varying judgments. The gloss which the Court now puts on its previous opinion in effect recognizes that this is so by the extent to which it hobbles the right to secure the revision of the Board's determination which it abstractly bestows. Thereby it undermines any justification for the notion that Congress intended to open the courts for a redetermination of the issue of authorization. When Congress was so miserly in granting any jurisdiction to the courts under the Act, it would be surprising if it had authorized review in a field where, as the Court's new opinion makes clear, there was likely to be so little dispute. Yet it is suggested that respondents are entitled to a judicial hearing to determine among other things whether they received individual notice of the proceedings before the Board. But the whole course and current of the railway trade union relationships imply that the interest of the individual member as to issues arising under the collective agreement is entrusted to his chosen representative. To require notice to the particular individuals affected by the specific controversies is to disregard the presupposition of the relationship between union members and their officials and the actualities of practice upon which the Railway Labor Act was based.

If the context of history into which the Railway Labor Act must be placed for a proper interpretation reveals that Congress was bent on creating a system complete in itself for securing peaceful industrial relations in the railroad world, this Court should not import into that system traditional assumptions and rules derived from a scheme of judicially enforceable rights. The new system was devised precisely for the purpose of replacing the ordinary judicial processes in resolving railway labor controversies, except in the very limited instances where Congress specifically retained judicial participation. The whole statute

reveals the restricted opportunities for resort to the courts which Congressional policy deemed it appropriate to reserve, even though such restrictions were not formulated with exquisite or explicit precision. By §§ 3 First (p) and 9, 44 Stat. 577, 578, 585, 48 Stat. 1189, 45 U. S. C. §§ 153 and 159, Congress gave courts jurisdiction, thus showing that the subject of judicial remedies was present in the mind of Congress and indicating the strictly defined limits within which they were available. In short, the policy of the legislation, derived from a long and painful experience, is to keep labor controversies on the railroads out of the courts except in the few specifically defined situations where Congress has put them into the courts. Congress has made a departure in the Railway Labor Act from the normal availability of judicial remedies, and we ought not to read the new law through the spectacles of the old remedies.

A court which has held that under the Railway Labor Act a Board's interpretation of its authority given by a provision of the Act is final and not subject to judicial review denies that another Board under the Act may determine finally whether those who submit controversies on behalf of their members have authority to make such submission so that the Board may settle such disputes, although the determination of the controversy itself is not reviewable unless it involves a money award. See *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297. Railway Labor Act, § 9 Third, 44 Stat. 577, 585, 45 U. S. C. § 159. The answer to such a mutilating construction of the Railway Labor Act was given by this Court in *General Committee of Adjustment* v. *Missouri-Kansas-Texas R. Co.,* 320 U. S. 323, 333: "The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate."

BELL ET AL. *v.* HOOD ET AL.

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

No. 344. Argued January 29, 1946.—Decided April 1, 1946.

1. Where the complaint seeks recovery squarely on the ground of violation of plaintiffs' rights under the Fourth and Fifth Amendments, a federal district court has jurisdiction of a suit against agents of the Federal Government to recover damages in excess of $3,000 alleged to have been suffered by the plaintiffs as a result of such violations—even though neither the Constitution nor the Congress has provided for the recovery of money damages for such violations and the complaint is so framed as possibly to state a common law action in tort or trespass. Pp. 680–685.
2. Where a complaint in a federal court is so drawn as to seek recovery directly under the Constitution or laws of the United States, the court must entertain the suit, except: (a) where the alleged claim appears to be immaterial and made solely for the purpose of obtaining jurisdiction, or (b) where it is wholly insubstantial and frivolous. P. 682.
3. Whether the complaint states a cause of action on which relief could be granted is a question of law which must be decided after, and not before, the court assumes jurisdiction. P. 682.
4. The issue whether federal courts can grant money recovery for damages alleged to have been suffered as a result of federal agents violating the Fourth and Fifth Amendments has sufficient merit to warrant exercise of federal jurisdiction for purposes of adjudicating it. P. 684.

150 F. 2d 96, reversed.

Petitioners brought suit in a federal district court against agents of the Federal Bureau of Investigation to recover damages in excess of $3,000 alleged to have been sustained as a result of violations of their rights under the Fourth and Fifth Amendments. The District Court dismissed the suit for want of federal jurisdiction. The Circuit Court of Appeals affirmed. 150 F. 2d 96. This Court granted certiorari. 326 U. S. 706. *Reversed,* p. 685.

A. L. Wirin and *Russell E. Parsons* argued the cause and filed a brief for petitioners.

Frederick Bernays Wiener argued the cause for respondents. With him on the brief were *Solicitor General McGrath, Assistant Attorney General Sonnett, David L. Kreeger* and *Abraham J. Harris.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioners brought this suit in a federal district court to recover damages in excess of $3,000 from the respondents who are agents of the Federal Bureau of Investigation. The complaint alleges that the court's jurisdiction is founded upon federal questions arising under the Fourth and Fifth Amendments. It is alleged that the damages were suffered as a result of the respondents imprisoning the petitioners in violation of their constitutional right to be free from deprivation of their liberty without due process of law, and subjecting their premises to search and their possessions to seizure, in violation of their constitutional right to be free from unreasonable searches and seizures.[1]

[1] The complaint stated in part:

"That on or about the 17th day of December, 1942, defendant R. B. Hood and each of the other defendants, unlawfully conspired with each other to act beyond their authority as said Federal Bureau of Investigation agents and police officer respectively, and agreed that they would abridge the Constitutional rights of the plaintiffs as guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States to be free from the deprivation of liberty and property without due process of law, and to be free from unreasonable searches and seizures, and agreed unlawfully to simultaneously, in the early morning of December 18th, 1942, search the homes of the individual plaintiffs herein without any warrants of search or seizure, and unlawfully to seize the papers, documents and effects of said plaintiffs and of 'Mankind United,' and falsely to imprison the individual plaintiffs by unlawfully arresting some of the individual plaintiffs without a warrant of arrest and unreasonably to delay the taking of all of the individual plaintiffs before a committing officer, in order to effectuate the unlawful searches and seizures aforesaid.

"That thereafter, and on the 18th day of December, 1942, . . . the defendants and each of them, in order to carry out the terms and

Respondents moved to dismiss the complaint for failure to state a cause of action for which relief could be granted and for summary judgment on the grounds that the federal agents acted within the scope of their authority as officers of the United States and that the searches and seizures were incidental to lawful arrests and were therefore valid. Respondents filed affidavits in support of their motions and petitioners filed counter-affidavits. After hearing the motions the district judge did not pass on them but, on his own motion, dismissed the suit for want of federal jurisdiction on the ground that this action was not one that ". . . arises under the Constitution or laws of the United States . . ." as required by 28 U. S. C. § 41 (1). The Circuit Court of Appeals affirmed on the same ground. 150 F. 2d 96. At the same time it denied a motion made by petitioners asking it to direct the District Court to give petitioners leave to amend their complaint in order to make it still more clearly appear that the action was directly grounded on violations of rights alleged to stem from the Fourth and Fifth Amendments. We granted certiorari because of the importance of the jurisdictional issue involved.

Respondents make the following argument in support of the District Court's dismissal of the complaint for want of federal jurisdiction. First, they urge that the complaint states a cause of action for the common law tort of trespass made actionable by state law and that it therefore does not raise questions arising "under the Constitution

---

conditions of the illegal conspiracy aforesaid, and solely for the purpose of carrying out said terms and conditions, did arrest and imprison the individual plaintiffs herein, and did search the homes of said plaintiffs, and seize and carry away books, papers and effects of said individual plaintiffs and of said 'Mankind United.'"

. . . . . .

". . . by reason of the deprivation of . . . [their] Constitutional rights . . . [plaintiffs had] suffered damages."

or laws of the United States." Second, to support this contention, respondents maintain that petitioners could not recover under the Constitution or laws of the United States, since the Constitution does not expressly provide for recovery in money damages for violations of the Fourth and Fifth Amendments and Congress has not enacted a statute that does so provide. A mere reading of the complaint refutes the first contention and, as will be seen, the second one is not decisive on the question of jurisdiction of the federal court.

Whether or not the complaint as drafted states a common law action in trespass made actionable by state law, it is clear from the way it was drawn that petitioners seek recovery squarely on the ground that respondents violated the Fourth and Fifth Amendments. It charges that the respondents conspired to do acts prohibited by these amendments and alleges that respondents' conduct pursuant to the conspiracy resulted in damages in excess of $3,000. It cannot be doubted therefore that it was the pleaders' purpose to make violation of these constitutional provisions the basis of this suit. Before deciding that there is no jurisdiction, the District Court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. For to that extent "the party who brings a suit is master to decide what law he will rely upon and . . . does determine whether he will bring a 'suit arising under' the . . . [Constitution or laws] of the United States by his declaration or bill." *The Fair* v. *Kohler Die Co.*, 228 U. S. 22, 25. Though the mere failure to set out the federal or constitutional claims as specifically as petitioners have done would not always be conclusive against the party bringing the suit, where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must

entertain the suit. Thus allegations far less specific than the ones in the complaint before us have been held adequate to show that the matter in controversy arose under the Constitution of the United States. *Wiley* v. *Sinkler,* 179 U. S. 58, 64–65; *Swafford* v. *Templeton,* 185 U. S. 487, 491–492. The reason for this is that the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy.

Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. *Swafford* v. *Templeton,* 185 U. S. 487, 493, 494; *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 305–308.[2] The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial

[2] For other cases discussing the distinction between questions going to the merits and those going to the jurisdiction, see the following: *Illinois Central R. Co.* v. *Adams,* 180 U. S. 28; *Geneva Furniture Co.* v. *Karpen,* 238 U. S. 254; and see *Nashville, C. & St. L. R. Co.* v. *Taylor,* 86 F. 168.

and frivolous. The accuracy of calling these dismissals jurisdictional has been questioned. *The Fair* v. *Kohler Die Co., supra,* 228 U. S. at 25. But cf. *Swafford* v. *Templeton, supra.*

But as we have already pointed out the alleged violations of the Constitution here are not immaterial but form rather the sole basis of the relief sought. Nor can we say that the cause of action alleged is so patently without merit as to justify, even under the qualifications noted, the court's dismissal for want of jurisdiction. The Circuit Court of Appeals correctly stated that "the complaint states strong cases, and if the allegations have any foundation in truth, the plaintiffs' legal rights have been ruthlessly violated." Petitioners' complaint asserts that the Fourth and Fifth Amendments guarantee their rights to be free from unauthorized and unjustified imprisonment and from unreasonable searches and seizures. They claim that respondents' invasion of these rights caused the damages for which they seek to recover and point further to 28 U. S. C. § 41 (1) which authorizes the federal district courts to try "suits of a civil nature" where the matter in controversy "arises under the Constitution or laws of the United States," whether these are suits in "equity" or at "law." Petitioners argue that this statute authorizes the Court to entertain this action at law and to grant recovery for the damages allegedly sustained. Respondents contend that the constitutional provisions here involved are prohibitions against the Federal Government as a government and that 28 U. S. C. § 41 (1) does not authorize recovery in money damages in suits against unauthorized officials who according to respondents are in the same position as individual trespassers.

Respondents' contention does not show that petitioners' cause is insubstantial or frivolous, and the complaint does in fact raise serious questions, both of law and fact, which the District Court can decide only after it has assumed

jurisdiction over the controversy. The issue of law is whether federal courts can grant money recovery for damages said to have been suffered as a result of federal officers violating the Fourth and Fifth Amendments. That question has never been specifically decided by this Court. That the issue thus raised has sufficient merit to warrant exercise of federal jurisdiction for purposes of adjudicating it can be seen from the cases where this Court has sustained the jurisdiction of the district courts in suits brought to recover damages for depriving a citizen of the right to vote in violation of the Constitution.[3] And it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution [4] and to restrain individual state officers from doing what the 14th Amendment forbids the State to do.[5] Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.[6] And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.[7] Whether the peti-

---

[3] *Wiley* v. *Sinkler, supra; Swafford* v. *Templeton, supra.* See also *Brickhouse* v. *Brooks,* 165 F. 534, 543, in which a similar suit was held to be within the jurisdiction of the federal court.

[4] *Philadelphia Co.* v. *Stimson,* 223 U. S. 605; *Hays* v. *Seattle,* 251 U. S. 233; *Pennoyer* v. *McConnaughy,* 140 U. S. 1; *City Railway Co.* v. *Citizens' Railroad Co.,* 166 U. S. 557; *City of Mitchell* v. *Dakota Telephone Co.,* 246 U. S. 396, 407.

[5] *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226; see also *Ex parte Virginia,* 100 U. S. 339, 346, 347.

[6] *Marbury* v. *Madison,* 1 Cranch 137, 162, 163; *Texas & N. O. R. Co.* v. *Brotherhood of Clerks,* 281 U. S. 548, 569, 570.

[7] See e. g. *Dooley* v. *United States,* 182 U. S. 222, and cases cited and discussed at 228–230; *Board of Comm'rs* v. *United States,* 308 U. S. 343, 349–350.

tioners are entitled to recover depends upon an interpretation of 28 U. S. C. § 41 (1) and on a determination of the scope of the Fourth and Fifth Amendments' protection from unreasonable searches and deprivations of liberty without due process of law. Thus, the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the District Court has jurisdiction. *Gully* v. *First National Bank,* 299 U. S. 109, 112–113; *Smith* v. *Kansas City Title Co.,* 255 U. S. 180, 199–200.

Reversed.

MR. JUSTICE REED joins in the opinion and the result. He desires to add to the cases cited in note 7, *Barron* v. *Baltimore,* 7 Pet. 243, and *Burdeau* v. *McDowell,* 256 U. S. 465, 475.

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

MR. CHIEF JUSTICE STONE and MR. JUSTICE BURTON dissenting.

The district court is without jurisdiction as a federal court unless the complaint states a cause of action arising under the Constitution or laws of the United States. Whether the complaint states such a cause of action is for the court, not the pleader, to say. When the provision of the Constitution or federal statute affords a remedy which may in some circumstances be availed of by a plaintiff, the fact that his pleading does not bring him within that class as one entitled to the remedy, goes to the sufficiency of the pleading and not to the jurisdiction. *The Fair* v. *Kohler Die Co.,* 228 U. S. 22, 25; *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 306–308, and cases cited. But where, as here, neither the constitutional provision nor

any act of Congress affords a remedy to any person, the mere assertion by a plaintiff that he is entitled to such a remedy cannot be said to satisfy jurisdictional requirements. Hence we think that the courts below rightly decided that the district court was without jurisdiction because no cause of action under the Constitution or laws of the United States was stated.

The only effect of holding, as the Court does, that jurisdiction is conferred by the pleader's unfounded assertion that he is one who can have a remedy for damages arising under the Fourth and Fifth Amendments is to transfer to the federal court the trial of the allegations of trespass to person and property, which is a cause of action arising wholly under state law. For even though it be decided that petitioners have no right to damages under the Constitution, the district court will be required to pass upon the question whether the facts stated by petitioners give rise to a cause of action for trespass under state law. See *Hurn* v. *Oursler*, 289 U. S. 238.

NORTH AMERICAN COMPANY *v.* SECURITIES & EXCHANGE COMMISSION.

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

No. 1. Argued November 15, 1945.—Decided April 1, 1946.

1. The enactment of § 11 (b) (1) of the Public Utility Holding Company Act of 1935, authorizing the Securities and Exchange Commission to require each public utility holding company engaged in interstate commerce to limit its operations to a single integrated public utility system, was within the power of Congress under the commerce clause of the Constitution. Pp. 700–707.

(a) While the ownership of securities, considered separately and abstractly, may not be commerce, the ownership of securities of operating companies has a real and intimate relation to the interstate activities of public utility holding companies and cannot be

effectively divorced therefrom; such ownership is the generating force of the constant interstate flow of reports, letters, equipment, securities, accounts, instructions and money which constitute the life blood of holding companies and allow abuses to be effectuated. P. 702.

(b) Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce, in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral or economic nature. P. 705.

(c) The fact that an evil may involve a corporation's financial practices, its business structure or its security portfolio does not detract from the power of Congress under the commerce clause to promulgate rules in order to destroy that evil—once it is established that the evil concerns or affects commerce in more States than one. P. 706.

(d) Congress having found that economic evils resulting from unintegrated public utility holding company systems were polluting the channels of interstate commerce and took the form of transactions occurring in and concerning more States than one, it had power under the commerce clause to attempt to remove those evils by ordering the holding companies to divest themselves of the securities that made such evils possible. P. 706.

2. An order of the Securities and Exchange Commission requiring a public utility holding company to divest itself of its scattered subsidiaries and to confine its operations to a single integrated public utility system, pursuant to § 11 (b) (1) of the Public Utility Holding Company Act of 1935, does not take property without just compensation in violation of the due process clause of the Fifth Amendment. Pp. 707–710.

(a) Congress having determined that the economic advantages of a holding company at the top of an unintegrated public utility system are not commensurate with the resulting economic disadvantages, the fact that valuable interests may be affected does not, by itself, render that determination invalid under the due process clause. P. 708.

(b) Since the Act does not contemplate or require the dumping or forced liquidation of securities on the market for cash, but requires any divestment or reorganization plan to be fair and equitable and to be carefully scrutinized by both the Commission and the enforcing court—thus enabling the assertion and protection of all shareholders' rights—it cannot be said, in the absence of any alleged unfair plan of divestment, that the shareholders are adversely affected from a constitutional standpoint by the operation of § 11 (b) (1). P. 709.

3. Congress having decided, within the scope of its constitutional power and discretion, that it is necessary to reorganize existing public utility holding company systems, this Court cannot question the appropriateness or propriety of its decision, even though other sections of the Act provide for the regulation of future transactions of the kinds that were found to give birth to many of the evils about which Congress was concerned. P. 710.
4. Even though a particular holding company may not have engaged in any of the evils enumerated in § 1 (b) of the Public Utility Holding Company Act of 1935, this does not make the application of § 11 (b) (1) to it unconstitutional, since the power of Congress to legislate generally in order to prevent potential injury to the national economy from becoming a reality is not limited by proof of the existence of evils in each particular situation. P. 710.
5. In the light of the facts stated in the opinion and particularly petitioner's extensive holdings of the securities of its subsidiaries and the penetration of local managements with men selected by or historically related to petitioner, the Commission was justified in treating petitioner not as engaged solely in the business of acquiring and holding stocks and other securities of its subsidiaries for investment but as a "holding company" possessing domination over its subsidiaries or the power to dominate them when and if necessary, even though petitioner's active intervention in the affairs of its subsidiaries has been of a limited character and operational policies have been left entirely to local management. Pp. 692, 693.
6. Petitioner clearly is engaged in interstate commerce, since it is the nucleus of an empire of corporations covering 17 States and the District of Columbia, its influence and domination permeate the entire system, the mails and instrumentalities of interstate commerce are vital to the functioning of this system, and several of its subsidiaries admittedly are engaged in interstate commerce. P. 694.
7. The power of the Commission to deny exemption under § 3 (a) (1) to a predominantly local holding company does not mean that a holding company having no relation whatever to interstate commerce may be subjected to § 11 (b) (1) or to any other provisions of the Act. P. 699.

133 F. 2d 148, affirmed.

After appropriate administrative proceedings under § 11 (b) (1) of the Public Utility Holding Company Act of 1935, the Securities and Exchange Commission entered

orders limiting petitioner's properties to those which, in the judgment of the Commission, complied with the standards of that section and requiring it to sever relationship with all of its other properties. 11 S. E. C. 194; 11 S. E. C. 715. On petition for review, the Circuit Court of Appeals sustained the Commission's order. 133 F. 2d 148. This Court granted certiorari. 318 U. S. 750. See also 320 U. S. 708. *Affirmed,* p. 711.

Charles E. Hughes, Jr. argued the cause and filed a brief for petitioner.

Solicitor General McGrath and *Paul A. Freund* argued the cause for respondent. With *Mr. Freund* on the brief were *Solicitor General Fahy, John F. Davis, Milton V. Freeman, Roger S. Foster* and *David K. Kadane.*

Arthur A. Ballantine, John F. MacLane, Wilkie Bushby and *Joseph Schreiber* filed a brief, as *amici curiae,* in support of petitioner.

Mr. Justice Murphy delivered the opinion of the Court.

Congress enacted the Public Utility Holding Company Act of 1935, 49 Stat. 803, in order to correct grave abuses which it had found in the use of the holding company device in the nation's electric and gas utility industries. This Court in *Electric Bond & Share Co.* v. *Securities & Exchange Commission,* 303 U. S. 419, held constitutional the various provisions of the Act relating to the registration of holding companies as therein defined. In this case we are called upon to determine the constitutionality of § 11 (b) (1) of the Act, authorizing the Securities and Exchange Commission to act to bring about the geographic and economic integration of holding company systems. Specifically, we must decide whether this requirement falls within the power of Congress to regulate commerce among

the several states and whether it violates the due process clause of the Fifth Amendment.

The North American Company, the petitioner, is a holding company within the meaning of the Act, § 2 (a) (7), and is registered as such with the Securities and Exchange Commission.[1] The Commission instituted appropriate administrative proceedings against North American under § 11 (b) (1), the provisions of which apply to registered holding companies. As a result, the Commission entered orders limiting North American's properties to those which, in the Commission's judgment, complied with the standards of § 11 (b) (1) and compelling it to sever relationships with all its other properties.[2] The court below, after affirming the orders of the Commission on a statutory level, rejected North American's constitutional objections. 133 F. 2d 148. Only these constitutional issues are now before us.

As was the situation in the *Electric Bond & Share Co.* case, North American is clearly engaged in activities which bring it within the ambit of congressional authority. North American is a typical utility holding company. It is the pinnacle of a great pyramid of corporations, the majority of which operate electric and gas utility properties. These properties are scattered throughout the United States, many of them serving large cities and contiguous territories.[3] Electric energy is transmitted across state lines by numerous companies in the pyramid or

---

[1] North American registered with the Commission on February 25, 1937, reserving its right to challenge the constitutionality of § 11 (b) (1) and other portions of the Act. See *Landis* v. *North American Co.*, 299 U. S. 248, 251–252; *Electric Bond & Share Co.* v. *Securities & Exchange Commission*, 303 U. S. 419, 435.

[2] Holding Company Act Releases Nos. 3405 and 3629. [See 11 S. E. C. 194; 11 S. E. C. 715.]

[3] Federal Trade Commission Report to the Senate, "Utility Corporations," Sen. Doc. 92, Part 72–A, 70th Cong., 1st Sess., pp. 107–110, 706–716.

system.[4] As of December 31, 1940, there were some eighty corporations in the system, with an aggregate capitalized value in excess of $2,300,000,000. Organized in New Jersey in 1890 and maintaining business headquarters in New York City, North American maintains direct or indirect interests in these corporations through the medium of stock ownership. It is that medium that binds the system together.

North American owns stock directly in ten of the corporations, holding 79% or more of the common stock of eight of them and 17.71% and 19.2%, respectively, of the voting securities of the other two. Three of these direct subsidiaries are registered holding companies: (1) Union Electric Company of Missouri, operating in and around St. Louis, Mo., and with subsidiaries operating in Illinois and Iowa as well; (2) Washington Railway and Electric Company, with subsidiaries operating in the District of Columbia and adjacent territory in Virginia and Maryland; and (3) North American Light & Power Company, operating extensive systems in Kansas, Missouri, Illinois and Iowa in addition to being the parent of several registered holding companies.

Four of the direct subsidiaries of North American are operating companies: (1) Cleveland Electric Illuminating Company, serving Cleveland, Ohio, and surrounding territory; (2) Pacific Gas & Electric Company, serving large areas in California; (3) The Detroit Edison Company, serving Detroit and vicinity; and (4) Wisconsin Electric Power Company, a holding company with subsidiaries operating an integrated electric utility system in Wisconsin and Michigan.

---

[4] In 1929 and 1930, companies in the North American system transmitted 9.3% and 7.7%, respectively, of the total amount of electric energy transmitted across state boundaries in the United States. Federal Trade Commission Report, *supra*, note 3, p. 43, Table 13.

The other three direct subsidiaries are (1) North American Utilities Securities Corporation, an investment trust; (2) West Kentucky Coal Company, which owns and operates a coal mine in Kentucky and sells coal in interstate commerce; and (3) 60 Broadway Building Corporation, which owns the office building in New York City where petitioner has its offices.

The various companies in the North American system perform a variety of functions from electric and gas service to railroad transportation, warehousing and amusement park operations. All told, they conduct business in seventeen states and the District of Columbia. Electric service alone is provided for more than 3,000,000 customers in an area of roughly 165,000 square miles.

North American claims that its sole and continuous business has been that of acquiring and holding for investment purposes stocks and other securities of the subsidiaries, its relationship being essentially that of "a large investor seeking to promote the sound development of his investment." Active intervention on North American's part in the activities of these companies, it is true, has been of a limited character. Operations and operational policies, the Commission found, have been left entirely to the local managements. Nor has North American sold these subsidiaries any supplies or engineering service. This lack of active intervention, however, is indecisive. It appears to have resulted in large part from North American's satisfaction with the local managements of the subsidiaries and from the fact that the local managements have often included men selected by or historically related to North American. See *Detroit Edison Co.* v. *Securities & Exchange Commission,* 119 F. 2d 730, 734–735; *Pacific Gas & Electric Co.* v. *Securities & Exchange Commission,* 127 F. 2d 378, 383–384. The Commission was thus warranted in considering the harmonization of local policies with those of North American as a fact, the

absence of conflicts making affirmative action by North American unnecessary. But it does not follow that North American's domination of its system was any less real or effective. Historical ties and associations, combined with strategic holdings of stock, can on occasion serve as a potent substitute for the more obvious modes of control. See *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483, 491–492; *Natural Gas Co.* v. *Slattery,* 302 U. S. 300, 307–308. Domination may spring as readily from subtle or unexercised power as from arbitrary imposition of command. To conclude otherwise is to ignore the realities of intercorporate relationships. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 145–146. In light of the extensiveness of North American's holdings of the securities of its subsidiaries and the penetration of local managements with men of North American background, the Commission was justified in treating North American as possessing domination over its subsidiaries or the power to dominate them when and if necessary.[5]

But North American in some respects has actually intervened in the activities of its subsidiaries. It has affirmatively participated in and dominated their financing operations.[6] So completely has it taken over the planning and handling of the various flotations of securities that North American urged before the Commission, though in vain, that the subsidiaries were incompetent to handle

[5] As to only two of the subsidiaries, the Detroit Edison Company and the Pacific Gas & Electric Company, has a claim been raised that they were not controlled by or subject to a controlling influence of North American. The Commission rejected both claims after hearings and its determinations were sustained upon appeal. *Detroit Edison Co.* v. *Securities & Exchange Commission,* 119 F. 2d 730, cert. denied, 314 U. S. 618; *Pacific Gas & Electric Co.* v. *Securities & Exchange Commission,* 127 F. 2d 378, affirmed on rehearing by equally divided court, 139 F. 2d 298, affirmed by equally divided Court, 324 U. S. 826.

[6] See Federal Trade Commission Report, *supra,* note 3, p. 347.

such matters and that it would be highly uneconomical for them to attempt to do so. As the Commission noted, the ability to dominate this financing and to control the flow, through underwriting channels, of millions of dollars of securities has been of great value and benefit to North American, in addition to being of aid to the subsidiaries. North American has also provided the subsidiaries with advisory and consultative facilities in relation to management problems; and intercompany committees have been created to serve as clearing houses for technical and accounting information.

The interstate character of North American and its subsidiaries is readily apparent from the Commission's survey of their activities. North American is more than a mere investor in its subsidiaries. See *Northern Securities Co.* v. *United States,* 193 U. S. 197, 353–354. It is the nucleus of a far-flung empire of corporations extending from New York to California and covering seventeen states and the District of Columbia. Its influence and domination permeate the entire system and frequently evidence themselves in affirmative ways. The mails and the instrumentalities of interstate commerce are vital to the functioning of this system. They have more than a casual or incidental relationship. Cf. *Ware & Leland* v. *Mobile County,* 209 U. S. 405; *Blumenstock Bros.* v. *Curtis Pub. Co.,* 252 U. S. 436; *Federal Baseball Club* v. *National League,* 259 U. S. 200. Without them, North American would be unable to float the various security issues of its own or of its subsidiaries, thereby selling securities to residents of every state in the nation. Without them, North American would be unable to exercise and maintain the influence arising from its large stock holdings, receiving notices and reports, sending proxies to stockholders' meetings, collecting dividends and interest, and transmitting whatever instructions and advice may be necessary. Nor could North American maintain its

other relationships and contacts with its own subsidiaries without the use of the mails and facilities of interstate commerce. Such interstate commercial transactions involve the very essence of North American's business. See *International Textbook Co.* v. *Pigg,* 217 U. S. 91. They enable it "to promote the sound development" of its investments from its headquarters in New York City. In short, they are commerce which concerns more states than one. *Gibbons* v. *Ogden,* 9 Wheat. 1, 194; *Second Employers' Liability Cases,* 223 U. S. 1, 46; *Minnesota Rate Cases,* 230 U. S. 352, 398. As stated by this Court in *Associated Press* v. *Labor Board,* 301 U. S. 103, 128, "Interstate communication of a business nature, whatever the means of such communication, is interstate commerce regulable by Congress under the Constitution."

Moreover, North American concedes that four of its direct utility subsidiaries, Union Electric Company of Missouri, Washington Railway and Electric Company, North American Light & Power Company and Wisconsin Electric Power Company, transmit energy across state lines and hence are engaged in interstate commerce. It further concedes that its subsidiary West Kentucky Coal Company is engaged in interstate commerce, although contending that the remaining five direct subsidiaries are not so engaged. In view of North American's very substantial stock interest and its domination as to the affairs of its subsidiaries, as well as its latent power to exercise even more affirmative influence, it cannot hide behind the façade of a mere investor. Their acts are its acts in the sense that what is interstate as to them is interstate as to North American. These subsidiaries thus accentuate and add materially to the interstate character of North American. *Electric Bond & Share Co.* v. *Securities & Exchange Commission, supra,* 440. They make even more inescapable the conclusion that North American bears not only a "highly important relation to interstate commerce

and the national economy," *id.*, p. 441, but is actually engaged in interstate commerce. It is thus subject to appropriate regulatory measures adopted by Congress under its commerce power.

Turning to § 11 (b) (1) [7] and its constitutional impact upon North American, we find that it directs the Commission to apply its provisions to holding companies engaged in interstate commerce. In essence, it confines the operations of each holding company system to a single inte-

---

[7] "Sec. 11. (a) . . .

"(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

"(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

"(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

"(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

"(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems."

grated public utility system with provision for the retention of additional systems only if they are relatively small, located close to the single system and unable to operate economically under separate management without the loss of substantial economies; in addition, other holdings may be retained only if their retention is related to the operations of the retained utility properties.

These requirements of § 11 (b) (1) apply only to registered holding companies. A holding company, by statutory definition, is a company that controls or possesses a controlling influence over an electric or gas utility company. § 2 (a) (7). A holding of 10% or more of the outstanding voting securities of such a utility company is presumed to be sufficient to constitute such a relationship, but this presumption may be rebutted by proof before the Commission of a lack of control or controlling influence. Accordingly, a company that is a mere investor in utility securities and that does not control or possess a controlling influence over the utility companies need not comply with § 11 (b) (1).

A holding company as so defined must register and hence must obey the commands of § 11 (b) (1) if it uses the mails or the instrumentalities of interstate commerce directly or through its subsidiaries in the operation of its business.[8] Thus a holding company may sell, transport or distribute gas or electric energy in interstate commerce. § 4 (a) (1). It may use the mails or interstate commerce to negotiate or perform service, sales or construction con-

[8] Section 4 (b) compels holding companies to register if they have outstanding any security which has been distributed by the use of the mails or commerce, or offered for sale by like means, subsequent to January 1, 1925, and if that security is held on October 1, 1935, by any person not a resident of the state in which the holding company is organized. We need not here consider the force of this section, however, since North American and other interstate holding companies are forced to register by reason of the provisions of § 4 (a).

tracts with other companies in the system. § 4 (a) (2). It may use the mails or interstate commerce to distribute or make public offerings for the sale or exchange of securities of its own or of other system companies. § 4 (a) (3). It may use the mails or interstate commerce to acquire securities or utility assets of other companies. § 4 (a) (4). It may engage in a business in interstate commerce. § 4 (a) (5). Or it may own or control securities of subsidiaries that do any of the foregoing acts. § 4 (a) (6). Moreover, § 2 (a) (28) defines "interstate commerce," as used in these and other provisions of the Act, to mean "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof."

By making these enumerated interstate transactions unlawful unless the holding company registers with the Commission and by extending § 11 (b) (1) to registered holding companies, Congress has effectively applied § 11 (b) (1) to those holding companies that are in fact in the stream of interstate activity and that affect commerce in more states than one. Congress has further declared in § 1 (c) that all the provisions of the Act, thus including § 11 (b) (1), shall be interpreted to meet the problems and remove the evils connected with public utility holding companies "which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce . . ." Section 11 (b) (1) is thus clearly and unmistakably applicable to holding companies engaged in interstate commerce.

Not all holding companies that are engaged in interstate activities, however, must necessarily comply with § 11 (b) (1). By the terms of § 3 (a) (1), if a holding company and all of its subsidiaries are predominantly intrastate in character and carry on their business substantially in a single state in which such holding company and every subsidiary thereof are organized, the Commis-

sion may grant an exemption from any provision of the Act "unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers . . ."

The power of the Commission under the "unless and except" clause of § 3 (a) to deny an exemption to a predominantly local holding company does not mean, as North American urges, that a holding company having no relation whatever to interstate commerce may be subjected to § 11 (b) (1) or to any other provision of the Act. The Commission, in denying an exemption under this clause, is bound by the policy set forth in § 1 (c) to act so as to eliminate evils connected with holding companies "engaged in interstate commerce or in activities which directly affect or burden interstate commerce . . ." A holding company predominantly local in character may nevertheless engage in activities affecting or burdening interstate commerce to the detriment of the public interest or the interests of investors and consumers. Only in such a case could the Commission properly deny an exemption under the "unless and except" clause.[9] This problem, however, is academic so far as North American is concerned. Like most public utility holding companies, North American is engaged in interstate commerce directly and through its subsidiaries. It can lay no claim to a predominantly intrastate character; as to it, § 3 (a) (1) is wholly inapplicable. The possibility that the Commission might erroneously fail to exempt some truly local holding company from the provisions of § 11 (b) (1) cannot negative the plain fact that § 11 (b) (1)

[9] The Commission has recognized the fact that the declaration of policy in § 1 (c) must be considered in granting or denying exemptions under § 3 (a) to predominantly intrastate holding companies. See *In re Niagara Hudson Power Corporation,* Holding Company Act Release No. 5115; *In re Long Island Lighting Company,* Holding Company Act Release No. 5746.

was designed to apply and does apply to holding companies engaged in interstate commerce. North American is therefore subject to its terms.

The crucial constitutional issue, so far as the commerce clause is concerned, resolves itself into the query whether Congress may validly require holding companies engaged in interstate commerce to dispose of their security holdings and to confine their activities in accordance with the standards of § 11 (b) (1). In urging the negative answer to this query, North American relies upon the settled doctrine that the federal commerce power extends to intrastate activities only where those activities "so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119. See also *Santa Cruz Fruit Packing Co.* v. *Labor Board*, 303 U. S. 453, 466; *United States* v. *Darby*, 312 U.S. 100, 118–123; *Wickard* v. *Filburn*, 317 U.S. 111, 122–124. It is said that the ownership by North American of securities of other system companies is not in itself commerce, interstate or intrastate, and that the right to own or retain property is characteristically governed by state laws, the Federal Government having no concern with such matters except as an incident to the due exercise of one of its granted powers. North American denies that the necessary relationship between the ownership of securities and interstate commerce is self-evident or that it has been found as a fact by Congress, the Commission or any court. The absence of this relationship, it is concluded, causes § 11 (b) (1) to fall.

This argument, however, misconceives not only the power of Congress over interstate commerce but also the basic nature of public utility holding companies and the effect that stock ownership has upon their activities.

The dominant characteristic of a holding company is the ownership of securities by which it is possible to control or substantially to influence the policies and management of one or more operating companies in a particular field of enterprise.[10] To be sure, other devices may be utilized to effectuate control, such as voting trusts, interlocking directors and officers, the control of proxies, management contracts and the like. But the concentrated ownership of voting securities is the prime method of achieving control, constituting a more fundamental part of holding companies than of other types of business. Public utility holding companies are thereby able to build their gas and electric utility systems, often gerrymandered in such ways as to bear no relation to economy of operation or to effective regulation. The control arising from this ownership of securities also allows such holding companies to exact unreasonable fees, commissions and other charges from their subsidiaries, to make undue profits from the handling of the issue, sale and exchange of securities for their subsidiaries, to issue unsound securities of their own based upon the inflated value of the subsidiaries, and to affect adversely the accounting practices and the rate and dividend policies of the subsidiaries. See § 1 (b).[11]

---

[10] Bonbright and Means, The Holding Company (1932), p. 10; Jones and Bigham, Principles of Public Utilities (1931), p. 589; Hearings before House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., on H. R. 5423, Part 1, pp. 76–77.

[11] The congressional findings as to abuses listed in § 1 (b) were based upon some of the most exhaustive and comprehensive studies ever to underlie a federal statute. Congress specifically referred in § 1 (b) to the studies made by the Federal Trade Commission pursuant to S. Res. 83, 70th Cong., 1st Sess., the reports of the House Committee on Interstate and Foreign Commerce made pursuant to H. Res. 59, 72nd Cong., 1st Sess., and H. J. Res. 572, 72nd Cong., 2d Sess. A summary of the manifold and complex abuses revealed by these studies is contained in the Federal Trade Commission Report, *supra*, note 3. See Barnes, The Economics of Public Utility Regulation (1942), p. 71.

Congress has found that all of these various abuses and evils occur and are spread and perpetuated through the mails and the channels of interstate commerce. And Congress has further found that such interstate activities, which grow out of the ownership of securities of operating companies, have caused public utility holding companies to be "affected with a national public interest." § 1 (a).[12]

The ownership of securities of operating companies, then, has a real and intimate relation to the interstate activities of holding companies and cannot be effectively divorced therefrom. That ownership is the generating force of the constant interstate flow of reports, letters, equipment, securities, accounts, instructions and money—all of which constitute the life blood of holding companies and allow the numerous abuses to be effectuated. It also makes the interstate transmission of gas and electricity by the subsidiaries, as well as their other interstate actions, reflect upon and magnify the interstate character of the holding companies. Without the factor of stock ownership the very foundation and framework of holding company systems would be gone and the amount of their interstate activity would be at a minimum; centralized management and control of widely scattered utility properties would be difficult if not impossible.

We may assume without deciding that the ownership of securities, considered separately and abstractly, is not

[12] The fact that § 1 (a) refers to certain activities of holding companies as "often" occurring in or affecting interstate commerce and that § 1 (b) refers to adverse effects "when" certain abuses and evils occur is but an instance of careful draftsmanship. Contrary to North American's contentions, the use of the words "often" and "when" does not imply that Congress felt that the relationships of some holding companies to commerce were negligible or that the abuses were other than general in nature. Those words merely recognize that interstate activities are not necessarily constant and that the abuses may arise from time to time. That is enough, however, to support legislative action. See *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 40.

commerce. But when it is considered in the context of public utility holding companies and their subsidiaries, its relationship to interstate commerce is so clear and definite as to make any other conclusion unreasonable. And Congress has plainly recognized that relationship in its declarations of policy in § 1 (a), in its enumeration of abuses in § 1 (b) and in its description of interstate activities of holding companies in § 4 (a). Such statements would be utterly meaningless in the light of reality were they not premised upon the ownership of securities by holding companies and the use of that ownership to burden and affect the channels of interstate commerce.

Section 11 (b) (1) is concerned with, and operates directly upon, this ownership of securities. In § 1 (b) (4) Congress specifically found that the national public interest, the interest of utility investors and the interest of utility consumers are or may be adversely affected "when the growth and extension of holding companies bears no relation to economy of management and operation or the integration and coordination of related operating properties . . ." [13] The "growth and extension of holding com-

[13] "The growth of the holding-company systems has frequently been primarily dictated by promoters' dreams of far-flung power and bankers' schemes for security profits, and has often been attained with the great waste and disregard of public benefit which might be expected from such motives. Whole strings of companies with no particular relation to, and often essentially unconnected with, units in an existing system have been absorbed from time to time. The prices paid for additional units not only have been based upon inflated values but frequently have been run up out of reason by the rivalry of contending systems. Because this growth has been actuated primarily by a desire for size and the power inherent in size, the controlling groups have in many instances done no more than pay lip service to the principle of building up a system as an integrated and economic whole, which might bring actual benefits to its component parts from related operations and unified management. Instead, they have too frequently given us massive, overcapitalized organizations of ever

panies" obviously rest upon their security holdings. Congress expressed in § 1 (c) its determination "to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems," thus eliminating the evil complained of in § 1 (b) (4) and ameliorating the conditions specified in the other subsections of § 1 (b). It accordingly adopted § 11 (b) (1), whereby holding companies are compelled to integrate and coordinate their systems and to divest themselves of security holdings of geographically and economically unrelated properties. In this way Congress hoped to rejuvenate local utility management and to restore effective state regulation, both of which had been seriously impaired by the existence and practices of nation-wide holding company systems.[14]

The constitutionality of § 11 (b) (1) under the commerce clause thus becomes apparent. For nearly one hundred and twenty-five years, this Court has recognized that the power of Congress over interstate commerce is "the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons* v. *Ogden, supra,* 196. This is not to say, of course, that Congress is an absolute sovereign. It is limited by

---

increasing complexity and steadily diminishing coordination and efficiency." Report of the National Power Policy Committee on Public-Utility Holding Companies, H. Doc. 137, 74th Cong., 1st Sess., p. 5.

[14] "As has been pointed out above, the purpose of section 11 is simply to provide a mechanism to create conditions under which effective Federal and State regulation will be possible. It is therefore the very heart of the title, the section most essential to the accomplishment of the purposes set forth in the President's message." S. Rep. 621, 74th Cong., 1st Sess., p. 11.

express provisions in other parts of the Constitution, such as § 9 of Article I and the Bill of Rights. But so far as the commerce clause alone is concerned Congress has plenary power, a power which "extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations." *Minnesota Rate Cases, supra,* 399.

This broad commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy. Rather it is an affirmative power commensurate with the national needs. It is unrestricted by contrary state laws or private contracts. And in using this great power, Congress is not bound by technical legal conceptions. Commerce itself is an intensely practical matter. *Swift & Co.* v. *United States,* 196 U. S. 375, 398. To deal with it effectively, Congress must be able to act in terms of economic and financial realities. The commerce clause gives it authority so to act.

We need not attempt here to draw the outer limits of this plenary power. It is sufficient to reiterate the well-settled principle that Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral or economic nature. *Brooks* v. *United States,* 267 U. S. 432, 436–437. This power permits Congress to attack an evil directly at its source, provided that the evil bears a substantial relationship to interstate commerce. Congress thus has power to make direct assault upon such economic evils as those relating to labor relations, *Labor Board* v. *Jones & Laughlin*

Corp., 301 U. S. 1; *Polish Alliance* v. *Labor Board*, 322 U. S. 643; to wages and hours, *United States* v. *Darby*, *supra;* to market transactions, *Stafford* v. *Wallace*, 258 U. S. 495; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1; and to monopolistic practices, *Northern Securities Co.* v. *United States*, *supra*. The fact that an evil may involve a corporation's financial practices, its business structure or its security portfolio does not detract from the power of Congress under the commerce clause to promulgate rules in order to destroy that evil. Once it is established that the evil concerns or affects commerce in more states than one, Congress may act. "The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge." *In re Rahrer*, 140 U. S. 545, 562.

Congress in § 11 (b) (1) of the Public Utility Holding Company Act was concerned with the economic evils resulting from uncoordinated and unintegrated public utility holding company systems. These evils were found to be polluting the channels of interstate commerce and to take the form of transactions occurring in and concerning more states than one. Congress also found that the national welfare was thereby harmed, as well as the interests of investors and consumers. These evils, moreover, were traceable in large part to the nature and extent of the securities owned by the holding companies. Congress therefore had power under the commerce clause to attempt to remove those evils by ordering the holding companies to divest themselves of the securities that made such evils possible.

It follows that North American's contention that the ownership of securities is not in itself interstate commerce and hence may not be made the basis of federal legislation misconceives the issue in this case. Precisely the same

misconception was made more than forty years ago by the appellants in *Northern Securities Co.* v. *United States, supra,* 334–335, and was rejected by this Court. Inasmuch as Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful and not prohibited by the Constitution, this Court in the *Northern Securities Co.* case recognized that Congress may deal with and affect the ownership of securities in order to protect the freedom of commerce. Congress likewise has the power in this case.

In fashioning the remedy decreed by § 11 (b) (1), Congress was following a pattern set many years ago by decisions applying the Sherman Antitrust Act, *Northern Securities Co.* v. *United States, supra; Standard Oil Co.* v. *United States,* 221 U. S. 1; *Continental Ins. Co.* v. *United States,* 259 U. S. 156, and the commodities clause of the Hepburn Act, *United States* v. *Lehigh Valley R. Co.,* 220 U. S. 257; *United States* v. *Delaware, L. & W. R. Co.,* 238 U. S. 516. In so affecting the corporate structure of holding companies, it was exercising its power "to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety." *Dayton-Goose Creek R. Co.* v. *United States,* 263 U. S. 456, 478. It is clear, therefore, that § 11 (b) (1) is invulnerable to attack under the commerce clause.

The constitutionality of § 11 (b) (1) is also questioned from the standpoint of the due process clause of the Fifth Amendment. North American argues that this section, by compelling it to divest itself of its scattered subsidiaries and to confine its operations to a single integrated system, involves a taking of property without just compensation. It is also claimed that such evils as were found to exist in public utility holding companies find an adequate remedy

in other sections of the Act and that § 11 (b) (1) is therefore inappropriate. Neither contention is meritorious.[15]

The taking of property is said to involve "a vast destruction of values." Reference is made in this respect to the valuable right of North American's shareholders to pool their investments and thereby obtain the benefit alleged to flow from efficient, common management of diversified interests. But Congress balanced the various considerations and concluded that this right is clearly outweighed by the actual and potential damage to the public, the investors and the consumers resulting from the use made of pooled investments. Under such circumstances, whatever value this right may have does not foreclose the protection of the various interests which Congress found to be paramount. See *Northern Securities Co.* v. *United States, supra.* Nor does the value of North American's contributions as a holding company to the earning power and intrinsic value of the assets divested pursuant to § 11 (b) (1) bar Congress from requiring such divestment. Congress has concluded from the extensive studies made prior to the passage of the Act that the economic advantages of a holding company at the top of an unintegrated, sprawling system are not commensurate with the resulting economic disadvantages. The reasonableness of that conclusion is one for Congress to determine. The fact that valuable interests may be affected does not, by itself, render invalid under the due process clause the determination made by Congress.

---

[15] The contention also is made that the fact that § 11 (b) (1) requires disposition of security holdings and the termination of relationships which antedate the passage of the Act is fatal to its validity. But it merely requires that such holdings and relationships shall not continue in the future. There is no punishment for past events. Certainly there is no constitutional requirement that the status quo be maintained. See *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 342.

Moreover, there is no basis here for assuming that in limiting the scope of North American's operations there will be dispositions of securities for inadequate considerations, thereby raising a question as to whether there is a destruction of these values without just compensation. The Act does not contemplate or require the dumping or forced liquidation of securities on the market for cash.[16] Under §§ 11 (d) and 11 (e) of the Act, any divestment or reorganization plan must meet the standards of fairness and equitableness. In many instances this may involve no more than a distribution of the securities among the existing shareholders of the holding company.[17] But should securities be sold for cash, speculation as to unfavorable market conditions cannot undermine the validity of § 11 (b) (1). Any plan of divestment or reorganization, moreover, must be carefully scrutinized by both the Commission and the enforcing court, thus enabling the assertion and protection of all shareholders' rights. See *Otis & Co.* v. *Securities & Exchange Commission,* 323 U. S. 624. And there are provisions in the

[16] "As has been explained above, the title does not require the dumping or forced liquidation of securities. Such disposition as may be necessary can be accomplished by reorganization which will equitably redistribute securities among existing security holders. Insofar as there may be some redistribution of the securities of operating companies through investment banking channels, this will not result in a substantial net increase in the supply of utility securities on the market because for every block of operating securities distributed there will be a corresponding block of holding-company securities retired. The net effect of such changes will be to strengthen the market for utility securities generally by replacing holding-company securities with sound operating-company securities. Such operations, primarily of a refunding nature, should strengthen rather than weaken the credit of operating companies." S. Rep. 621, 74th Cong., 1st Sess., p. 16.

[17] North American has already disposed of its holdings of Detroit Edison Company common stock under a plan distributing the stock to North American's stockholders over a period of time. *In re The North American Company,* Holding Company Act Release No. 4056.

Act guarding against unduly rapid divestment or liquidation.[18] In the light of such statutory and judicial safeguards and in the absence of any alleged unfair plan of divestment, we cannot say that North American's shareholders are adversely affected, from a constitutional standpoint, by the operation of § 11 (b) (1). North American's reliance on such cases as *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, is therefore misplaced.

It is true, as North American points out, that other sections of the Act provide for the regulation of many activities of holding companies and their subsidiaries, activities that were found to give birth to many of the evils about which Congress was concerned. But such sections regulate future transactions, whereas § 11 (b) (1) is concerned with the existing structures of holding company systems. These structures in and of themselves have been found by Congress to constitute an evil that cannot be met by simply regulating future transactions. Congress, in the exercise of its discretion, has decided that it is necessary to reorganize the holding company structures. And inasmuch as it has the constitutional power to do so, we cannot question the appropriateness or propriety of its decision. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 394.

Finally, North American claims that it has engaged in none of the evils enumerated in § 1 (b) and that it should be allowed to prove that fact. The contention apparently is that § 11 (b) (1), as applied to North American, is unconstitutional since none of the evils that led Congress to enact the statute is present in this instance. But if evils disclosed themselves which entitled Congress to legislate

---

[18] Under § 11 (c), holding companies are given at least a year to comply with an order of the Commission under § 11 (b). The Commission is also authorized to extend the time for an additional year upon a proper showing.

as it did, Congress had power to legislate generally, unlimited by proof of the existence of the evils in each particular situation. Section 11 (b) (1) is not designed to punish past offenders but to remove what Congress considered to be potential if not actual sources of evil. And nothing in the Constitution prevents Congress from acting in time to prevent potential injury to the national economy from becoming a reality.

The judgment of the court below is accordingly

Affirmed.

MR. JUSTICE REED, MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

WILLIAMS *v.* UNITED STATES.

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

No. 123. Argued December 10, 1945.—Decided April 1, 1946.

1. The Assimilative Crimes Act penalizes, when committed within a federal enclave, any act "which is not made penal by any laws of Congress," but which is an offense under the law of the State in which such enclave is located. The Arizona "statutory rape" law fixes 18 as the age of consent. Section 279 of the Federal Criminal Code, defining the crime of carnal knowledge, fixes 16 as the age of consent. *Held* that the Assimilative Crimes Act did not make the Arizona law applicable to the case of a married white man who, within the Colorado River Indian Reservation in Arizona, had sexual intercourse with an unmarried Indian girl then over 16 but under 18 years of age. P. 716.
2. So held because (1) the very acts upon which conviction would depend have been made penal by the laws of Congress defining adultery, and (2) the offense known to Arizona as "statutory rape" has been defined and prohibited by § 279 of the Criminal Code, which section is not to be redefined and enlarged by application to it of the Assimilative Crimes Act. P. 717.

148 F. 2d 960, reversed.

Petitioner was convicted in the federal District Court of an alleged offense committed within the Colorado River Indian Reservation in Arizona. The Circuit Court of Appeals affirmed the judgment of conviction. 148 F. 2d 960. This Court granted certiorari. 326 U. S. 701. *Reversed*, p. 725.

Samuel Slaff argued the cause for petitioner. *M. J. Dougherty* filed a brief for petitioner.

Irving S. Shapiro argued the cause for the United States. With him on the brief were *Solicitor General McGrath*, *W. Marvin Smith* and *Robert S. Erdahl.*

MR. JUSTICE BURTON delivered the opinion of the Court.

This case turns upon the applicability of the Assimilative Crimes Act, § 289 of the Criminal Code, 54 Stat. 234, 18 U. S. C. § 468, which reads:

> "Whoever, within the territorial limits of any State, organized Territory, or district, but within or upon any of the places now existing or hereafter reserved or acquired, described in section 272 of the Criminal Code (U. S. C., title 18, sec. 451),[1] shall do or omit the doing of any act or thing which is not made penal by any laws of Congress, but which if committed or omitted within the jurisdiction of the State, Terri-

---

[1] "Sec. 272. The crimes and offenses defined in this chapter [§§ 272–289, 18 U. S. C. §§ 451–468] shall be punished as herein prescribed:

. . . . . .

"Third. *When committed within or on any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof*, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building." (Italics supplied.) 35 Stat. 1142, as amended by 54 Stat. 304, 18 U. S. C. § 451.

> tory, or district in which such place is situated, by the laws thereof in force on February 1, 1940, and remaining in force at the time of the doing or omitting the doing of such act or thing, would be penal, shall be deemed guilty of a like offense and be subject to a like punishment."

The petitioner, a married white man, was convicted in the District Court of the United States for the District of Arizona, of having had sexual intercourse in 1943, within the Colorado River Indian Reservation in Arizona, with an unmarried Indian girl who was then over 16, but under 18, years of age. There was no charge or evidence of use of force by the petitioner or of lack of consent by the girl. The Circuit Court of Appeals affirmed the judgment by a divided court. We granted certiorari under § 240 (a) of the Judicial Code because of the importance of the case in interpreting the Assimilative Crimes Act.

It is not disputed that this Indian reservation is "reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof," [2] or that it is "Indian country" within the meaning of Rev. Stat. § 2145.[3] This means that many sections of the Federal Criminal Code apply to the reservation, including not only the Assimilative Crimes Act, but also those making penal the offenses of rape,[4] assault with intent to

---

[2] See note 1.

[3] "Except as to . . . [certain crimes not material here] the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, . . . shall extend to the Indian country." Rev. Stat. § 2145, 25 U. S. C. § 217. *Donnelly* v. *United States,* 228 U. S. 243, 269; *Ex parte Crow Dog,* 109 U. S. 556; *United States* v. *Chavez,* 290 U. S. 357; *United States* v. *McGowan,* 302 U. S. 535; Cohen, Handbook of Federal Indian Law, pp. 5, *et seq.*, and 358, *et seq.*

[4] "Whoever shall commit the crime of rape shall suffer death." Criminal Code, § 278, 35 Stat. 1143, 18 U. S. C. § 457.

commit rape,[5] having carnal knowledge of a girl,[6] adultery [7] and fornication.[8]

While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on this reservation between persons who are not Indians,[9] the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian.[10]

---

[5] "Whoever shall assault another with intent to commit . . . rape, shall be imprisoned not more than twenty years. . . ." Criminal Code, § 276, 35 Stat. 1143, 18 U. S. C. § 455.

[6] "Whoever shall carnally and unlawfully know any female under the age of sixteen years, or shall be accessory to such carnal and unlawful knowledge before the fact, shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense be imprisoned not more than thirty years." Criminal Code, § 279, 35 Stat. 1143, 18 U. S. C. § 458.

[7] ". . . the offenses defined in this chapter [§§ 311–322] shall be punished as hereinafter provided, when committed within any Territory or District, or within or upon any place within the exclusive jurisdiction of the United States." Criminal Code, § 311, 35 Stat. 1148, 18 U. S. C. § 511.

"Whoever shall commit adultery shall be imprisoned not more than three years; . . . and when such act is committed between a married man and a woman who is unmarried, the man shall be deemed guilty of adultery." Criminal Code, § 316, 35 Stat. 1149, 18 U. S. C. § 516.

[8] "If any unmarried man or woman commits fornication, each shall be fined not more than one hundred dollars, or imprisoned not more than six months." Criminal Code, § 318, 35 Stat. 1149, 18 U. S. C. § 518.

[9] *New York ex rel. Ray* v. *Martin,* 326 U. S. 496; *United States* v. *McBratney,* 104 U. S. 621; *Draper* v. *United States,* 164 U. S. 240.

[10] *Donnelly* v. *United States, supra; United States* v. *Pelican,* 232 U. S. 442; *United States* v. *Ramsey,* 271 U. S. 467; *United States* v. *Chavez, supra.* Cohen, Handbook of Federal Indian Law, pp. 364–365, 146–148. This has not always been as clear as it is now. In 1896, this Court, following *United States* v. *McBratney, supra,* held, in *Draper* v. *United States, supra,* that the state courts, and not the federal courts, had jurisdiction over a murder on an Indian reserva-

The conviction cannot be sustained under the federal definitions of rape or assault with intent to rape, because the federal crime of rape carries with it the requirement of proof of the use of force by the offender and of an absence of consent by the victim. *Oliver* v. *United States,* 230 F. 971. Neither of these elements was charged or proved here. The federal crime of having carnal knowledge of a girl requires proof that she was under 16 years of age at the time of the offense, whereas here the indictment charged merely that she was under 18 and the proof

---

tion in the State of Montana, by one person not an Indian of another not an Indian. The effect of this went so far that, in 1902, the Committee on the Judiciary of the House of Representatives reported that, "As the law now stands . . . offenses committed by half-breeds or white persons, whether upon an Indian or other person, are not cognizable by the Federal courts and generally go unpunished. This state of the law is causing serious conditions of disorder within these Indian reservations." H. R. Rep. No. 2704, 57th Cong., 1st Sess., p. 1. After a cession of jurisdiction by the State and after being memorialized to do so by the legislature of South Dakota, Congress, in 1903, granted jurisdiction specifically to the courts of the United States for the District of South Dakota over actions charging any person with certain major crimes committed within any Indian reservation in that State. 32 Stat. 793; 35 Stat. 1151; 36 Stat. 1167; 18 U. S. C. § 549. This Court, however, in 1913, in *Donnelly* v. *United States, supra,* at pp. 271–272, said: "Upon full consideration we are satisfied that offenses committed by or against Indians are not within the principle of the *McBratney* and *Draper Cases.* This was in effect held, as to crimes committed *by* the Indians, in the *Kagama Case,* 118 U. S. 375, 383, . . . This same reason applies—perhaps *a fortiori*—with respect to crimes committed by white men against the persons or property of the Indian tribes while occupying reservations set apart for the very purpose of segregating them from the whites and others not of Indian blood." We find no material special legislation on this subject affecting Arizona except its Enabling Act. 36 Stat. 568, 572. That Act contains provisions similar to those applicable to Montana, considered in *Draper* v. *United States, supra,* and to those applicable to New Mexico, considered in *United States* v. *Chavez, supra.*

showed that she was between 16 and 18. While the indictment did not state whether or not the petitioner was an Indian or whether or not he was married, the undisputed evidence showed that he was a married white man.

However, the offense charged comes within the statutory definition of "rape" in § 43–4901 of the Arizona Code.[11] That section expands the crime of "statutory rape" so as to include sexual intercourse with a girl under 18 instead of merely with a girl under 16. Accordingly,

---

[11] Arizona's definition of rape and the punishment that Arizona prescribes for its commission differ from those relating either to rape or carnal knowledge under the Federal Criminal Code. These differences well illustrate the confusing variations from the definition of a federal crime and from provisions for its punishment which would have to be considered if indictments were permitted under the Assimilative Crimes Act for every act committed within a federal enclave and which might come within a State's enlargement of the federal definition of the same offense. Section 43–4901 of the Arizona Code of 1939 provides:

"Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under any of the following circumstances:

"Where the female is under the age of eighteen [18] years;

"Where she is incapable, through lunacy or any other unsoundness of mind, whether temporary or permanent, of giving legal consent;

"Where she resists, but her resistance is overcome by force or violence;

"Where she is prevented from resisting by threats of immediate and great bodily harm, accompanied by apparent power of execution, or by any intoxicating, narcotic, or anaesthetic substance, administered by or with the privity of the accused;

"Where she is at the time unconscious of the nature of the act, and this is known to the accused;

"Where she submits, under a belief that the person committing the act is her husband, and this belief is induced by any artifice, pretense or concealment practiced by the accused, with intent to induce such belief . . .

"Rape is punishable by imprisonment in the state prison for life or for any term of years not less than five [5]."

the question here is whether or not the Assimilative Crimes Act makes this section applicable to Indian reservations in Arizona. The question extends not only to the definition of the offense but also to the punishment prescribed. The Arizona Code fixes the punishment for its violation in those instances where violations would not come within § 279 of the Federal Criminal Code. Under those circumstances, on an Indian reservation in Arizona, the statutory punishment, fixed by § 279 of the Federal Criminal Code, for a man, not an Indian, who had carnal knowledge of an Indian girl under 16, would be imprisonment for not more than 15 years for the first offense and not more than 30 years for a subsequent offense, with no minimum sentence specified. On the same facts, except that the girl be between 16 and 18, the punishment, fixed by the Arizona Code, would be imprisonment for life or for any term not less than five years. This would impose a more stringent range of punishment, including the minimum sentence of five years imposed in this case, upon what Congress in its Criminal Code evidently had treated as a lesser offense.

We hold that the Assimilative Crimes Act does not make the Arizona statute applicable in the present case because (1) the precise acts upon which the conviction depends have been made penal by the laws of Congress defining adultery [12] and (2) the offense known to Arizona as that of "statutory rape" [13] has been defined and prohibited by the Federal Criminal Code,[14] and is not to be redefined and enlarged by application to it of the Assimilative Crimes Act. The fact that the definition of this offense as enacted by Congress results in a narrower scope for the offense than that given to it by the State, does not mean that the con-

[12] See note 7, *supra.*

[13] See note 11, *supra,* and for the use of this designation of the crime in Arizona see *Sage* v. *State,* 22 Ariz. 151, 195 P. 533, and *Taylor* v. *Arizona,* 55 Ariz. 29, 97 P. 2d 927.

[14] See note 6, *supra.*

gressional definition must give way to the State definition. This is especially clear in the present case because the specified acts which would come within the additional scope given to the offense by the State through its postponement of the age of consent of the victim from 16 to 18 years of age, are completely covered by the federal crimes of adultery or fornication.[15] The interesting legislative history of the Assimilative Crimes Act [16] discloses nothing to indicate that, after Congress has once defined a penal offense, it has authorized such definition to be enlarged by the application to it of a State's definition of it. It has not even been suggested that a conflicting State definition could give a narrower scope to the offense than that given to it by Congress. We believe that, similarly, a conflicting State definition does not enlarge the scope of the offense defined by Congress. The Assimilative Crimes Act has a natural place to fill through its supplementation of the Federal Criminal Code, without giving it the added effect of modifying or repealing existing provisions of the Federal Code.

Where offenses have been specifically defined by Congress and the public has been guided by such definitions for many years, it is not natural for Congress by general legislation to amend such definitions or the punishments prescribed for such offenses, without making clear its intent to do so.[17] On the other hand, it is natural for Con-

---

[15] See notes 7 and 8, *supra.*

[16] See *United States* v. *Press Publishing Co.*, 219 U. S. 1, 10–13, and *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383, 398–401.

[17] In *Ex parte Crow Dog,* 109 U. S. 556, 570–571, Mr. Justice Matthews, writing for the court, said:

"The language of the exception is special and express; the words relied on as a repeal are general and inconclusive. The rule is, *generalia specialibus non derogant.* 'The general principle to be applied,' said Bovill, C. J., in *Thorpe* v. *Adams,* L. R. 6 C. P. 135, 'to the construction of acts of Parliament is that a general act is not to be construed

gress from time to time, through renewals of the Assimilative Crimes Act, to use local statutes to fill in gaps in the Federal Criminal Code where no action of Congress has been taken to define the missing offenses.

That the attorneys for the Government have recognized the force of some of these considerations is apparent from the following statement at the close of their brief:

> "Congress, of course, was free to fix policy for areas of federal jurisdiction even though it might conflict with local policy, and we think it has done so in respect of the instant situation. These considerations, we think, outweigh the considerations in support of the judgment of the court below."

The first Federal Crimes Act, approved April 30, 1790, 1 Stat. 112, dealt primarily with subjects over which the Constitution had expressly given jurisdiction to the Federal Government. For example, it dealt with treason, crimes upon the high seas and counterfeiting of securities of the United States. In so far as it related to federal enclaves, it recognized and provided punishment for the offenses of "wilful murder" and manslaughter if committed "within any fort, arsenal, dock-yard, magazine, or

---

to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together.' 'And the reason is,' said Wood, V. C., in *Fitzgerald* v. *Champenys,* 30 L. J. N. S. Eq. 782; 2 Johns. and Hem. 31–54, 'that the legislature having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do.' "

In *Franklin* v. *United States,* 216 U. S. 559, 568, in referring to the Assimilative Crimes Act, it was said, "by this act Congress adopted for the government of the designated places, . . . the criminal laws then existing in the several States within which such places were situated, *in so far as said laws were not displaced by specific laws enacted by Congress.*" (Italics supplied.)

in any other place or district of country, under the sole and exclusive jurisdiction of the United States . . ." § 3, 1 Stat. 113. It contained nothing corresponding directly to the Assimilative Crimes Act.[18]

On February 10, 1823, James Buchanan, then serving his first term in the House of Representatives, clearly stated the need for the recognition of additional federal crimes. He secured the adoption of a Resolution "That the Committee on the Judiciary be instructed to inquire whether there be any, and, if any, what, crimes not now punishable by law, to which punishments ought to be affixed." Annals of Congress, 17th Cong., 2d Sess. (1822–1823) 929.[19]

---

[18] Its nearest approach to an Assimilative Crimes Act was in its definition of piracies. It provided in § 8 that "if any person or persons shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence which if committed within the body of a county, would by the laws of the United States be punishable with death; . . . every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death; . . ." 1 Stat. 113. This corresponds to the plan in certain English statutes (e. g. 28 Henry VIII, c. 15 (1536); 39 George III, c. 37 (1799)) for supplementing their Maritime Law with "other offenses" known to the common law. There was no attempt to enlarge the definitions of existing crimes under the Maritime Law by cross reference to broader definitions under the common law. When the Assimilative Crimes Act later appeared in the Federal Criminal Code, it followed this general form of statement.

[19] "In offering this resolution, Mr. B. said, it had been decided that the courts of the United States had no power to punish any act, no matter how criminal in its nature, unless Congress have declared it to be a crime, and annexed a punishment to its perpetration. Offences at the common law, not declared such by acts of Congress, are therefore not within the range of the jurisdiction of the Federal courts. Congress have annexed punishments but to a very few crimes, and those all of an aggravated nature. The consequence is, that a great variety of actions, to which a high degree of moral guilt is attached,

In the second session of the next Congress,[20] Daniel Webster, Chairman of the Committee of the Judiciary of the House of Representatives, sponsored the bill which became the Federal Crimes Act of March 3, 1825. After extended debate,[21] Congress expanded the list of enumerated federal crimes. It also added the § 3 which became the basis of the Assimilative Crimes Act of today:

> ". . . if any offence shall be committed in any of the places aforesaid,[22] the punishment of which offence is not specially provided for by any law of the United States, such offence shall, upon a conviction in any court of the United States having cognisance thereof, be liable to, and receive the same punishment as the laws of the state in which such fort, dock-yard, navy-yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated, provide for the like offence when committed within the body of any county of such state." 4 Stat. 115.

---

and which are punished as crimes at the common law, and by every State in the Union, may be committed with impunity on the high seas, and in any place where Congress has exclusive jurisdiction. To afford an example: An assault and battery, with intent to commit murder, may be perpetrated, either on the high seas, or in a fort, magazine, arsenal, or dockyard, belonging to the United States, and there exists no law to punish such an offence.

"This is a palpable defect in our system, which requires a remedy; and it is astonishing that none has ever yet been supplied." Annals of Congress, 17th Cong., 2d Sess. (1822–1823) 929.

[20] In its first session, a bill for some assimilation of the criminal laws of the States passed the Senate, but apparently was not acted upon by the House. Annals of Congress, 18th Cong., 1st Sess. (1823–1824) 528, 592, 762. See also, 1 Gales & Seaton, Register of Debates in Congress, 338.

[21] 1 Gales & Seaton, Register of Debates in Congress, 152–158, 335–341, 348–355, 363–365.

[22] ". . . any fort, dock-yard, navy-yard, arsenal, armory, or magazine, the site whereof is ceded to, and under the jurisdiction of, the United States, or on the site of any lighthouse, or other needful building belonging to the United States . . ." 4 Stat. 115, § 1.

This was amended in 1866, 14 Stat. 13, and in 1874 it was incorporated in the Revised Statutes as § 5391 in substantially its then existing form. For many years it thus referred to an "offense" which is not prohibited or the punishment of which "is not specially provided for, by any law of the United States . . ." [23] A similar provision was enacted in 1898 in 30 Stat. 717. In 1909, however, in codifying the Federal Criminal Code, this section was slightly changed when it was incorporated in that Code as § 289 in substantially its present form. The word "offense" was changed so as to avoid the use of it as referring to an action which had not been prohibited and, therefore, technically could not be an "offense." Possibly this change of the old phrase into the phrase "any act or thing which is not made penal by any laws of Congress" led to the present attempt to interpret it in a specific sense as referring to individual acts of the parties rather than in a generic sense referring to acts of a general type or kind. The new words, in the light of the Congressional Committee's explanation of them,[24] cannot, however, be

---

[23] "If any offense be committed in any place which has been or may hereafter be, ceded to and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not specifically provided for, by any law of the United States, such offense shall be liable to, and receive, the same punishment as the laws of the State in which such place is situated, now in force, provide for the like offense when committed within the jurisdiction of such State; and no subsequent repeal of any such State law shall affect any prosecution for such offense in any court of the United States." Rev. Stat. § 5391.

[24] The Committee's statement as to the new section was:

"Section 5391, Revised Statutes, provides that if any 'offense' be committed, etc., which 'offense' is not prohibited or punished by any law of Congress, such 'offense' shall receive the same punishment as is attached thereto by the law of the State within which the place upon which it is committed is situated.

"An act which is not forbidden by law and to the commission of which no penalty is attached in no legal sense can be denominated an

regarded as changing the scope of the Act so substantially as to make it amend and enlarge the definition of an existing federal offense as well as to cover the case where an "offense" had not been prohibited. To do so would be contrary to the expressed purpose of the Committee to continue, rather than to change, its original meaning. In the instant case not only has the generic act been covered by the definition of having carnal knowledge, but the specific acts have been made "penal" by the definition of adultery. The subsequent amendments [25] have been made merely to advance the dates as of which the assimilated local statutes must have been in force. The last amendment, in 1940, followed an explanation of the bill in identical letters from the Attorney General to the Speaker of the House of Representatives and to the Chairman of the Senate Committee on the Judiciary. These letters adopted the view that the Act was to cover crimes on which Congress had not legislated and did not suggest that the Act was to enlarge or otherwise amend definitions of crimes already contained in the Federal Code.[26]

'offense.' The section has therefore been rewritten so as to correctly express what Congress intended when it enacted the section referred to." H. R. Rep. No. 2, 60th Cong., 1st Sess., p. 25. See also, notes on the decision in the instant case below. 59 Harv. L. Rev. 131; 45 Col. L. Rev. 972; and see *United States* v. *Franklin,* 174 F. 163, writ of error dismissed, 216 U. S. 559, 568.

[25] 48 Stat. 152; 49 Stat. 394; 54 Stat. 234.

[26] "Certain crimes committed on Federal reservations are expressly defined in the Criminal Code. This is true of grave offenses, such as murder, manslaughter, rape, assault, mayhem, robbery, arson, and larceny (U. S. C., title 18, secs. 451–467). The Congress has not, however, legislated as to other crimes committed on Federal reservations, but has provided generally that as to them, the law of the State within which the reservation is situated, shall be applicable (Criminal Code, sec. 289; U. S. C., title 18, sec. 468)." Quoted in H. Rep. No. 1584, 76th Cong., 3d Sess., p. 2 and S. Rep. No. 1699, 76th Cong., 3d Sess., p. 1.

As to the particular offense involved in this case, the legislative history shows an increasing purpose by Congress to cover rape and all related offenses fully with penal legislation. In the Federal Crimes Act of 1825, 4 Stat. 115, rape was prohibited and made punishable only within certain areas under the admiralty and maritime jurisdiction of the United States. In the same Act, the assimilative crimes section was applied to federal enclaves.[27] It thus provided the original federal prohibition of such conduct in those areas. If Congress had been satisfied to continue to apply local law to this and related offenses it would have been simple for it to have left the offense to the Assimilative Crimes Act. A contrary intent of Congress has been made obvious. Congress repeatedly has increased its list of specific prohibitions of related offenses and has enlarged the areas within which those prohibitions are applicable. It has covered the field with uniform federal legislation affecting areas within the jurisdiction of Congress.[28]

When Congress thus enacted the statute as to carnal knowledge in 1889 it gave special attention to the age of consent. The House of Representatives fixed the age

---

[27] See note 22, *supra*.

[28] Rape: (1825) 4 Stat. 115, applied to the high seas but not to federal enclaves; (1874) Rev. Stat. § 5345 applied to federal enclaves; (1909) 35 Stat. 1143. Assault with intent to commit rape: (1825) 4 Stat. 121, on high seas but not within federal enclaves: (1874) Rev. Stat. § 5346; (1909) 35 Stat. 1143. Carnal knowledge: (1889) 25 Stat. 658, age of consent fixed at 16; (1909) 35 Stat. 1143. Adultery: (1887) 24 Stat. 635, in connection with the amendment of bigamy statutes; (1909) 35 Stat. 1149. Fornication: (1887) 24 Stat. 636, in connection with revision of bigamy statutes; (1909) 35 Stat. 1149. See also, Criminal Code, § 312, obscene literature (1873); § 313, polygamy (1862); § 314, unlawful cohabitation (1882); § 317, incest (1887). 18 U. S. C. §§ 512–517.

at 14 and the Senate changed it to 16. 20 Cong. Rec. 997.[29]

For these reasons, we believe that the Assimilative Crimes Act does not make the Arizona Code applicable to the facts of this case. The judgment of the Court of Appeals accordingly is

Reversed.

MR. JUSTICE RUTLEDGE concurs in the result.

Mr. JUSTICE JACKSON took no part in the consideration or decision of this case.

[29] Senator Faulkner, in charge of the bill, said: ". . . the age was fixed by the committee after considerable discussion and an examination of the laws of the several States. Some of the States have changed their laws. A number of the States have fixed the age of sixteen. Some of them have fixed as high as eighteen. Mississippi, Colorado, and Alabama have fixed as high as eighteen." 19 Cong. Rec. 6501.

HEISER *v.* WOODRUFF ET AL.

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

No. 496. Argued March 5, 1946.—Decided April 22, 1946.

1. Where, in a bankruptcy proceeding, allowance of a claim based upon a money judgment acquired against the bankrupt before the bankruptcy is objected to on the ground that the judgment was procured by fraud, but the issue of fraud has been litigated and decided between the claimant and the bankrupt before the bankruptcy and has since been litigated and decided between the claimant and the trustee in bankruptcy, that issue is *res judicata* and may not be litigated further in the bankruptcy proceeding, even though, in the previous litigation, the allegations of fraud were not supported by tender of evidence or other proof. *Pepper* v. *Litton*, 308 U. S. 295, differentiated. Pp. 731, 736.
2. While a bankruptcy court is also a court of equity and may exercise equity powers in bankruptcy proceedings to set aside fraudulent claims—including a fraudulent judgment where the issue of fraud has not been adjudicated previously—and may subordinate the claim of one creditor to those of others in order to prevent the consummation of a fraudulent or otherwise inequitable course of conduct, no principle of law or equity sanctions the rejection by a federal court of the salutary principle of *res judicata*. P. 732.
3. Since the Bankruptcy Act authorizes a proof of claim based on a judgment, such a proof may be assailed in the bankruptcy court on the ground that the purported judgment is not a judgment because of want of jurisdiction of the court which rendered it over the persons of the parties or the subject matter of the suit, or because it was procured by fraud of a party. P. 736.
4. In passing upon a proof of claim based on a judgment, however, a bankruptcy court may not reexamine the issues determined by the judgment itself. P. 736.
5. It is well settled that, where a trustee in bankruptcy unsuccessfully litigates an issue outside the bankruptcy court, the decision against him is binding in the bankruptcy court. P. 733.
6. In general, a judgment is *res judicata*, not only as to all matters litigated and decided by it but also as to all relevant issues which could have been, but were not, raised and litigated in the suit. P. 735.

7. Nothing decided in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, requires a bankruptcy court, in applying the statutes of the United States governing the liquidation of bankrupts' estates, to adopt local rules of law in determining what claims are provable, or to be allowed, or how the bankrupt's estate is to be distributed among claimants. P. 732.
8. In passing upon a proof of claim based on a judgment, a bankruptcy court proceeds—not without appropriate regard for rights acquired under state law—under federal statutes which govern the proof and allowance of claims based on judgments. P. 732.
9. In determining what judgments are provable and what objections may be made to their proof, and in determining the extent to which the inequitable conduct of a claimant in acquiring or asserting his claim in bankruptcy requires its rejection or its subordination to other claims which in other respects are of the same class, the bankruptcy court is defining and applying federal, not state, law. P. 732.

150 F. 2d 869, reversed.

Petitioner filed a claim in bankruptcy based upon a money judgment acquired against the bankrupt before bankruptcy. Respondents objected on the ground that the judgment was procured by fraud. The referee disallowed the claim. The District Court allowed the claim, sustaining petitioner's contention that the issue of fraud had been litigated previously and decided in petitioner's favor in proceedings in which petitioner and the bankrupt or his trustee, or both, had been parties, and was therefore *res judicata.* The Circuit Court of Appeals reversed. 150 F. 2d 869. This Court granted certiorari. 326 U. S. 715. *Reversed,* p. 740.

Leonard J. Meyberg and *Rupert B. Turnbull* argued the cause and filed a brief for petitioner.

Louis A. Fischl argued the cause for respondents. With him on the brief were *H. A. Ledbetter* and *Thos. W. Champion.*

Opinion of the Court by MR. CHIEF JUSTICE STONE, announced by MR. JUSTICE BLACK.

This is a proceeding in bankruptcy on objections to the allowance of petitioner's claim in bankruptcy based upon a money judgment acquired against the bankrupt before the bankruptcy. Respondents objected to allowance of the claim on the ground that, so far as here relevant, the judgment was procured by fraud, that is, by perjured allegations in the complaint in the suit in which the judgment was rendered, and by perjured testimony as to the value of property alleged to have been converted by the defendant.

The referee in bankruptcy disallowed the claim. On the referee's certificate the district court, sitting in bankruptcy, allowed the claim, sustaining petitioner's contention that the issue of fraud in procurement of the judgment had been previously litigated and decided in petitioner's favor in proceedings in which the petitioner and the bankrupt or his trustee, or both, had been parties, and was therefore *res judicata.*

The Court of Appeals for the Tenth Circuit reversed. 150 F. 2d 869. Relying upon our decisions in *Pepper* v. *Litton,* 308 U. S. 295, and *Prudence Realization Corp.* v. *Geist,* 316 U. S. 89, it held that the court of bankruptcy could go behind the prior adjudications of the validity of the judgment and decide for itself the questions previously litigated and decided, whether the cause of action on which the judgment was entered was meritorious, and whether the claim in bankruptcy should be rejected because based on a judgment procured by claimant's fraud. The Court of Appeals accordingly remanded the cause to the district court for further proceedings on the objections to allowance of the claim. We granted certiorari, 326 U. S. 715, upon a petition which raises the questions whether the bankruptcy court may re-adjudicate the merits of a cause of action on which a judgment against

the bankrupt, proved as a claim in bankruptcy, was entered and may disregard a previous adjudication between the parties that the judgment was not procured by fraud.

Woodruff, the bankrupt, was adjudicated as such on his voluntary petition on July 5, 1939. Petitioner, proceeding under § 63 (a) (1) of the Bankruptcy Act, 11 U. S. C. 103 (a), which provides that a fixed liability, evidenced by a judgment, is a provable claim in bankruptcy, filed his proof of claim in the bankruptcy court upon a default judgment against Woodruff for the sum, including accrued interest and costs, of more than $278,000. The suit in which the judgment was procured was filed in the United States District Court for the Southern District of California in July, 1935. Judgment was entered for petitioner on March 20, 1939, on proof taken of service of summons on January 31, 1939, and of Woodruff's default and on evidence given by the petitioner.

The suit was based on diversity of citizenship, and the cause of action alleged was in substance that Woodruff had procured property of petitioner, consisting of rough sapphires, opals and zircons, of a stated value of $164,000, by false pretenses and false representations, the details of which are not now material, and had thereafter converted them to his own use.

On March 29, 1939, shortly after the judgment was rendered, Woodruff filed a motion in the trial court to set it aside. The motion, so far as it was based upon the alleged failure to serve the defendant Woodruff with process, was denied on June 8, 1939. But the court, on stipulation of the parties, directed that a hearing be held to determine the value of the converted gems and provided that at the hearing "such competent evidence as either party desire to present be received" and considered by the court "in determining the actual value of the property" which the plaintiff alleged was converted by defendants. The

court's order further provided that the judgment should be reduced in the amount by which the adjudged value of the gems exceeded the actual value as found at the hearing. After a contested hearing at which evidence, oral and documentary, was received, the trial court made a minute order stating that the court found that the values of the converted property were those alleged in the complaint, and declined to give further consideration to the motion to set aside the judgment. No appeal was taken from the judgment, and no review was had of the minute order or of the denial of the motion to set the judgment aside.

On August 23, 1939, on application of Jackson, the trustee of the bankrupt's estate, which certain creditors supported, the referee in bankruptcy authorized and directed the trustee "to take such legal steps as may be proper and necessary under the law to vacate, set aside and to avoid" the judgment, and authorized him to retain counsel in the Southern District of California for that purpose. This was followed by a motion on behalf of the bankrupt's trustee, and the bankrupt, in the district court for that district, to set aside the judgment on the grounds, among others, that no proper service of process had been made on the defendant, that the complaint did not state a cause of action, that "a fraud was practiced upon the above entitled court with respect to the entry of said judgment", and that the trustee and the bankrupt "have been prevented from presenting said defense upon any trial of the merits by reason of fraud, accident, surprise and excusable neglect as is more particularly shown by the affidavits" upon which the motion was made. The affidavit of the trustee in support of the motion stated that the judgment was "based upon fictitious values and was obtained by methods which amount to a constructive fraud upon the other creditors and your affiant, as representative of said creditors". Counter affidavits by peti-

tioner and his attorney in the suit in which the judgment was rendered denied the allegations of fraud.

The district court denied the motion, and the Court of Appeals for the Ninth Circuit affirmed. 111 F. 2d 310. It overruled all the alleged grounds for setting aside the judgment, holding that the service of process was valid and that in any case the defendant had appeared in the suit by entering into the stipulation for trial of the issue of value of the property alleged to have been converted and participating in the hearing on that issue. It also held that the charge of fraud was denied and unsupported by proof, adding "that ground of appellants' motion appears to have been abandoned." There was no review of this decision.

The court below, in rejecting petitioner's plea of *res judicata,* and in directing inquiry into the merits of the original cause of action and into the allegation of fraud in procurement of the judgment, rested its decision upon the ground that the bankrupt's trustee had failed to place before the California district court any contention or proof that petitioner's testimony, particularly as to the value of the converted property, was perjured, that the bankrupt was not indebted to petitioner, or that the allegations of the complaint were untrue. The court, relying on *Pepper* v. *Litton, supra,* also held that the bankruptcy court, being a court having equity powers, was not bound by the principles of *res judicata* as to issues which were not pressed before the California district court, and that the authority of the bankruptcy court as a court of equity included the power to inquire into the validity of the claim upon which the judgment, presented as a claim against the estate, was based.

We need not consider whether, apart from the requirements of the full faith and credit clause of the Constitution, the rule of *res judicata* applied in the federal courts, in diversity of citizenship cases, under the doctrine of

Erie R. Co. v. *Tompkins,* 304 U. S. 64; cf. *Guaranty Trust Co.* v. *York,* 326 U. S. 99; *Holmberg* v. *Armbrecht,* 327 U. S. 392, can be other than that of the state in which the federal court sits. For nothing decided in *Erie R. Co.* v. *Tompkins, supra,* requires a court of bankruptcy, in applying the statutes of the United States governing the liquidation of bankrupts' estates, to adopt local rules of law in determining what claims are provable, or to be allowed, or how the bankrupt's estate is to be distributed among claimants. Cf. *Board of Comm'rs* v. *United States,* 308 U. S. 343; *Deitrick* v. *Greaney,* 309 U. S. 190; *D'Oench, Duhme & Co.* v. *F. D. I. C.,* 315 U. S. 447; *Helvering* v. *Stuart,* 317 U. S. 154, 161–2; *Sola Electric Co.* v. *Jefferson Co.,* 317 U. S. 173, 176; *Wragg* v. *Federal Land Bank,* 317 U. S. 325, 328; *Clearfield Trust Co.* v. *United States,* 318 U. S. 363. In passing upon and rejecting or allowing the proof of claim in this case the court of bankruptcy proceeds—not without appropriate regard for rights acquired under state law—under federal statutes which govern the proof and allowance of claims based on judgments. In determining what judgments are provable and what objections may be made to their proof, and in determining the extent to which the inequitable conduct of a claimant in acquiring or asserting his claim in bankruptcy, requires its rejection or its subordination to other claims which, in other respects are of the same class, the bankruptcy court is defining and applying federal, not state, law. See *Prudence Realization Corp.* v. *Geist, supra,* 95, 96 and cases cited; cf. *United States* v. *Pelzer,* 312 U. S. 399, 402–03.

It is true that a bankruptcy court is also a court of equity, *Local Loan Co.* v. *Hunt,* 292 U. S. 234, 240, and may exercise equity powers in bankruptcy proceedings to set aside fraudulent claims, including a fraudulent judgment where the issue of fraud has not been previously adjudicated. *Pepper* v. *Litton, supra,* 306. In appro-

priate cases, acting upon equitable principles, it may also subordinate the claim of one creditor to those of others in order to prevent the consummation of a course of conduct by the claimant which, as to them, would be fraudulent or otherwise inequitable. *Taylor* v. *Standard Gas Co.,* 306 U. S. 307; *Pepper* v. *Litton, supra; Prudence Realization Corp.* v. *Geist, supra; American Surety Co.* v. *Sampsell,* 327 U. S. 269. But we are aware of no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata,* which is founded upon the generally recognized public policy that there must be some end to litigation and that when one appears in court to present his case, is fully heard, and the contested issue is decided against him, he may not later renew the litigation in another court. *Baldwin* v. *Traveling Men's Assn.,* 283 U. S. 522, 525–6.

Before *Erie R. Co.* v. *Tompkins* it was recognized by this Court that, apart from the full faith and credit clause, a judgment duly rendered in one court will be recognized as *res judicata* in a suit between the same parties in a federal court. *Cromwell* v. *County of Sac,* 94 U. S. 351; *Case* v. *Beauregard,* 101 U. S. 688; *Baltimore S. S. Co.* v. *Phillips,* 274 U. S. 316; *Grubb* v. *Public Utilities Comm'n,* 281 U. S. 470. See *Baldwin* v. *Traveling Men's Assn., supra,* and cases cited; cf. *Chicago, R. I. & P. R. Co.* v. *Schendel,* 270 U. S. 611; *Milwaukee County* v. *White Co.,* 296 U. S. 268, 272–3. It has been held in non-diversity cases, since *Erie R. Co.* v. *Tompkins,* that the federal courts will apply their own rule of *res judicata. Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 403; *Jackson* v. *Irving Trust Co.,* 311 U. S. 494, 503. This Court has also required that effect be given in both state and federal courts to a plea of *res judicata* arising from decrees of a bankruptcy court. *Stoll* v. *Gottlieb,* 305 U. S. 165; *Chicot County Dist.* v. *Bank,* 308 U. S. 371. And it is well settled that where the trustee in bankruptcy unsuccessfully litigates an issue out-

side the bankruptcy court the decision against him is binding in the bankruptcy court. *Davis* v. *Friedlander*, 104 U. S. 570; *Fischer* v. *Pauline Oil Co.*, 309 U. S. 294, 302–03. At least to the extent that the issue of fraud raised by the objections to petitioner's claim as between petitioner and the bankrupt has been litigated and decided before the bankruptcy and has since been litigated between the petitioner and the trustee in bankruptcy, who represents the bankrupt and his creditors, that issue is now *res judicata* and may not further be litigated in the bankruptcy proceeding. Hence we turn to the question, what issues essential to the allegations that the judgment was procured by fraud have been so litigated.

Examination of the record in this proceeding, including the objections filed to petitioner's claim, the applications of the bankrupt, the trustee, and the creditors, for authority to attack the judgment in the District Court of Southern California, and the proceedings instituted in that court for that purpose, make plain the nature of the fraud charged against petitioner. Shortly stated it is that in the course of transactions with petitioner the bankrupt acquired possession of and converted to his own use a quantity of worthless minerals, owned or previously owned or possessed by petitioner, who, by means of perjured allegations in the complaint and perjured testimony as to their amount and value, procured a default judgment against the bankrupt for an amount in excess of their value.

It is evident that an essential element of the claim of fraud is that the alleged converted minerals were worth substantially less than the $164,000 alleged to be their value in the complaint, for which the judgment was rendered. But before the bankruptcy this issue of value had been litigated between petitioner and the bankrupt in the District Court for Southern California. In the course of the proceedings had on the bankrupt's motion to set aside the judgment, the district court decided the issue

against the bankrupt and declined to disturb the judgment. No appeal was taken from the judgment and consequently there was no review of the denial of the bankrupt's motion to set aside or modify the judgment, or of the court's minute order finding that the converted gems were of the value alleged in the complaint.

The same issue as to value and also the issue whether there was perjured testimony of value were raised in the proceeding later brought in the District Court for Southern California by the trustee in behalf of the bankrupt to set aside the judgment. In his application to the bankruptcy court to direct the trustee to bring the proceeding, the bankrupt had represented that "the material allegations of the complaint filed in said case [in the District Court for Southern California] are untrue"; that "the raw gems described in plaintiff's complaint were at no time of the value of $164,000.00 or any comparable value". As already noted the papers on the motion in behalf of the trustee and the bankrupt to vacate the judgment, set up that the judgment was based on "fictitious values" and was fraudulently procured. In that proceeding the charge of fraud thus alleged was put in issue by the answering affidavits. The denial of the motion by the district court was affirmed by the Court of Appeals for the Ninth Circuit on the ground that the applicants had not sustained their allegations of fictitious value and fraud by any tender of evidence or other proof. This was a final judgment on the issues thus raised, binding on the parties to the proceeding. It is not any the less so, as the Court of Appeals thought, because the moving parties failed to support their allegations by evidence.

In general a judgment is *res judicata* not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit. *Cromwell* v. *County of Sac, supra,* 352; *Grubb* v. *Public Utilities Comm'n, supra,* 479; *Chicot*

County Dist. v. *Bank, supra,* 375. But here the alleged fraud was put in issue and the issue was decided against the trustee, the bankrupt and those whom they represent or who claim under them, for failure of proof. After two proceedings, in one of which the bankrupt and in the other of which the bankrupt and his trustee, sought, and were free, to prove that the judgment was based on fraudulently alleged, fictitious values, and in both of which the decision was against them, the principles of *res judicata* preclude the revival of the litigation in the bankruptcy court.

Pepper v. *Litton, supra,* lends no support to a different view. Undoubtedly, since the Bankruptcy Act authorizes a proof of claim based on a judgment, such a proof may be assailed in the bankruptcy court on the ground that the purported judgment is not a judgment because of want of jurisdiction of the court which rendered it over the persons of the parties or the subject matter of the suit, or because it was procured by fraud of a party. *Pepper* v. *Litton, supra,* 306; *Chandler* v. *Thompson,* 120 F. 940; *In re Continental Engine Co.,* 234 F. 58; *In re Stucky Trucking & Rigging Co.,* 243 F. 287; *In re Rubin,* 24 F. 2d 289. But it is quite another matter to say that the bankruptcy court may reexamine the issues determined by the judgment itself. It has, from an early date, been held to the contrary. *McKinsey* v. *Harding,* Fed. Cas. No. 8,866; *Ex parte O'Neil,* Fed. Cas. No. 10,527; *In re Ulfelder Co.,* 98 F. 409; *Peters* v. *United States,* 177 F. 885; *Handlan* v. *Walker,* 200 F. 566; *In re Ganet Realty Corp.,* 83 F. 2d 945; *Lyders* v. *Petersen,* 88 F. 2d 9. Nor can an attack be sustained on a judgment allegedly procured by fraudulent representations of the plaintiff, when the charge of fraud has been rejected in previous litigations by the parties to the suit in which the judgment was rendered, or their representatives. *Pepper* v. *Litton, supra,* 306, n. 13; cf. *Mays* v. *Fritton,* 20 Wall. 414; *Jerome* v. *McCarter,* 94 U. S. 734, 737; *McHenry* v. *La Société Française,* 95

U. S. 58; *Davis* v. *Friedlander, supra; Winchester* v. *Heiskell,* 119 U. S. 450, 453; *Grant* v. *Buckner,* 172 U. S. 232, 238.

Neither *Pepper* v. *Litton, supra,* on which respondents chiefly rely, nor the other cases which they cite, sustain the contention that the bankruptcy court, in passing on the validity of creditors' claims, may disregard the principle of *res judicata.* In that case the judgment creditor sought by proof of claim on his judgment to share in the assets of the bankrupt estate, which were insufficient to satisfy the rival claim of another judgment creditor. We assumed, for purposes of decision, that the claim on which the disputed judgment was based was founded on a valid debt. But the court held that as the judgment creditor was also a controlling stockholder of the bankrupt corporation he was a fiduciary for the other creditors of the corporation and, as such, could not prove his claim in competition with other creditors or gain from the estate any personal advantage, security, or priority over them. After referring to certain cases in which creditors' claims had been disallowed and saying: "These cases do not turn on the existence or non-existence of the debt. Rather they involve simply the question of order of payment," 308 U. S. 310, the Court concluded: "Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation. On such a test the action of the District Court in disallowing or subordinating Litton's claim was clearly correct." 308 U. S. 311. Cf. *Taylor* v. *Standard Gas Co., supra.*

Although the trustee in bankruptcy in *Pepper* v. *Litton* had unsuccessfully attacked the judgment in another proceeding in the state courts, this Court pointed out that in that proceeding no question was presented "whether or not the . . . judgment might be subordinated to the claims of other creditors upon equitable principles," 308 U. S. 302–03, and that "the only decree which was asked or could be given in the plaintiff's favor" under the plead-

ings "was for cancellation of the judgment as a record obligation of the bankrupt." 308 U. S. 303. It was thus made plain that the theory relied upon as requiring disallowance or subordination of the contested claim rested upon grounds not previously adjudicated, and we explicitly noted that the state court did not adjudicate it. 308 U. S. 302–03.*

*In *Pepper* v. *Litton*, 308 U. S. 295, the Court found that Litton, a "dominant and controlling" stockholder of the bankrupt corporation entered into a "planned and fraudulent scheme" which was "plainly for the sole purpose of avoiding payment of the Pepper debt," which was then owed by the corporation. The fraudulent scheme, which was initiated shortly before the bankruptcy, involved several successive steps, as follows: Litton procured a judgment in his favor against the corporation, upon an alleged fictitious claim for salary, which was entered on confession in its behalf by one of its officers, who was also an employee of Litton and subservient to his will. A second judgment having been entered against the corporation upon the debt to Pepper, and, execution upon the Pepper judgment having been stayed pending an appeal by the corporation, Litton then became the purchaser of certain property of the corporation on execution sale under his judgment, and transferred the property to a newly organized corporation in exchange for all its stock. He then caused the judgment debtor to be adjudged a bankrupt on its voluntary petition and filed in the bankruptcy proceeding proof of claim upon the confessed judgment.

In the meantime Pepper had brought suit in the Virginia state courts to have the Litton judgment set aside as void. Following the sale of the corporation's property under the Litton execution, the sheriff instituted an interpleader suit joining Litton and Pepper as claimants to the proceeds of the execution sale in the sheriff's hands. Litton and Pepper both answered, asserting claims to the proceeds subject to an existing prior lien. Thereafter the trustee in bankruptcy, with the authority of the bankruptcy court, moved in the state court to set aside the Litton judgment and to quash the execution on the ground that the judgment was void, since the confession did not conform to the Virginia statutes. That court concluded that the Litton judgment was void, but denied the motion on the ground that the trustee was estopped to challenge it.

It held that Pepper, in asserting a claim to the proceeds of the sheriff's sale in the interpleader suit, had treated them as validly derived from the execution sale on the Litton judgment, and that in consequence he had elected to recognize the validity of the judgment.

Here when the petitioner brought his suit for conversion he was not a fiduciary for the defendant, Woodruff, or his creditors. There was no equitable ground upon

---

As at that time Litton had acquired or caused to be withdrawn from the bankruptcy proceedings all the claims against the estate, other than the Pepper judgment, the court held that the trustee was representing only Pepper in the state court suit and that the trustee, as well as Pepper, was estopped to maintain it. The judgment was affirmed on these grounds by the Virginia Supreme Court. *Smith* v. *Litton*, 167 Va. 263, 188 S. E. 214. On objections to the claim on the Litton judgment the district court, sitting in bankruptcy, disallowed the claim. On appeal the Circuit Court of Appeals reversed, holding that the decision and judgment of the state court in *Smith* v. *Litton*, *supra*, were *res judicata* in the bankruptcy proceeding. 100 F. 2d 830.

This Court, in reversing the judgment of the Court of Appeals, pointed out that the challenge to the validity of the Litton judgment in the state court was on the ground that the judgment was irregular or void on its face because the confession of judgment did not conform to the requirements of state law. We also pointed out that under the pleadings and practice in the suit attacking the judgment the validity of the alleged debt for salary was not in issue and no question was in issue or presented whether the Litton judgment might, on equitable principles, be subordinated to the claims of other creditors. We said, page 303: "The only decree which was asked or could be given in the plaintiff's favor" under the pleadings "was for cancellation of the judgment as a record obligation of the bankrupt. It is therefore plain that the issue which the bankruptcy court later considered was not an issue in the trial of the cause in the state court and could not be adjudicated there."

Thus the Court recognized that the judgment of the state court in *Smith* v. *Litton*, *supra*, was not *res judicata* as to matters later ruled upon by the bankruptcy court and by this Court. Upon this assumption, and assuming also the validity of the alleged salary debt underlying the Litton judgment, this Court held, on equitable principles, that Litton was not free to assert his judgment in competition with other creditors because he had acquired the judgment in breach of the fiduciary obligation which a controlling stockholder of the bankrupt owes to the other creditors, not to secure for himself a personal advantage by way of security or priority over them. Cf. *Taylor* v. *Standard Gas Co.*, 306 U. S. 307.

The decision in *Pepper* v. *Litton* thus affords no support for petitioner's contention that the doctrine of *res judicata* is inapplicable

which his claim or the judgment upon it could be set aside or subordinated to those of other creditors in the bankruptcy proceeding, except that asserted by respondents that the judgment had been procured by a fraud perpetrated on the judgment debtor. That issue, having been twice litigated and decided in the court in which the judgment was rendered, in proceedings brought by the trustee in bankruptcy and the bankrupt, and by the bankrupt alone, may not now be relitigated in the bankruptcy court.

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissenting.

We would affirm the judgment for the reasons stated by Judge Bratton writing for the Circuit Court of Appeals. 150 F. 2d 869.

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

MR. JUSTICE RUTLEDGE.

I concur in the result. In my judgment it is necessary, in this case, to do no more than to rule that equitable principles, applicable in bankruptcy in accordance with

in a bankruptcy proceeding. Cases on which respondents rely, cited in *Pepper* v. *Litton*, as illustrating the extent to which a court may look behind a judgment proved in bankruptcy to ascertain the nature of a claim upon which the judgment is based, are concerned exclusively with the question of the nature of the liability represented by the judgment, that is, whether it represents a "debt" provable and dischargeable in bankruptcy under §§ 17 and 63 of the Bankruptcy Act. Thus a decree for alimony was held to be not a "debt" but in the nature of a penalty for failure to perform a duty, and not provable or dischargeable in bankruptcy. *Wetmore* v. *Markoe*, 196 U. S. 68. Those cases do not support the ruling of the Court of Appeals below that the bankruptcy court, in determining the validity of a provable claim upon a judgment, may reexamine the issues which were litigated by the bankrupt or his trustee in the suit in which the judgment was rendered or in any other. See *Boynton* v. *Ball*, 121 U. S. 457.

Pepper v. *Litton,* 308 U. S. 295, and prior decisions, do not require reexamination by the bankruptcy court, in the circumstances now presented, of the foundations of the judgment which is the basis of the claim in issue. If, as the Court declared in *Pepper* v. *Litton,* the bankruptcy court has power to reject claims, even when previously allowed, "in whole or in part 'according to the equities of the case,' " 308 U. S. at 304,[1] see 11 U. S. C. § 93 (k), I find no reason for qualifying that rule in this case. It necessarily comprehends that the bankruptcy court in the allowance or rejection and ordering of claims shall not be bound by any broad or rigid rule of *res judicata.* That, I think, is the essential ruling of the *Pepper* case.[2]

On the other hand, prior adjudication of the very grounds alleged for disallowing or subordinating a judg-

[1] "Allowance and disallowance are judicial acts. . . . In passing on an allowance of claims the court sits as a court of equity, which gives it far-reaching powers 'to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate.' [*Pepper* v. *Litton,* 308 U. S. 295, 308.] Mere reasons of equity may sometimes require that a creditor's claim be either totally disallowed or subordinated to the claims of all or of certain other general creditors . . . . Equities to be weighed in connection with the allowance of a claim may vary in importance. They may in extreme cases be strong enough to warrant disallowance absolutely and entirely. In other cases equity may be satisfied with a mere 'subordination' or postponement of a claim, and its relegation to a rank inferior to that of all general creditors or of a particular group." 3 Collier, Bankruptcy (14th ed.) 185–186. See also 3 *id.* at 1800–1801.

11 U. S. C. § 93 (a) provides: "A proof of claim shall consist of a statement under oath, in writing and signed by a creditor, setting forth the claim; the consideration therefor; whether any and, if so, what securities are held therefor; and whether any and, if so, what payments have been made thereon; and that the claim is *justly owing* from the bankrupt to the creditor." (Emphasis added.)

[2] The case has been so read. Citing it, 3 Collier, Bankruptcy (14th ed.) 1800, says: "The doctrine of *res judicata,* as applied to the bankruptcy court in deciding whether a claim should be allowed, disallowed or subordinated, is subject to the paramount equitable powers of bankruptcy courts to prevent the perpetration of fraud and collusion."

691100°—47——51

ment claim, cannot be irrelevant to what equitable principles may require the bankruptcy court to do in disposing of the claim. And the same may be true also of prior failure to secure such an adjudication when adequate opportunity is afforded by proceedings instituted to set aside or modify the judgment. Cf. *Handlan* v. *Walker*, 200 F. 566. Sound policies of judicial administration, affecting both the bankruptcy court and the court rendering the judgment, may have a similar bearing.

In this case the two separate proceedings had in the District Court for the Southern District of California afforded perhaps more than adequate opportunity for adjudication of the issues now raised in the bankruptcy court, once to the bankrupt, once to his trustee. These proceedings were allowed to be terminated adversely in the one case without appeal, in the other after adverse decision on appeal and without application for certiorari. *Jackson* v. *Heiser*, 111 F. 2d 310. I do not think equity requires a third opportunity to be afforded by the bankruptcy court. On this ground I agree that the judgment should be reversed.

UNITED STATES *v.* RICE, DISTRICT JUDGE.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 411. Argued February 5, 1946.—Decided April 22, 1946.

1. A circuit court of appeals may not, by mandamus, review a judgment of a district court ordering remand to a state court of a proceeding which had been removed to the district court upon petition of the United States pursuant to § 3 of the Act of April 12, 1926, relating to suits involving title to lands allotted to members of the Five Civilized Tribes in Oklahoma. Pp. 744, 753.

(a) The United States can not assert, by virtue of its sovereignty, a right of appeal which no statute confers. P. 749.

(b) Section 3 of the Act of April 12, 1926, does not confer upon the Government any right of review of an order remanding a cause

removed under that Act; and § 2 of the Judiciary Act of 1887 intended to withhold it in all cases of removal from state courts. Pp. 749, 751.

2. Statutory language and objective appearing with reasonable clarity are not to be overcome by resort to a mechanical rule of construction, whose function is not to create doubts but to resolve them when the real issue or statutory purpose is otherwise obscure. P. 753.

Proceedings were begun in a County Court for administration on the estate of a restricted Indian member of the Five Civilized Tribes in Oklahoma. The County Court appointed administrators. The United States petitioned for an order of removal pursuant to § 3 of the Act of April 12, 1926, 44 Stat. 239. The County Court made its order of removal and a transcript of the proceedings was filed in the District Court. The United States petitioned for intervention in the District Court and prayed for a determination of the decedent's heirs and of the specific parts of his property which are restricted and subject to the supervision of the Secretary of the Interior. On motion of the administrators appointed by the County Court, the District Court dismissed the petition in intervention without prejudice and remanded the proceeding to the County Court for want of jurisdiction in the District Court. *In re Micco's Estate,* 59 F. Supp. 434.

The United States applied to the Circuit Court of Appeals for leave to file a petition for a writ of mandamus to direct the District Court to vacate its judgment dismissing the petition for intervention and remanding the proceeding.

Being equally divided on two questions, (1) whether the judgment of remand is reviewable by mandamus, and (2) whether the proceeding was removable under the Act of April 12, 1926, the Circuit Court of Appeals certified a single question for the consideration of this Court: "May this court, by mandamus, review the judgment of the United States District Court for the Eastern District of Oklahoma ordering the remand of the proceeding to the

County Court of Okfuskee County, Oklahoma?" It further requested this Court to exercise its authority under § 239 of the Judicial Code, "to require the entire record in the cause to be sent up for its consideration and to decide the whole matter in controversy." The Government made a motion to like effect.

The certified question is answered "No" and the Government's motion that this Court order up the entire record is denied. P. 753.

Marvin J. Sonosky argued the cause for the United States. With him on the brief were *Solicitor General McGrath* and *J. Edward Williams.*

Alfred Stevenson argued the cause for Judge Rice. With him on the brief was *W. T. Anglin.*

Opinion of the Court by MR. CHIEF JUSTICE STONE, announced by MR. JUSTICE BLACK.

In this case the Court of Appeals for the Tenth Circuit, acting under § 239 of the Judicial Code, 28 U. S. C. § 346, has certified a question of law upon which it desires the instruction of this Court for the proper decision of the cause. The question is whether that court may, by mandamus, review the judgment of the District Court for Eastern Oklahoma ordering the remand of a proceeding to the County Court of Okfuskee County, Oklahoma, from which it had been previously removed to the district court pursuant to § 3 of the Act of April 12, 1926, c. 115, 44 Stat. 239.

The certificate shows that proceedings were begun in the county court by a petition for administration on the estate of Peter Micco, a restricted Indian member of the Five Civilized Tribes in Oklahoma. The county court granted the petition, and appointed administrators. Section 3 of the Act of April 12, 1926, provides that a party to a suit "in the State courts of Oklahoma to which a re-

stricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties, . . . and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes". The United States is afforded a specified time after notice is given to appear in the suit, and after such appearance, or the expiration of the time specified, it is provided that "the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved." The Act further provides that

> "the United States may be, and hereby is, given the right to remove any such suit pending in a State court to the United States district court by filing in such suit in the State court a petition for the removal of such suit into the said United States district court, to be held in the district where such suit is pending, together with the certified copy of the pleadings in such suit . . . It shall then be the duty of the State court to accept such petition and proceed no further in said suit. The said copy shall be entered in the said district court of the United States . . . and the defendants and intervenors in said suit shall within twenty days thereafter plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in said district court, and such court is hereby given jurisdiction to hear and determine said suit, and its judgment may be reviewed by certiorari, appeal, or writ of error in like manner as if the suit had been originally brought in said district court."

Following the service upon the Superintendent of the Five Civilized Tribes of notice of the pendency of the suit in the county court, the United States timely filed its

petition in that court for an order of removal, alleging that the proceeding was instituted to obtain the appointment of an administrator for the estate of a three-fourths blood Seminole Indian; that a portion of said estate, comprising real and personal property, is restricted under the laws of the United States; that title to and interests in restricted land are involved; that the heirs at law of Micco are restricted Indians and wards of the United States.

Thereupon the county court made its order of removal, and a transcript of the proceedings was filed in the district court. The United States then filed its complaint in intervention in the district court, praying a determination of the heirs of Peter Micco, and of the specific parts of decedent's property which are restricted and subject to the supervision of the Secretary of the Interior. On motion of the administrators appointed by the county court, the district court entered an order dismissing the complaint in intervention without prejudice, and remanding the proceeding to the county court for want of jurisdiction in the district court. *In re Micco's Estate,* 59 F. Supp. 434. The United States thereupon instituted this proceeding in the circuit court of appeals by a petition for writ of mandamus, to direct the district court to vacate its judgment dismissing the Government's petition for intervention and remanding the proceeding.

The certificate of the circuit court of appeals, after stating that the court is equally divided on two questions, first, whether the judgment of remand is reviewable by mandamus, and, second, whether the proceeding was removable under the provisions of the Act of 1926, certified a single question for our consideration, as follows: "May this court, by mandamus, review the judgment of the United States District Court for the Eastern District of Oklahoma ordering the remand of the proceeding to the County Court of Okfuskee County, Oklahoma?" The

certificate further requested this Court to exercise its authority under § 239 of the Judicial Code, "to require the entire record in the cause to be sent up for its consideration and that it decide the whole matter in controversy." The Government has made a motion to like effect.

In considering these requests, it is to be noted that the only matter pending in the court below to which the certified question relates is the application filed in that court for mandamus, on which the court has not acted. There is consequently no order or judgment in the case which can be brought before this Court by appeal. The practice established by statute, 28 U. S. C. § 346, of answering questions certified to this Court, or in some such cases, of deciding the entire controversy on the whole record, is plainly not within our original jurisdiction. As far as it is within our appellate jurisdiction, our authority is defined wholly by the statute, which provides that, upon the presentation of the certificate, this Court "may require that the entire record in the cause be sent up for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought [here] by writ of error or appeal." But the only manner in which we, as an appellate court, can decide a controversy brought here by writ of error or appeal is by affirming, reversing or modifying the order or judgment before us for review. It may be doubted whether the statute contemplates our going beyond the certified question, to decide a case or controversy not within our original jurisdiction, and which, since no inferior court has decided it, could not be brought here on appeal. But we need not resolve the doubt as to our power here, for as will presently appear, the answer which we give to the question certified is dispositive of the whole case before the circuit court of appeals, making it unnecessary to express an opinion on any other issue which the record might present, or to order the record to be filed here.

The Act of 1926, under which the cause, *In re Micco's Estate,* was removed from the Oklahoma county court, contains no provisions respecting remand or any mode of review of an order of remand. But its provisions must be read with those provisions governing removal of suits from state courts to federal district courts, and their remand, appearing in § 2 of the Judiciary Act of March 3, 1887 (24 Stat. 552, reenacted to correct errors in enrollment, August 13, 1888, 25 Stat. 433, and again reenacted and amended March 3, 1911, 36 Stat. 1094, as § 28 of the Judicial Code, 28 U. S. C. § 71), and in § 37 of the Judicial Code, 28 U. S. C. § 80. Section 80 authorizes remand of "any suit" removed from a state court to a district court where the latter finds that it is without jurisdiction. Section 2 of the Act of 1887 provided for the removal of diversity suits from state courts to federal circuit courts, now district courts, and, as corrected in 1888, contained a separate paragraph, in terms relating to "any cause" removed from a state court into a circuit court. This paragraph read:

> "Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."

Before the Judiciary Act of March 3, 1875, 18 Stat. 470, 472, an order of remand was deemed to be not reviewable by appeal or writ of error because the order was not final. *Railroad Co.* v. *Wiswall,* 23 Wall. 507; *In re Pennsylvania Co.,* 137 U. S. 451. But § 5 of the Act of 1875 expressly authorized the review of an order of remand by appeal or writ of error "in any suit" removed from a state court. This provision was repealed by § 6 of the Act of 1887, *supra,* and to make doubly certain, § 2, *supra,* specifically

prohibited appeals, with the added direction that the order of remand should "be immediately carried into execution". It thus appears that when the Act of 1926 was passed, the practice in removal cases was, as it had been established from the beginning, save for a brief interval under § 5 of the Act of 1875, that an order of remand was not appealable, and it is also clear that in 1926, as for forty years before, § 2 of the Act of 1887 required the remand of "any" removed cause to "be immediately carried into execution".

The enactment of § 3 of the 1926 Act, without more, did not confer upon the Government any right of appeal from an order remanding a cause removed under that Act. We cannot say that under the Act of 1926, standing alone, the right of appeal from an order of remand stands on any different footing than it did under any other statute authorizing removal before the enactment of the 1875 Act, or that the order of remand is any less final in the case of the Government than in the case of an individual. Each loses, by the order, such right as there may be to litigate the case in the federal courts on removal, but both retain such rights as they may have to continue the litigation in the state court or to bring an independent suit in the federal courts. To whatever extent the Government may be excluded from the operation of a statute in which it is not named, cf. *United States* v. *Stevenson*, 215 U. S. 190, 197 with *United States* v. *California*, 297 U. S. 175, 186, it is clear that the United States can not assert, by virtue of its sovereignty, a right of appeal which no statute has conferred, or which, if conferred, has been abolished. Not only was no such right of appeal conferred by the Act of 1926, but, we think, as will presently appear, that the provisions of § 2 of the Act of 1887, denying an appeal from an order remanding a case removed under the Act of 1926, denied the right to review by mandamus as well.

Before the enactment of the Act of 1875 it had been suggested that although orders of remand were not ap-

pealable, because non-final, they might be reviewed by mandamus. *Railroad Co.* v. *Wiswall,* 23 Wall. 507; see also *In re Pennsylvania Co.,* 137 U. S. 451, 453; *Employers Corp.* v. *Bryant,* 299 U. S. 374, 378. After the right of appeal from such an order was conferred in all removal cases by § 5 of the Act of 1875, the question arose whether there could be review by mandamus of an order denying a motion to remand. This was answered in the negative on the ground that the right to appeal given by the 1875 Act was limited to orders of remand. Hence resort could not be had to mandamus to perform the office of a writ of error which Congress had withheld in the case of an order denying remand. *Ex parte Hoard,* 105 U. S. 578; *Ex parte Harding,* 219 U. S. 363; *Ex parte Roe,* 234 U. S. 70. In all these cases it was pointed out that the mode of review of an order denying remand is by appeal from the final judgment in the suit in which the remand is denied.

But it is urged that the mere failure of the 1926 Act to confer on the Government a right of appeal from an order of remand should not preclude review by mandamus, since, unlike the case where the district court refuses to remand, an order denying the right to have the removed cause tried in the district court could not otherwise be reviewed in the federal courts. But this argument presupposes that the provisions of the 1887 Act, prohibiting appeals from orders of remand, and directing the immediate execution of such orders, do not apply to causes removed from the state courts under the Act of 1926, a supposition which disregards the plain purport of the words of the 1887 statute, and its legislative history.

Section 5 of the Judiciary Act of 1875, which, for the first time, authorized review of an order of remand by writ of error or appeal, was, by its terms, made applicable generally to "any suit" removed from a state court to a federal circuit (now district) court. It authorized the circuit court to remand the cause for want of juris-

diction, and provided that the order of remand should be reviewable by appeal. This section was repealed by § 6 of the 1887 Act, and § 2 of that Act substituted for the repealed provision governing appeals, a new provision, which was in terms likewise extended to orders of remand "whenever any cause shall be removed from any State court". Section 6, together with this substituted provision, explicitly withdrew the right of appeal and writ of error in all cases in which it had been previously allowed by § 5, that is, in all cases removed from state courts under any statute authorizing removal. See *Employers Corp.* v. *Bryant, supra,* 380–1.

Section 2 of the Act of 1887 thus expressly denied review by appeal or writ of error from orders of remand which had previously been allowed by § 5 of the Act of 1875 in all cases removed from state courts, but which before that Act had been deemed not to be appealable because not final orders. But § 2 also coupled with this prohibition the direction, made applicable in every case removed from a state court, that "such remand shall be immediately carried into execution". Reading and construing these provisions together, this Court has consistently held, and it is no longer open to doubt, that an order remanding a cause which is subject to the prohibition against appeals of § 2 cannot be reviewed by mandamus. *In re Pennsylvania Co., supra; Employers Corp.* v. *Bryant, supra.*

Congress, by the adoption of these provisions, as thus construed, established the policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed. This was accomplished by denying any form of review of an order of remand, and, before final judgment, of an order denying remand. In the former case, Congress has directed that upon the remand the litigation should proceed in the state

court from which the cause was removed. It may be arguable, as a matter of policy, that in giving the Government the right to intervene and remove a cause from a state court, it should also have been given the right, not allowed to private litigants, to have orders of remand reviewed in the appellate courts. But the Congressional policy of avoiding interruption of the litigation of the merits of removed causes, properly begun in state courts, is as pertinent to those removed by the United States as by any other suitor, see *United States* v. *California, supra,* 186, and we think it plain that the Act of 1926 did not confer any such right of review, and that the Act of 1887 intended to withhold it in all cases of removal from state courts.

As we have already indicated, and as the legislative history shows, these provisions of the Act of 1887 were intended to be applicable not only to remand orders made in suits removed under the Act of 1887, but to orders of remand made in cases removed under any other statutes, as well. *Cole* v. *Garland,* 107 F. 759, dismissed on appeal 183 U. S. 693, approved in *Gay* v. *Ruff,* 292 U. S. 25, 29, n. 5; see also *Employers Corp.* v. *Bryant, supra,* 380–1. It was so held with respect to the Act of 1926 in *United States* v. *Fixico,* 115 F. 2d 389.

Nothing in the Act of 1926 purports to impair or restrict the application of § 2 of the 1887 Act, thus construed, to orders of remand made under 28 U. S. C., § 80, in cases removed under the 1926 Act. Congress, in enacting the 1926 Act, not only failed to include in it any provision modifying what had been for forty years the established practice of denying review of orders remanding causes removed from state courts, but it must be taken to have been aware of the universality of that practice, and to have been content that, as established by the 1887 Act, it should apply to cases removed under the 1926 Act. Statutory

language and objective, thus appearing with reasonable clarity, are not to be overcome by resort to a mechanical rule of construction, whose function is not to create doubts, but to resolve them when the real issue or statutory purpose is otherwise obscure. *United States* v. *California, supra,* 186.

The certified question will be answered "No", and the Government's motion that we order up the entire record may accordingly be denied.

So ordered.

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

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE RUTLEDGE concur, dissenting.

The Act of April 12, 1926, 44 Stat. 239, has two main purposes. It provides the machinery for bringing in the United States where the property interests of a restricted Indian of the Five Civilized Tribes are being litigated in either the federal or the state courts. This was done so that all interested parties might be concluded by one proceeding and titles to these Indian lands stabilized.[1] H. Rep. No. 322, 69th Cong., 1st Sess., p. 2. In case the proceeding is brought in a state court, the United States is given "the right to remove" the suit to the federal court by filing in the state court a petition for removal. The Act provides that when such petition is filed it shall be "the duty of the State court to accept such petition and proceed no further in said suit." The right to remove is unquali-

[1] Prior to the 1926 Act the United States could not be bound by a proceeding affecting restricted Indian lands. After the matter had been litigated, the United States could still institute an independent suit and annul the prior decree entered in the suit to which it was not a party. *Sunderland* v. *United States,* 266 U. S. 226.

fied. It rests in the sole discretion of the United States, which is given the choice of the forum. As stated in the House Report, *supra*, p. 2:

> "Section 3 provides only where the interest of a restricted Indian of the Five Civilized Tribes is being litigated in the State courts that service may be had upon the Government and the Government is given the right to chose [*sic*] the forum in which the suit may be tried and may transfer such case to the United States district court upon motion in the event that the Government chooses to do so."

But it is said that this special Act, passed in 1926, is governed by the general removal Act of March 3, 1887, 24 Stat. 552, Judicial Code § 28, 28 U. S. C. § 71, which disallows appeals from orders remanding causes removed from state courts. I do not agree.

(1) The 1926 Act contains none of the qualifications written into the general removal acts.

(2) The 1926 Act is an independent statute dealing with a highly specialized problem and limited as to parties and subject matter. The mischief at which the general removal acts were aimed is not present here. They were concerned with eliminating litigious interruptions of private litigation by prolonged disputes over the jurisdiction of the court to which the cause was removed. But the United States is not in a position of a private litigant. The United States has a special function to perform in these Indian cases. It represents the public interest. *Heckman* v. *United States*, 224 U. S. 413, 437–444. It alone is given the "right to remove". If the cause is remanded, it alone can seek review. It should be remembered that the 1926 Act provides a procedure whereby the United States can be bound by a suit instituted by another. It is fair to infer that when the United States was subjected to that risk, Congress intended that it should have a right, if it so elected, to have the cause heard and de-

termined by its own courts. The "right to chose [*sic*] the forum in which the suit may be tried" (H. Rep., *supra*) can hardly have any other meaning.

(3) The 1887 Act in its operation was not applicable to the United States. It provided for removal by defendants. They alone could remove. The right of removal was therefore not available to the United States. It could not be a defendant in a state court, since it had not consented to be sued there. That was well settled at the time. For in 1896 the Court stated, "The United States, by various acts of Congress, have consented to be sued in their own courts in certain classes of cases; but they have never consented to be sued in the courts of a State in any case." *Stanley* v. *Schwalby,* 162 U. S. 255, 270. It seems clear then that the prohibition against review of orders of remand contained in the 1887 Act was not aimed at the United States. I think, therefore, that it should require an explicit provision in the 1926 Act to conclude that the United States was now to be bound by an Act heretofore inapplicable to it. It has long been held that if the United States is to be deprived of a right or a remedy by the general terms of a statute, "the language must be clear and specific to that effect." *United States* v. *Stevenson,* 215 U. S. 190, 197; *United States* v. *American Bell Tel. Co.,* 159 U. S. 548, 554; *United States* v. *Herron,* 20 Wall. 251, 263; *Dollar Savings Bank* v. *United States,* 19 Wall. 227, 239. This seems to me to be a clear case for the application of that rule.

If Congress had said that orders of remand under the 1926 Act should not be reviewed, mandamus of course would not lie. But since there is no such prohibition, mandamus is available to compel the District Court to perform its duty. *Railroad Co.* v. *Wiswall,* 23 Wall. 507; *In re Pennsylvania Co.,* 137 U. S. 451, 453.

DECISIONS PER CURIAM, ETC., FROM JANUARY 29, 1946, THROUGH APRIL 22, 1946.*

No. 723. REPUBLIC PICTURES CORP. *v.* KAPPLER. Appeal from the Circuit Court of Appeals for the Eighth Circuit. February 4, 1946. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *McKnett* v. *St. Louis & San Francisco R. Co.*, 292 U. S. 230, 233, 234; *Pufahl* v. *Estate of Parks*, 299 U. S. 217, 227; *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698, 704. *A. A. McLaughlin* for appellant. *George B. Porter* for appellee. Reported below: 151 F. 2d 543.

No. 61, Misc. IN RE YAMASHITA; and

No. 672. YAMASHITA *v.* STYER, COMMANDING GENERAL. February 4, 1946. It is ordered that the order of this Court of December 17, 1945, 326 U. S. 693, staying all further proceedings in these causes pending the consideration and determination of the applications for writs of habeas corpus and prohibition and of the petition for writ of certiorari is vacated.

It is further ordered that certified copies of the orders denying the motions for leave to file the petitions for writs of habeas corpus and prohibition and denying the petition for writ of certiorari be issued forthwith.

For opinion of the Court in these cases, see *ante*, p. 1.

No. 85, Misc. LAMORE *v.* WELCH, SUPERINTENDENT. February 4, 1946. The motion for leave to file a petition for a writ of habeas corpus is denied.

---

*MR. JUSTICE JACKSON took no part in the consideration or decision of the cases in which judgments or orders were announced during this period.

For decisions on applications for certiorari, see *post*, pp. 771, 777; rehearing, *post*, pp. 812, 813.

No. 84, Misc. RESCO *v.* RAGEN, WARDEN. February 4, 1946. The motion to withdraw the motion for leave to file a petition for writ of certiorari is granted.

No. 495. CRESPO *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit. February 4, 1946. Dismissed for failure to comply with the rules. Reported below: 151 F. 2d 44.

No. 770. TAYLOR *v.* KENTUCKY STATE BAR ASSOCIATION. Appeal from the Court of Appeals of Kentucky. February 11, 1946. *Per Curiam:* The motion to dismiss is granted and the appeal dismissed for the want of a properly presented substantial federal question. Appellant *pro se*. *Eldon S. Dummit* for appellee. Reported below: 300 Ky. 448, 189 S. W. 2d 403.

No. 402. BRUCE'S JUICES, INC. *v.* AMERICAN CAN CO. Certiorari, 326 U. S. 711, to the Supreme Court of Florida. Argued January 29, 30, 1946. Decided February 11, 1946. *Per Curiam:* Judgment affirmed by an equally divided Court. *Cody Fowler* and *Thurman Arnold* argued the cause for petitioner. With them on the brief was *R. W. Shackleford*. *John Lord O'Brian* argued the cause for respondent. With him on the brief were *Leonard B. Smith, John M. Allison* and *Harry B. Terrell*. Reported below: 155 Fla. 877, 22 So. 2d 461.

No. 410. MACGREGOR *v.* WESTINGHOUSE ELECTRIC & MANUFACTURING CO. Certiorari, 326 U. S. 708, to the Supreme Court of Pennsylvania. Argued January 31, 1946. Decided February 11, 1946. *Per Curiam:* Judg-

ment affirmed by an equally divided Court. *William B. Jaspert* argued the cause and filed a brief for petitioner. *Jo. Baily Brown* argued the cause and filed a brief for respondent. Reported below: 352 Pa. 443, 43 A. 2d 332.

No. 93, Misc. HOMMA *v.* PATTERSON, SECRETARY OF WAR, ET AL.; and

No. 818. HOMMA *v.* STYER, COMMANDING GENERAL, ET AL. On motion for leave to file petition for writs of habeas corpus and prohibition and on petition for a writ of certiorari to the Supreme Court of the Philippines. February 11, 1946. The motion for leave to file petition for writ of habeas corpus and writ of prohibition is denied and the petition for writ of certiorari is also denied on authority of *In re Yamashita,* 327 U. S. 1. *Captain George W. Ott* for petitioner. *Solicitor General McGrath* for respondents.

MR. JUSTICE MURPHY, dissenting.

This case, like *In re Yamashita,* 327 U. S. 1, poses a problem that cannot be lightly brushed aside or given momentary consideration. It involves something more than the guilt of a fallen enemy commander under the law of war or the jurisdiction of a military commission. This nation's very honor, as well as its hopes for the future, is at stake. Either we conduct such a trial as this in the noble spirit and atmosphere of our Constitution or we abandon all pretense to justice, let the ages slip away and descend to the level of revengeful blood purges. Apparently the die has been cast in favor of the latter course. But I, for one, shall have no part in it, not even through silent acquiescence.

Petitioner, a civilian for the past three and a half years, was the victorious commander of the 14th Army of the

Imperial Japanese Army in the Philippines from December 12, 1941, to August 5, 1942. It may well be that the evidence of his guilt under the law of war is more direct and clear than in the case of General Yamashita, though this could be determined only by an examination of the evidence such as we have had no opportunity to make. But neither clearer proof of guilt nor the acts of atrocity of the Japanese troops could excuse the undue haste with which the trial was conducted or the promulgation of a directive containing such obviously unconstitutional provisions as those approving the use of coerced confessions or evidence and findings of prior mass trials. To try the petitioner in a setting of reason and calm, to issue and use constitutional directives and to obey the dictates of a fair trial are not impossible tasks. Hasty, revengeful action is not the American way. All those who act by virtue of the authority of the United States are bound to respect the principles of justice codified in our Constitution. Those principles, which were established after so many centuries of struggle, can scarcely be dismissed as narrow artificialities or arbitrary technicalities. They are the very life blood of our civilization.

Today the lives of Yamashita and Homma, leaders of enemy forces vanquished in the field of battle, are taken without regard to due process of law. There will be few to protest. But tomorrow the precedent here established can be turned against others. A procession of judicial lynchings without due process of law may now follow. No one can foresee the end of this failure of objective thinking and of adherence to our high hopes of a new world. The time for effective vigilance and protest, however, is when the abandonment of legal procedure is first attempted. A nation must not perish because, in the natural frenzy of

the aftermath of war, it abandoned its central theme of the dignity of the human personality and due process of law.

MR. JUSTICE RUTLEDGE agrees with these views.

MR. JUSTICE RUTLEDGE, dissenting.

I dissent upon the grounds stated in the dissenting opinions in the *Yamashita* case, 327 U. S. 1, 26, 41, all of which are exemplified in these applications, and for additional reasons presented by them.

For the first time the Court, by its denial of the applications with the effect of sustaining the commission's jurisdiction, permits trial for a capital offense under a binding procedure which allows forced confessions to be received in evidence;[1] makes proof in prior trials of groups for mass offenses "*prima facie* evidence that the accused likewise is guilty of that offense";[2] and requires that the findings and judgment in such a mass trial "be given full faith and credit" in any subsequent trial of an individual

[1] The directive or order prescribing the regulations governing the trial was issued December 5, 1945, and provided in Paragraph 5d *Evidence* (7): "All purported confessions or statements of the accused shall be admissible without prior proof that they were voluntarily given, it being for the commission to determine *only* the truth or falsity of such confessions or statements." (Emphasis added.) In addition to the further provisions set forth in notes 2 and 3, the order provided for the reception of hearsay and documentary evidence in even broader terms, if possible, than the directive relating to similar matters which covered General Yamashita's trial.

[2] Paragraph 5d *Evidence* also contained the following subdivision (4): "If the accused is charged with an offense involving concerted criminal action upon the part of a military or naval unit, or any group or organization, evidence which has been given previously at a trial resulting in the conviction of any other member of that unit, group or organization, relative to that concerted offense, may be received as *prima facie* evidence that the accused likewise is guilty of that offense."

person charged as a member of the group.[3] These provisions of the directive ordering the creation of the commission in my judgment vitiate the entire proceeding.

Moreover the time allowed for preparation of the defense was cut from the three weeks given to Yamashita to fifteen days between arraignment and the beginning of trial. Motions at arraignment for 30 days to prepare defense before the trial began and on the opening day of trial for a ten-day continuance, the latter supported by counsel's affidavit of insufficient time, were denied.[4]

---

[3] Paragraph 5d *Evidence* (5) is as follows: "The findings and judgment of a commission in any trial of a unit, group, or organization with respect to the criminal character, purpose or activities thereof shall be given full faith and credit in any subsequent trial, by that or any other commission, of an individual person charged with criminal responsibility through membership in that unit, group or organization. Upon proof of membership in that unit, group or organization convicted by a commission, the burden shall be on the accused to establish by proof any mitigating circumstances relating to his membership or participation therein."

[4] The following is a bare chronological statement concerning the constitution of the commission and subsequent events: On December 5, 1945, the regulations governing the trial were issued; December 6, the order to General Styer to appoint the commission followed; on December 12, petitioner was transferred from Japan to Manila; December 15, counsel for the defense was appointed; December 17, the charge was served on petitioner, substantially identical with that in the *Yamashita* case, containing 47 specifications of the same general type there involved, together with a supplemental charge that on May 6, 1942, petitioner refused to grant quarter to the armed forces of the United States and its allies in Manila Bay, Philippines; December 19, the commission convened, counsel were sworn, petitioner was arraigned, pleaded not guilty and entered a motion for thirty days time to prepare defense before trial. The motion was denied.

On January 3, 1946, the commission reconvened. The prosecution then filed a bill of particulars to two of the specifications. Petitioner's plea to the jurisdiction, motion to dismiss, motions for bills of particulars relating to certain items in the specifications, and for further particulars concerning other items were denied. The commission also then denied the motion of counsel for the defense to postpone the

Other serious questions, affecting the validity and fairness of the commission's constitution are presented which were not raised in the *Yamashita* petitions.

I think the motion and petition respectively should be granted and determined on the merits.

MR. JUSTICE MURPHY joins in this opinion.

No. 86, Misc. WHITE *v.* RAGEN, WARDEN. February 11, 1946. The motion for leave to file petition for writ of certiorari is denied.

No. 87, Misc. BAILEY *v.* PARKER, WARDEN; and

No. 88, Misc. HOUGHTON *v.* BENSON, ACTING WARDEN. February 11, 1946. The motions for leave to file petitions for writs of habeas corpus are denied.

---

trial for ten days. This motion was supported by affidavit of chief counsel, dated January 2, 1946, which set forth that he and his associates began work on preparing the defense on December 16; that "each of the forty-eight specifications requires a detailed investigation and that eighteen days have proved insufficient time to accomplish even a small portion of this investigation"; that two members of the defense staff who had left for Tokyo on December 25 to interview witnesses and secure other evidence had not returned; that two of three investigators originally assigned to the defense were ill and in the hospital, one from December 21, the other from December 24, and that only one additional investigator had been assigned to the defense, though others had been promised; that on January 2 the defense had received from the prosecution eleven "typical cases" on which proof was to be offered under specification 4 and nine "representative instances" under specification 47, which the defense had had no opportunity to investigate. The affidavit concluded with the statement that a minimum period of ten days was required before counsel could be prepared to proceed with the trial.

The trial began in the afternoon of January 3. On January 16 petitions for writs of habeas corpus and prohibition were filed in the Supreme Court of the Philippines. They were denied January 23 without argument. The petitions and motions constituting this application were filed in this Court February 7, 1946.

No. 89, Misc. OWENS *v.* HUNTER, WARDEN. February 11, 1946. The motion for leave to file petition for writ of mandamus is denied.

No. 12, original. UNITED STATES *v.* CALIFORNIA. February 11, 1946. The motion of the Commonwealth of Massachusetts for leave to intervene is denied.

No. 19. LIGGETT & MYERS TOBACCO CO. ET AL. *v.* UNITED STATES. February 11, 1946. Upon suggestion of the death of Edward H. Thurston, a petitioner in this case, the motion to dismiss the writ of certiorari as to Edward H. Thurston, deceased, is granted.

No. 544. UNITED STATES EX REL. HURWITZ *v.* ALEXANDER. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. February 11, 1946. Dismissed on motion of the petitioner. Petitioner *pro se*. *Solicitor General McGrath* and *Robert S. Erdahl* for respondent. Reported below: 150 F. 2d 1013.

No. 751. COMMISSIONER OF INTERNAL REVENUE *v.* COLLINS. On certificate from the Circuit Court of Appeals for the Ninth Circuit. February 25, 1946. *Per Curiam:* It appearing that the Commissioner of Internal Revenue has dismissed his petition for review in the Circuit Court of Appeals for the Ninth Circuit, the certificate is dismissed as moot. *Solicitor General McGrath* for petitioner. *Joseph D. Brady* for respondent. Reported below: 153 F. 2d 1022.

No. 75, Misc. ABRAMS *v.* 188 RANDOLPH BUILDING CORP. ET AL. February 25, 1946. The motion for leave to file a petition for writ of certiorari is denied. MR.

JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Meyer Abrams, pro se. Solicitor General McGrath, Frederick Bernays Wiener* and *Roger S. Foster* for the Securities & Exchange Commission, respondent.

No. 90, Misc. FIESTER *v.* ILLINOIS. February 25, 1946. Application denied.

No. 91, Misc. THOMPSON *v.* RAGEN, WARDEN. February 25, 1946. The motion for leave to file a petition for writ of habeas corpus is denied.

No. 92, Misc. IN RE ROSS. February 25, 1946. The motion for leave to file a petition for writ of mandamus or prohibition is denied.

No. 94, Misc. MCCONNELL *v.* DOWD, WARDEN. February 25, 1946. The motion for leave to file a petition for writ of certiorari is denied.

No. 845. SKENE *v.* RAGEN, WARDEN. On petition for writ of certiorari to the Supreme Court of Illinois. February 25, 1946. Dismissed on motion of petitioner.

No. 435. LAND, CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, ET AL. *v.* WATERMAN STEAMSHIP CORP. February 27, 1946. Macauley, Acting Chairman, substituted for Land. Writ of certiorari dismissed as to petitioners Kenneth F. Clark, Victor B. Gerard, and W. B. Van Houten, per stipulation of counsel. *Solicitor General McGrath, David L. Kreeger, Robert L. Stern* and *Joseph B. Goldman* for petitioners. *Bon Geaslin* for respondent.

No. 518. McGOLDRICK, COMPTROLLER, ET AL. *v.* CARTER & WEEKES STEVEDORING CO.; and

No. 519. McGOLDRICK, COMPTROLLER, ET AL. *v.* JOHN T. CLARK & SON. March 1, 1946. Joseph, present Comptroller, and Young, present Treasurer, substituted as parties petitioner on motion of *Isaac C. Donner,* counsel for the petitioners.

No. 95, Misc. McMAHAN *v.* CLARK, ATTORNEY GENERAL. March 4, 1946. The motion for leave to file a petition for writ of habeas corpus is denied.

No. 803. AKIN *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Western District of Louisiana. March 11, 1946. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *T. S. Christopher* and *A. B. Culbertson* for appellant. *Solicitor General McGrath* and *Daniel W. Knowlton* for appellees. Reported below: 62 F. Supp. 391.

No. 817. HARTSHORN *v.* KUZMIER ET AL. Appeal from the District Court of the United States for the Eastern District of New York. March 11, 1946. *Per Curiam:* The appeal is dismissed for want of a properly presented substantial federal question.

No. 74, Misc. LOPEZ *v.* UNITED STATES. March 11, 1946. The motion for leave to file a petition for writ of certiorari is denied. Petitioner *pro se. Solicitor General McGrath* and *Robert S. Erdahl* for the United States.

No. 97, Misc. FACTOR *v.* HUMPHREY, WARDEN; and

No. 99, Misc. McDONALD *v.* HUNTER, WARDEN. March

11, 1946. The motions for leave to file petitions for writs of habeas corpus are denied. *A. Bradley Eben* for petitioner in No. 97 Misc.

No. 98, Misc. FRASER *v.* UNITED STATES. March 11, 1946. The application is denied.

Nos. 67 and 578. THOMAS PAPER STOCK CO. ET AL. *v.* BOWLES, PRICE ADMINISTRATOR;

No. 393. COLLINS ET AL. *v.* BOWLES, PRICE ADMINISTRATOR;

No. 400. UTAH JUNK CO. *v.* BOWLES, PRICE ADMINISTRATOR;

No. 793. BOWLES, PRICE ADMINISTRATOR, *v.* WARNER HOLDING CO.;

No. 805. LENTIN, DOING BUSINESS AS J. LENTIN LUMBER CO., *v.* BOWLES, PRICE ADMINISTRATOR;

No. 826. LEITHOLD ET AL., CO-PARTNERS TRADING AS CUSTOM MAID BRASSIERE CO., *v.* BOWLES, PRICE ADMINISTRATOR; and

No. 870. TAYLOR ET AL. *v.* BOWLES, PRICE ADMINISTRATOR. March 11, 1946. Porter, Price Administrator, substituted for Bowles.

No. 769. QUEENSIDE HILLS REALTY CO., INC. *v.* WILSON, COMMISSIONER OF HOUSING & BUILDINGS. March 11, 1946. Saxl, present Commissioner, substituted for Wilson.

No. 917. IVERSEN ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the District of Columbia. March 25, 1946. *Per Curiam:* The motion to affirm is granted and the judgment is

affirmed. *Haskell Donoho, Dale C. Dillon* and *Ashley Sellers* for appellants. *Solicitor General McGrath* and *Daniel W. Knowlton* for appellees. Reported below: 63 F. Supp. 1001.

No. 100, Misc. FORTUNE *v.* VERDEL. March 25, 1946. The motion for leave to file a petition for writ of habeas corpus is denied.

No. 101, Misc. MORSE *v.* DIVISION OF CORRECTION OF THE DEPARTMENT OF PUBLIC SAFETY OF ILLINOIS. March 25, 1946. The motion for leave to file a petition for writ of mandamus is denied.

No. 102, Misc. VANDERWATER *v.* CITY NATIONAL BANK, EXECUTOR; and

No. 103, Misc. IN RE BRUBAKER. March 25, 1946. The applications are denied.

No. 577. BROWN *v.* MAYO, STATE PRISON CUSTODIAN. March 25, 1946. The petition for writ of certiorari to the Supreme Court of Florida and the motion for leave to file a petition for writ of habeas corpus are dismissed, it appearing that the petitioner is no longer in the custody of the respondent.

No. 728. CONGRESS OF INDUSTRIAL ORGANIZATIONS ET AL. *v.* WATSON, ATTORNEY GENERAL, ET AL. Appeal from the District Court of the United States for the Southern District of Florida. April 1, 1946. *Per Curiam:* The decree is reversed and the cause is remanded to the District Court for further proceedings in conformity to the opinion of this Court in *American Federation of Labor* v. *Watson*, 327 U. S. 582. *Lee Pressman, Frank Donner* and *Ernest Goodman* for appellants.

No. 96, Misc. ROSS *v.* RAGEN, WARDEN;

No. 105, Misc. PHILLIPS *v.* NEW YORK; and

No. 108, Misc. GAUMITZ *v.* MURPHY, WARDEN. April 1, 1946. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 106, Misc. LANE *v.* C. S. SMITH METROPOLITAN MARKET CO. ET AL.; and

No. 107, Misc. MCMAHAN *v.* UNITED STATES. April 1, 1946. The motions for leave to file petitions for writs of certiorari are denied.

No. 221. GIBSON *v.* UNITED STATES. Certiorari, 326 U. S. 708, to the Circuit Court of Appeals for the Eighth Circuit. April 1, 1946. Upon consideration of the application of counsel for the petitioner in the above-entitled cause for the release of petitioner from custody on bail: It is ordered that Taze Hamrick Gibson, the petitioner herein, be released from custody and admitted to bail pending the consideration and decision of this Court in this case. Provided, however, that the petitioner, Taze Hamrick Gibson, execute and file with the Clerk of this Court bond, with good and sufficient surety or sureties, in the lawful sum and amount of two thousand dollars ($2,000), conditioned to provide for the full and prompt compliance by the said Taze Hamrick Gibson with the orders and judgment of this Court. The said bond to run to the United States of America and to be approved by the Honorable Wiley Rutledge, Associate Justice of the Supreme Court of the United States. When the bond specified herein is approved and filed with the Clerk of this Court, but not before, the petitioner, Taze Hamrick Gibson, shall be enlarged on bail to the extent and subject to the conditions provided in this order and such further order or orders as may be entered by this Court in this cause.

No. 984. CITY AND COUNTY OF DENVER *v.* MCGLONE ET AL. Appeal from the Supreme Court of Colorado. April 22, 1946. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a properly presented federal question. *Malcolm Lindsey* and *Thomas H. Gibson* for appellant. *Walter W. Blood* and *Frank N. Bancroft* for appellees. Reported below: 163 P. 2d 646.

No. 592. HELWIG *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit. April 22, 1946. *Per Curiam:* The petition for writ of certiorari is granted and the judgment of the Circuit Court of Appeals is vacated and the cause remanded to the Circuit Court of Appeals with directions to require the District Court to perfect the record. Rule 39 of the Federal Rules of Criminal Procedure. See *Miller* v. *United States,* 317 U. S. 192, 199–200. Petitioner *pro se.* *Solicitor General McGrath* and *Robert S. Erdahl* for the United States. Reported below: 151 F. 2d 535.

No. 109, Misc. IN RE MASSEY;
No. 110, Misc. TOMPSETT *v.* HENDERSON, WARDEN;
No. 111, Misc. IN RE KEMMERER; and
No. 112, Misc. YOUNG *v.* SANFORD, WARDEN. April 22, 1946. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 113, Misc. MCMAHAN *v.* HULEN, JUDGE; and
No. 114, Misc. MCMAHAN *v.* BENNETT, DIRECTOR, BUREAU OF PRISONS. April 22, 1946. The motions for leave to file petitions for writs of mandamus are denied.

ORDERS GRANTING CERTIORARI, FROM JANUARY 29, 1946, THROUGH APRIL 22, 1946.

No. 625. HUST *v.* MOORE-McCORMACK LINES, INC. February 4, 1946. Petition for writ of certiorari to the Supreme Court of Oregon granted. *B. A. Green* and *Edwin D. Hicks* for petitioner. *Erskine Wood* for respondent. *Silas B. Axtell* and *Myron Scott* filed a brief, as *amici curiae,* in support of the petition. Reported below: 176 Ore. 662, 158 P. 2d 275.

No. 361. BURTON-SUTTON OIL CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. February 11, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Cullen R. Liskow* and *Norman F. Anderson* for petitioner. *Acting Solicitor General Judson* for respondent. Reported below: 150 F. 2d 621.

No. 675. BIHN *v.* UNITED STATES. February 11, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *David V. Cahill* and *Henry K. Chapman* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Andrew F. Oehmann* for the United States. Reported below: 152 F. 2d 342.

No. 749. ILLINOIS EX REL. GORDON, DIRECTOR OF LABOR, *v.* UNITED STATES. February 25, 1946. Petition for writ of certiorari to the Supreme Court of Illinois granted. *George F. Barrett,* Attorney General of Illinois, *Albert E. Hallett* and *William C. Wines,* Assistant Attorneys General, for petitioner. *Solicitor General McGrath, Sewall Key, Helen R. Carloss* and *Norman S. Altman* for the United States. Reported below: 391 Ill. 29, 62 N. E. 2d 537.

No. 750. ILLINOIS EX REL. GORDON, DIRECTOR OF LABOR, *v.* CAMPBELL, COLLECTOR OF INTERNAL REVENUE. February 25, 1946. Petition for writ of certiorari to the Supreme Court of Illinois granted. *George F. Barrett,* Attorney General of Illinois, *Albert E. Hallett* and *William C. Wines,* Assistant Attorneys General, for petitioner. *Solicitor General McGrath, Sewall Key, Helen R. Carloss* and *Norman S. Altman* for respondent. Reported below: 391 Ill. 29, 62 N. E. 2d 537.

No. 631. WOODS *v.* NIERSTHEIMER, WARDEN. On petition for writ of certiorari to the Circuit Court of Randolph County, Illinois; and

No. 671. WOODS *v.* NIERSTHEIMER, WARDEN. On petition for writ of certiorari to the Criminal Court of Cook County, Illinois. February 25, 1946. Petitions for writs of certiorari granted. Petitioner *pro se. George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent.

No. 328. WILSON ET AL., DOING BUSINESS AS WILSON LUMBER CO., *v.* COOK, COMMISSIONER OF REVENUES. See *ante,* p. 474.

Nos. 696 and 697. UNITED STATES *v.* JOSEPH A. HOLPUCH CO. March 4, 1946. Petition for writs of certiorari to the Court of Claims granted. *Solicitor General McGrath* for the United States. Reported below: 104 Ct. Cls. 254.

No. 719. PINKERTON ET AL. *v.* UNITED STATES. March 4, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Thomas E. Skinner* for petitioners. *Solicitor General McGrath, W. Marvin Smith* and *Robert S. Erdahl* for the United States. Reported below: 151 F. 2d 499.

No. 793. PORTER, PRICE ADMINISTRATOR, *v.* WARNER HOLDING CO. March 11, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General McGrath* for petitioner. *R. H. Fryberger* and *George W. Townsend* for respondent. Reported below: 151 F. 2d 529.

No. 606. ODOM *v.* UNITED STATES. March 11, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Benjamin E. Pierce* for petitioner. *Solicitor General McGrath* and *Robert S. Erdahl* for the United States. Reported below: 151 F. 2d 448.

No. 782. BALLARD ET AL. *v.* UNITED STATES. March 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Roland Rich Woolley, Ralph C. Curren* and *Joseph F. Rank* for petitioners. *Solicitor General McGrath, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 152 F. 2d 941.

No. 843. SECURITIES & EXCHANGE COMMISSION *v.* W. J. HOWEY CO. ET AL. March 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General McGrath* and *Roger S. Foster* for petitioner. *C. E. Duncan* and *George C. Bedell* for respondents. Reported below: 151 F. 2d 714.

No. 809. UNITED STATES *v.* LOVETT;

No. 810. UNITED STATES *v.* WATSON; and

No. 811. UNITED STATES *v.* DODD. March 25, 1946. Petition for writs of certiorari to the Court of Claims granted. *Solicitor General McGrath* for the United

States. *Edward B. Burling, Charles A. Horsky* and *Amy Ruth Mahin* for respondents. *John C. Gall* filed a brief on behalf of the Congress of the United States in support of the petition. Reported below: 104 Ct. Cls. 557, 66 F. Supp. 142.

No. 892. ROTHENSIES, COLLECTOR OF INTERNAL REVENUE, *v.* ELECTRIC STORAGE BATTERY CO. March 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General McGrath* for petitioner. *Laurence H. Eldredge* and *Charles C. Norris, Jr.* for respondent. Reported below: 152 F. 2d 521.

No. 821. PYRAMID MOTOR FREIGHT CORP. *v.* ISPASS ET AL. March 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Charles Edward Cotterill* for petitioner. *John W. Scott* for respondents. Reported below: 152 F. 2d 619.

No. 848. VANSTON BONDHOLDERS PROTECTIVE COMMITTEE *v.* GREEN ET AL.;

No. 849. VANSTON BONDHOLDERS PROTECTIVE COMMITTEE *v.* EARLY ET AL.;

No. 850. VANHORN BONDHOLDERS PROTECTIVE COMMITTEE *v.* GREEN ET AL.; and

No. 851. VANHORN BONDHOLDERS PROTECTIVE COMMITTEE *v.* EARLY ET AL. March 25, 1946. Petitions for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. MR. JUSTICE REED took no part in the consideration or decision of these applications. *George W. Jaques* and *LeWright Browning* for petitioner in Nos. 848 and 849. *Robert J. Bulkley* for petitioner in Nos. 850 and 851. *Oscar S. Rosner* for Green et al., and *Chas. I. Dawson* and *A. Shelby Winstead* for Early et al., respondents. Reported below: 151 F. 2d 470.

No. 630. UNITED STATES *v.* CAUSBY ET UX. April 1, 1946. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General McGrath* for the United States. *Wm. E. Comer* for respondents. Reported below: 104 Ct. Cls. 342, 60 F. Supp. 751.

No. 970. FISHGOLD *v.* SULLIVAN DRYDOCK & REPAIR CORP. ET AL. April 1, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Knowlton Durham* for petitioner. Reported below: 154 F. 2d 785.

No. 592. HELWIG *v.* UNITED STATES. See *ante*, p. 770.

No. 786. NATIONAL LABOR RELATIONS BOARD *v.* DONNELLY GARMENT CO. ET AL.; and

No. 787. INTERNATIONAL LADIES' GARMENT WORKERS UNION *v.* DONNELLY GARMENT CO. ET AL. April 22, 1946. Petitions for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General McGrath* for petitioner in No. 786. *Clif Langsdale* and *Clyde Taylor* for petitioner in No. 787. *Robert J. Ingraham* for the Donnelly Garment Co., and *Frank E. Tyler* for the Donnelly Garment Workers' Union, respondents. Reported below: 151 F. 2d 854.

No. 812. UNITED STATES *v.* CARMACK. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General McGrath* for the United States. *Homer Hall* and *Robt. D. Abbott* for respondent. Reported below: 151 F. 2d 881.

No. 909. FISWICK ET AL. *v.* UNITED STATES. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Frederic M. P. Pearse* for petitioners. *Solicitor General McGrath, Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 153 F. 2d 176.

No. 920. UNITED STATES *v.* RUZICKA ET AL., TRADING AS SEELEY DAIRY. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General McGrath* for the United States. *William Parker Ward* for respondents. Reported below: 152 F. 2d 167.

No. 968. ORDER OF RAILWAY CONDUCTORS OF AMERICA ET AL. *v.* SWAN ET AL.; and

No. 969. WILLIAMS ET AL. *v.* SWAN ET AL. April 22, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *V. C. Shuttleworth, Everett L. Gordon* and *Leo J. Hassenauer* for petitioners. *Kenneth F. Burgess, Douglas F. Smith, R. J. Hagman, Bryce L. Hamilton, Burton Mason* and *John A. Sheean* for the Railroad Carriers et al., and *Conrad H. Poppenhusen* and *Anan Raymond* for the Railroad Yardmasters, respondents. Reported below: 152 F. 2d 325.

No. 972. FEDERAL COMMUNICATIONS COMMISSION *v.* WOKO, INCORPORATED. April 22, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Solicitor General McGrath* and *Rosel H. Hyde* for petitioner. *William J. Dempsey* and *William C. Koplovitz* for respondent. Reported below: 153 F. 2d 623.

No. 902. UNITED STATES *v.* HOWARD P. FOLEY CO., INC. April 22, 1946. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General McGrath* for the United States. *Alexander M. Heron* and *William L. Owen* for respondent. Reported below: 105 Ct. Cls. 161, 63 F. Supp. 209.

No. 629. PERLSTEIN *v.* HIATT, WARDEN. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. Petitioner *pro se*. *Solicitor General McGrath* and *Robert S. Erdahl* for respondent. Reported below: 151 F. 2d 167.

ORDERS DENYING CERTIORARI, FROM JANUARY 29, 1946, THROUGH APRIL 22, 1946.

No. 672. YAMASHITA *v.* STYER, COMMANDING GENERAL. See *ante*, p. 1.

Nos. 650 and 651. DENNY *v.* UNITED STATES. February 4, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Isaac Lobe Straus, Bernard M. Goldstein* and *Hamilton O'Dunne* for petitioner. *Solicitor General McGrath* and *Robert S. Erdahl* for the United States. Reported below: 151 F. 2d 828.

No. 703. HUDSON COAL CO. *v.* WATKINS ET AL. February 4, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Walter Gordon Merritt* and *Robert R. Bruce* for petitioner. *Stanley F. Coar* for respondents. Reported below: 151 F. 2d 311.

No. 705. FEDERAL NATIONAL BANK *v.* NEW YORK LIFE INSURANCE CO. February 4, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mark Goode* for petitioner. *V. P. Crowe* for respondent. Reported below: 151 F. 2d 537.

No. 715. BLACKFORD ET AL. *v.* POWELL ET AL., RECEIVERS. February 4, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *R. Bayly Chapman* for petitioners. *Leonard D. Adkins, Edwin S. S. Sunderland, W. R. C. Cocke* and *Harold J. Gallagher* for respondents. Reported below: 151 F. 2d 392.

No. 620. BAILEY *v.* FLORIDA. February 4, 1946. Petition for writ of certiorari to the Supreme Court of Florida denied. *Wm. W. Flournoy* for petitioner.

No. 649. TOUCEY *v.* NEW YORK LIFE INSURANCE CO. February 4, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. Reported below: 151 F. 2d 696.

No. 689. BRIDGES *v.* RAGEN, WARDEN. February 4, 1946. Petition for writ of certiorari to the Circuit Court of Vermilion County, Illinois, denied.

No. 706. EAGLE *v.* CHERNEY ET AL. February 4, 1946. Petition for writ of certiorari to the Court of Appeals of New York denied. Reported below: 294 N. Y. 980, 63 N. E. 2d 713.

No. 663. KOBLEY *v.* ILLINOIS; and

No. 730. WILKE *v.* ILLINOIS. February 4, 1946. The petitions for writs of certiorari to the Supreme Court of Illinois are denied for the reason that applications therefor were not made within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C. 350. Reported below: 390 Ill. 565, 598; 62 N. E. 2d 454, 468.

No. 818. HOMMA *v.* STYER, COMMANDING GENERAL, ET AL. See *ante*, p. 759.

No. 718. LEHIGH NAVIGATION COAL CO., INC. ET AL. *v.* JOHN B. KELLY, INC. February 11, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *William A. Schnader, E. Russell Shockley* and *Thomas C. Egan* for petitioners. *John Morgan Davis* for respondent. Reported below: 151 F. 2d 743.

No. 722. MCINTIRE ET AL. *v.* WM. PENN BROADCASTING CO. February 11, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Weidner Titzck* and *William S. Bennet* for petitioners. *Wm. Clarke Mason, A. Allen Woodruff, Thomas B. K. Ringe, W. Theodore Pierson* and *F. Cleveland Hedrick, Jr.* for respondent. Reported below: 151 F. 2d 597.

No. 758. TIMONY *v.* TODD SHIPYARDS CORP. February 11, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second circuit denied. *Herbert Goldmark* for petitioner. *Jules Haberman* for respondent. Reported below: 151 F. 2d 336.

No. 666. LUCAS *v.* RAGEN, WARDEN. February 11, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 680. EATON *v.* ILLINOIS. February 11, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 685. BRADFORD *v.* NIERSTHEIMER, WARDEN. February 11, 1946. Petition for writ of certiorari to the Circuit Court of Randolph County, Illinois, denied.

No. 688. DUNCAN *v.* RAGEN, WARDEN. February 11, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 694. ROLLAND *v.* RAGEN, WARDEN. February 11, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 713. BESSENHOFFER *v.* RAGEN, WARDEN. February 11, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 350. ALL SERVICE LAUNDRY CORP. *v.* PHILLIPS, ADMINISTRATRIX, ET AL. February 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Stanley I. Posner, Henry J. Fox* and *Albert E. Arent* for petitioner. *James L. Goldwater* for respondents. Reported below: 149 F. 2d 416.

No. 674. SHAWANO NATIONAL BANK ET AL. *v.* BOWLES, PRICE ADMINISTRATOR. February 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Orville S. Luckenbach* and *C. H. Bonnin* for petitioners. *Solicitor General McGrath, John R. Benney, Milton Klein* and *David London* for respondent. Reported below: 151 F. 2d 749.

No. 702. KRAUSE *v.* UNITED STATES. February 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Joseph T. Harrington* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Andrew F. Oehmann* for the United States. Reported below: See 136 F. 2d 935.

No. 709. MUTARIELLI *v.* UNITED STATES. February 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Thomas D. McBride* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 151 F. 2d 925.

No. 729. THEIS ET AL., AS BONDHOLDERS' PROTECTIVE COMMITTEE, ET AL. *v.* LUTHER. February 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Chauncey H. Clarke* and *Frank P. Barker* for petitioners. *Charles M. Blackmar* for respondent. Reported below: 151 F. 2d 397.

No. 731. GREENBERG *v.* I. & I. HOLDING CORP. ET AL. February 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Edwin M. Slote* for petitioner. *Leonard G. Bisco* and *Max Schwartz* for respondents. Reported below: 151 F. 2d 570.

No. 734. MISSION STATE BANK *v.* SPURGEON. February 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Price Wickersham* for petitioner. Reported below: 151 F. 2d 702.

No. 736. LYON *v.* HARKNESS. February 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Samuel A. Margolis* for petitioner. *Frank R. Kenison* for respondent. Reported below: 151 F. 2d 731.

No. 745. GIORDANO *v.* ASBURY PARK & OCEAN GROVE BANK ET AL. February 25, 1946. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Herbert J. Kenarik* for petitioner. *Theodore D. Parsons* for respondents. Reported below: 135 N. J. Eq. 511, 39 A. 2d 433.

No. 746. KANSAS CITY BRIDGE CO. *v.* LEICHTY. February 25, 1946. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Richard S. Righter* for petitioner. *Bert E. Strubinger* for respondent. Reported below: 354 Mo. 629, 190 S. W. 2d 201.

No. 753. R. G. LETOURNEAU, INC. *v.* GAR WOOD INDUSTRIES, INC. February 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Percy S. Webster* and *Theodore H. Lassagne* for petitioner. *Frederick S. Lyon, Leonard S. Lyon* and *Wm. Edward Hann* for respondent. Reported below: 151 F. 2d 432.

No. 754. SEWELL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. February 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *E. F. Colladay, Wilton H. Wallace* and *W. A. Sutherland* for petitioners. *Solicitor General McGrath, Sewall Key, Arnold Raum, Helen R. Carloss* and *John F. Costelloe* for respondent. Reported below: 151 F. 2d 765.

No. 757. MORRISON ET AL. *v.* MARYLAND CASUALTY CO. February 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *John H. Cantrell* and *Charles E. France* for petitioners. Reported below: 151 F. 2d 772.

No. 716. CLAYTON *v.* ALABAMA. February 25, 1946. Petition for writ of certiorari to the Supreme Court of Alabama denied. *John C. Walters* for petitioner. *William N. McQueen,* Attorney General of Alabama, for respondent. Reported below: 247 Ala. 194, 23 So. 2d 397.

No. 721. CAPITOL WINE & SPIRIT CORP. *v.* BERKSHIRE, DEPUTY COMMISSIONER OF INTERNAL REVENUE, ET AL. February 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Joseph P. Tumulty, Jr.* for petitioner. *Solicitor General McGrath, Assistant Attorney General Berge* and *Matthias N. Orfield* for respondents. Reported below: 150 F. 2d 619.

No. 735. DAVIS *v.* COMMISSIONER OF INTERNAL REVENUE. February 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Alfred H. Phillips* for petitioner. *Solicitor General McGrath, Sewall Key, J. Louis Monarch* and *Louise Foster* for respondent. Reported below: 151 F. 2d 441.

No. 759. First National Bank *v.* City of Longview. February 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *J. N. Saye* for petitioner. *R. O. Kenley, Jr.* for respondent. Reported below: 152 F. 2d 97.

No. 771. Klumb *v.* Roach et al. February 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Ira Milton Jones* for petitioner. *Edwin B. H. Tower, Jr.* and *Carl T. Mack* for respondents. Reported below: 151 F. 2d 374.

No. 692. York Engineering & Construction Co. *v.* United States; and

No. 783. United States *v.* York Engineering & Construction Co. March 4, 1946. Petitions for writs of certiorari to the Court of Claims denied. *Robert P. Smith* and *Charles S. Collier* for the York Company. *Solicitor General McGrath, Frederick Bernays Wiener* and *Paul A. Sweeney* for the United States. Reported below: 103 Ct. Cls. 613, 62 F. Supp. 546.

No. 701. United States *v.* Henry Ericsson Co. March 4, 1946. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General McGrath* for the United States. *Herman J. Galloway* for respondent. Reported below: 104 Ct. Cls. 397, 62 F. Supp. 312.

No. 747. Teramine *v.* Shuttleworth, Warden. March 4, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *William G. Fitzpatrick, Jr.* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Leon Ulman* for respondent. Reported below: 151 F. 2d 602.

No. 748. UNITED STATES *v.* B–W CONSTRUCTION CO. March 4, 1946. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General McGrath* for petitioner. *Dean Hill Stanley* for respondent. Reported below: 104 Ct. Cls. 608.

No. 762. CRUMMER ET AL. *v.* UNITED STATES. March 4, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *R. B. Caldwell, Francis X. Busch, E. R. Sloan, Thomas M. Lillard, Joseph G. Carey, Arthur W. Skaer* and *James J. Magner* for petitioners. *Solicitor General McGrath, Robert S. Erdahl* and *Andrew F. Oehmann* for the United States. Reported below: 151 F. 2d 958.

No. 775. PROCTER *v.* COMMISSIONER OF INTERNAL REVENUE. March 4, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. Petitioner *pro se*. *Solicitor General McGrath, Sewall Key, Arnold Raum, Helen R. Carloss* and *Carlton Fox* for respondent. Reported below: 151 F. 2d 603.

No. 779. GINSBURG *v.* ADAMS. March 4, 1946. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Paul Ginsburg, pro se.* Respondent *pro se.*

No. 814. MANHATTAN RAILWAY CO. ET AL. *v.* CITY OF NEW YORK ET AL. March 4, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *John B. Doyle* for petitioners. *John J. Bennett* and *Leo Brown* for respondents. Reported below: 152 F. 2d 655.

No. 727. LORENZ *v.* COMMISSIONER OF INTERNAL REVENUE. March 4, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Marion A. Ross* for petitioner. *Solicitor General McGrath, Sewall Key, Arnold Raum, J. Louis Monarch* and *John F. Costelloe* for respondent. Reported below: 148 F. 2d 527.

No. 733. TANDARIC *v.* UNITED STATES. March 4, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Harold J. Finder* for petitioner. *Solicitor General McGrath* and *Robert S. Erdahl* for the United States. Reported below: 152 F. 2d 3.

No. 717. JOYCE *v.* BOARD OF EDUCATION OF CHICAGO. March 4, 1946. Petition for writ of certiorari to the Appellate Court of Illinois, First District, denied. MR. JUSTICE MURPHY is of the opinion that certiorari should be granted. *Ode L. Rankin* for petitioner. *Richard S. Folsom, Frank S. Righeimer* and *Frank R. Schneberger* for respondent. Reported below: 325 Ill. App. 543, 60 N. E. 2d 431.

Nos. 687 and 698. ANDREWS *v.* ATKINSON, JUDGE. March 4, 1946. Petition for writ of certiorari to the Supreme Court of Georgia denied. Petitioner *pro se*. *Eugene Cook*, Attorney General of Georgia, for respondent.

No. 712. LEBEDIS *v.* RAGEN, WARDEN. March 4, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 720. TAYLOR *v.* PARKER, WARDEN. March 4, 1946. Petition for writ of certiorari to the Supreme Court of Missouri denied.

No. 741. WRIGHT *v.* RAGEN, WARDEN. March 4, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 742. FEELEY *v.* RAGEN, WARDEN. March 4, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 710. ANDREWS *v.* ATKINSON, JUDGE. March 4, 1946. Petition for writ of certiorari to the Supreme Court of Georgia denied for the reason that application therefor was not made within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C. 350. Petitioner *pro se*. *Eugene Cook,* Attorney General of Georgia, for respondent.

No. 763. CARRUTHERS *v.* UNITED STATES. March 11, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Walter Bachrach* and *Walter H. Moses* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 152 F. 2d 512.

No. 772. BICANIC ET AL. *v.* J. C. CAMPBELL CO.; and

No. 773. CZUPIY ET AL. *v.* NORTH STAR TIMBER CO. March 11, 1946. Petition for writs of certiorari to the Supreme Court of Minnesota denied. *Lee Pressman* and *Frank J. Donner* for petitioners. *Thomas M. McCabe* and *Arthur M. Clure* for respondents. Reported below: 220 Minn. 115, 20 N. W. 2d 885; 220 Minn. 117, 20 N. W. 2d 489.

No. 774. MARKHAM, ALIEN PROPERTY CUSTODIAN, *v.* KALLIMANIS ET AL. March 11, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Solicitor General McGrath* for petitioner. *Thomas S. Tobin* for respondents. Reported below: 151 F. 2d 145.

No. 781. INDUSTRIAL TRUST CO. ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE. March 11, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Harold A. Andrews* for petitioners. *Solicitor General McGrath, Sewall Key, Arnold Raum, Helen R. Carloss* and *Carlton Fox* for respondent. Reported below: 151 F. 2d 592.

No. 788. ADAMS ET AL. *v.* UNITED STATES DISTRIBUTING CORP. ET AL. March 11, 1946. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *John J. Wicker, Jr.* for petitioners. *William W. Crump* and *James V. Hayes* for respondents. Reported below: 184 Va. 134, 34 S. E. 2d 244.

No. 794. UNITED STATES EX REL. NITKEY *v.* DAWES ET AL. March 11, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Walter F. Dodd* and *Harry G. Fins* for petitioner. *Andrew J. Dallstream, Arthur M. Cox, Frederic H. Stafford* and *John B. Robinson, Jr.* for respondents. Reported below: 151 F. 2d 639.

No. 795. BANKERS TRUST CO., TRUSTEE, ET AL. *v.* NEW YORK. March 11, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit de-

nied. *Jesse E. Waid* for petitioners. *Nathaniel L. Goldstein*, Attorney General of New York, and *Orrin G. Judd*, Solicitor General, for respondent. Reported below: 140 F. 2d 840.

No. 798. STEINER *v.* UNITED STATES; and

No. 799. MILLER *v.* UNITED STATES. March 11, 1946. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Robert A. Grant* for petitioners. *Solicitor General McGrath, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 152 F. 2d 484.

No. 815. PROVIDENT TRUST CO. *v.* METROPOLITAN CASUALTY INSURANCE CO.; and

No. 816. PROVIDENT TRUST CO., TRUSTEE, *v.* METROPOLITAN CASUALTY INSURANCE CO. March 11, 1946. Petitions for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Wm. Clarke Mason* and *A. Allen Woodruff* for petitioner. *Lewis M. Stevens* for respondent. Reported below: 152 F. 2d 875.

No. 827. VANDEVOIR *v.* SOUTHEASTERN GREYHOUND LINES. March 11, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Homer B. Aikman* for petitioner. *Richard C. Stoll* and *Wallace Muir* for respondent. Reported below: 152 F. 2d 150.

No. 676. SWIHART *v.* JOHNSTON, WARDEN. March 11, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. Petitioner *pro se*. *Solicitor General McGrath, Robert S. Erdahl* and *Leon Ulman* for respondent. Reported below: 150 F. 2d 721.

691100°—47——54

No. 800. FLORIDA EX REL. QUIGG *v.* NELSON. March 11, 1946. Petition for writ of certiorari to the Supreme Court of Florida denied. *E. F. P. Brigham* and *Joseph A. Padway* for petitioner. *J. W. Watson, Jr.* and *John M. Murrell* for respondent. Reported below: 156 Fla. 189, 23 So. 2d 136.

No. 454. KRAUSE *v.* GILL, GENERAL SUPERINTENDENT, ET AL. March 11, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. Petitioner *pro se*. *Solicitor General McGrath* and *Robert S. Erdahl* for respondents. Reported below: 151 F. 2d 15.

Nos. 654 and 655. DELLAR *v.* SAMUEL GOLDWYN, INC. ET AL. March 11, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *William F. Hamilton* for petitioner. *David L. Podell* for respondents. Reported below: 150 F. 2d 612.

No. 656. DUGGAN *v.* OLSON, WARDEN. March 11, 1946. Petition for writ of certiorari to the Supreme Court of Nebraska denied. Reported below: 146 Neb. 248, 19 N. W. 2d 353.

Nos. 658 and 659. GRIERSON *v.* ASHE, WARDEN, ET AL. March 11, 1946. Petition for writs of certiorari to the Supreme Court of Pennsylvania denied.

No. 665. LANTZ *v.* RAGEN, WARDEN. March 11, 1946. Petition for writ of certiorari to the Circuit Court of Macon County, Illinois, denied.

No. 683. HAWLEY *v.* RAGEN, WARDEN;
No. 738. MARINO *v.* RAGEN, WARDEN; and
No. 739. TUTTLE *v.* RAGEN, WARDEN. March 11, 1946. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 743. SPENSKY *v.* ASHE, WARDEN. March 11, 1946. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied.

No. 752. MARR *v.* ILLINOIS; and
No. 760. HENSLEY *v.* NIERSTHEIMER, WARDEN. March 11, 1946. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 766. SPENCER *v.* RAGEN, WARDEN. March 11, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 768. ATKINS *v.* ILLINOIS; and
No. 777. PALMER *v.* RAGEN, WARDEN. March 11, 1946. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 778. TAYLOR *v.* RAGEN, WARDEN. March 11, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 780. WRIGHT *v.* ILLINOIS;
No. 785. BALDRIDGE *v.* NIERSTHEIMER, WARDEN; and
No. 806. WAGNER *v.* RAGEN, WARDEN. March 11, 1946. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 807. COLEMAN *v.* RAGEN, WARDEN. March 11, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 820. TAYLOR *v.* NIERSTHEIMER, WARDEN;
No. 829. SIMMONS *v.* NIERSTHEIMER, WARDEN;
No. 836. ARMSTRONG *v.* RAGEN, WARDEN;
No. 842. CROWLEY *v.* ILLINOIS. March 11, 1946. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 761. PEASE *v.* PARKER, WARDEN. March 11, 1946. Petition for writ of certiorari to the Supreme Court of Missouri denied.

No. 776. HUMBLE *v.* RAGEN, WARDEN. March 11, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied for the reason that application therefor was not made within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C. 350.

No. 784. GANT *v.* UNITED STATES. March 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Warren O. Coleman* for petitioner. *Solicitor General McGrath* and *Robert S. Erdahl* for the United States. Reported below: 152 F. 2d 106.

No. 801. CRAIN ET AL., TRUSTEES, *v.* UNITED STATES. March 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Geo. E. H. Goodner* and *Scott P. Crampton* for petitioners. *Solicitor General McGrath, Paul A. Sweeney* and *Abraham J. Harris* for the United States. Reported below: 151 F. 2d 606.

No. 819. CANADIAN RIVER GAS CO. *v.* HIGGINS, FORMERLY COLLECTOR OF INTERNAL REVENUE. March 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Arthur A. Ballantine* and *George E. Cleary* for petitioner. *Solicitor General McGrath, Sewall Key, Helen R. Carloss* and *Hilbert P. Zarky* for respondent. Reported below: 151 F. 2d 954.

No. 822. JOHN HANCOCK MUTUAL LIFE INSURANCE CO. ET AL. *v.* DONOVAN, COLLECTOR OF TAXES. March 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *G. K. Richardson* for petitioners. *William H. Kerr* for respondent. Reported below: 151 F. 2d 751.

No. 834. LA SOCIETE FRANCAISE DE BIENFAISANCE MUTUELLE *v.* UNITED STATES. March 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Charles D. Hamel* for petitioner. *Solicitor General McGrath, Sewall Key* and *Robert N. Anderson* for the United States. Reported below: 152 F. 2d 243.

No. 841. PIERCE, TRUSTEE, *v.* KUNKEL ET AL. March 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Otis Harold Woodrow* for petitioner. Reported below: 151 F. 2d 897.

Nos. 823, 824 and 825. HUMMEL, TRUSTEE IN BANKRUPTCY, *v.* CARDWELL ET AL. March 25, 1946. Petition for writs of certiorari to the Supreme Court of Illinois denied. *Sidney H. Block* for petitioner. *Dwight S. Bobb*

for Cardwell, *Maurice P. Golden* for Huszagh, and *M. Manning Marcus* for Wegg, respondents. Reported below: 390 Ill. 526, 62 N. E. 2d 433.

No. 826. LEITHOLD ET AL., CO-PARTNERS TRADING AS CUSTOM MAID BRASSIERE CO., *v.* PORTER, PRICE ADMINISTRATOR. March 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Abraham L. Shapiro* and *Harry Shapiro* for petitioners. *Solicitor General McGrath* and *David London* for respondent. Reported below: 155 F. 2d 124.

No. 830. REA *v.* MCDONALD, WARDEN. March 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Hayden C. Covington* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Irving S. Shapiro* for respondent. Reported below: 153 F. 2d 190.

No. 837. SORCEY *v.* UNITED STATES. March 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *James C. Leaton* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Andrew F. Oehmann* for the United States. Reported below: 151 F. 2d 899.

No. 839. MAXFIELD ET AL. *v.* UNITED STATES; and

No. 840. WILTON ET AL. *v.* UNITED STATES. March 25, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *George H. Zeutzius* and *A. P. G. Steffes* for petitioners. *Solicitor General McGrath, Sewall Key* and *J. Louis Monarch* for the United States. Reported below: 152 F. 2d 593.

No. 854. OHIO EX REL. GREENSTEIN *v.* CLIFFORD ET AL., JUDGES. March 25, 1946. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Hugh M. Bennett* for petitioner. Reported below: 146 Ohio St. 78, 64 N. E. 2d 62.

No. 863. GARDNER *v.* CAPITAL TRANSIT CO. March 25, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Burton A. McGann* for petitioner. Reported below: 152 F. 2d 288.

No. 876. BEHRENS *v.* SMITH, SUPERINTENDENT. March 25, 1946. Petition for writ of certiorari to the Supreme Court of Washington denied. *Howard E. Foster* for petitioner. Reported below: 24 Wash. 2d 125, 163 P. 2d 587.

No. 877. SANFORD *v.* SMITH, SUPERINTENDENT. March 25, 1946. Petition for writ of certiorari to the Supreme Court of Washington denied. *Howard E. Foster* for petitioner. Reported below: 24 Wash. 2d 134, 163 P. 2d 591.

No. 888. STANFIELD, EXECUTRIX, *v.* PAUL REVERE LIFE INSURANCE CO. March 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *J. B. Moore* for petitioner. *D. I. Johnston* for respondent. Reported below: 151 F. 2d 776.

No. 802. MASSACHUSETTS MUTUAL LIFE INSURANCE CO. *v.* SECURITIES & EXCHANGE COMMISSION ET AL. March 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration or

decision of this application. *Roscoe Anderson* for petitioner. *Solicitor General McGrath, Roger S. Foster, David K. Kadane* and *Arnold R. Ginsburg* for the Securities & Exchange Commission, and *Guy A. Thompson* for the Laclede Gas Light Co., respondents. Reported below: 151 F. 2d 424.

No. 831. GUARANTY TRUST CO., TRUSTEE, ET AL. *v.* SECURITIES & EXCHANGE COMMISSION;

No. 832. GUARANTY TRUST CO., TRUSTEE, ET AL. *v.* STANDARD GAS & ELECTRIC CO. ET AL.; and

No. 833. GUARANTY TRUST CO., TRUSTEE, ET AL. *v.* STANDARD GAS & ELECTRIC CO. March 25, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Thomas O'G. FitzGibbon, Paul P. Eagleton* and *Spencer Pinkham* for petitioners. *Solicitor General McGrath, Roger S. Foster, David K. Kadane* and *David L. Ferber* for the Securities & Exchange Commission, and *A. Louis Flynn, Abner Goldstone* and *Jacob K. Javits* for the Standard Gas & Electric Co., respondents. Reported below: 151 F. 2d 326.

No. 606. ODOM *v.* UNITED STATES. March 25, 1946. The order of March 11 granting the petition for writ of certiorari, *ante,* p. 773, is vacated. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Benjamin E. Pierce* for petitioner. *Solicitor General McGrath* and *Robert S. Erdahl* for the United States.

No. 677. QUICK ET AL. *v.* ASHE, WARDEN, ET AL. March 25, 1946. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied.

No. 767. VILES *v.* PRUDENTIAL INSURANCE CO. March 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. Reported below: 151 F. 2d 99.

No. 796. FARRELL *v.* MASSACHUSETTS. March 25, 1946. Petition for writ of certiorari to the Supreme Judicial Court of Massachusetts denied.

No. 844. ADAMS *v.* RAGEN, WARDEN. March 25, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 846. GIBILTERRA *v.* PARKER, WARDEN. March 25, 1946. Petition for writ of certiorari to the Supreme Court of Missouri denied. Petitioner *pro se*. *Robert Hyder* for respondent.

No. 847. IN RE WHISTLER. March 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. Reported below: 154 F. 2d 500.

No. 855. SIMMONS *v.* NIERSTHEIMER, WARDEN. March 25, 1946. Petition for writ of certiorari to the Circuit Court of Randolph County, Illinois, denied.

No. 856. RUSSO *v.* SHAW, DIRECTOR. March 25, 1946. Petition for writ of certiorari to the Supreme Court of New York denied.

No. 858. NEELEY *v.* PARKER, WARDEN. March 25, 1946. Petition for writ of certiorari to the Supreme Court of Missouri denied. Petitioner *pro se*. *Robert Hyder* for respondent.

No. 859. WEBB *v.* RAGEN, WARDEN. March 25, 1946. Petition for writ of certiorari to the Circuit Court of Rock Island County, Illinois, denied.

No. 860. WEBB *v.* ILLINOIS. March 25, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 693. GASKILL ET AL. *v.* ROTH, TRUSTEE, ET AL. April 1, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *S. L. Winters* for petitioners. *Wymer Dressler, Robert D. Neely, Wm. T. Faricy* and *Nye F. Morehouse* for the Chicago & N. W. R. Co., and *W. C. Fraser* and *V. C. Shuttleworth* for the Order of Railway Conductors et al., respondents. Reported below: 151 F. 2d 366.

No. 835. GALLOIS, EXECUTOR, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. April 1, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Clyde C. Sherwood* and *John V. Lewis* for petitioners. *Solicitor General McGrath, Sewall Key, J. Louis Monarch* and *Louise Foster* for respondent. Reported below: 152 F. 2d 81.

No. 838. BOSTWICK ET AL. *v.* BALDWIN DRAINAGE DISTRICT ET AL. April 1, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Thos. B. Adams* for petitioners. *Giles J. Patterson* and *John W. Harrell* for respondents. Reported below: 152 F. 2d 1.

No. 874. ANDREWS *v.* OHIO. April 1, 1946. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Sol Goodman* for petitioner. *Carson Hoy* for respondent. Reported below: 146 Ohio St. 82, 63 N. E. 2d 912.

No. 875. TUCSON GAS, ELECTRIC LIGHT & POWER CO. *v.* TUCSON. April 1, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *George R. Darnell* for petitioner. *Thos. J. Elliott* for respondent. Reported below: 152 F. 2d 552.

No. 878. STATE OF WASHINGTON ET AL. *v.* MARICOPA COUNTY ET AL. April 1, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Smith Troy,* Attorney General of Washington, *David M. Wood* and *J. L. Gust* for petitioners. *John L. Sullivan,* Attorney General of Arizona, *Leslie C. Hardy* and *George Herrington* for respondents. Reported below: 152 F. 2d 556.

No. 879. MAGNOLIA PETROLEUM CO. *v.* THOMAS, COLLECTOR OF INTERNAL REVENUE. April 1, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Walace Hawkins, Homer Hendricks* and *Raymond M. Myers* for petitioner. *Solicitor General McGrath, Sewall Key, J. Louis Monarch* and *William Robert Koerner* for respondent. Reported below: 151 F. 2d 1008.

No. 880. ALKER ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORP. April 1, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Allen J. Levin* and *Stanley Folz* for petitioners. *James M. Kane, Allen S. Olmsted, 2nd,* and *Irving H. Jurow* for respondent. Reported below: 151 F. 2d 907.

No. 881. BELL *v.* MULCAHY, SHERIFF. April 1, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Robert E. Bryant* for petitioner. Reported below: 392 Ill. 290, 64 N. E. 2d 474.

No. 890. MEMOLO *v.* UNITED STATES. April 1, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Robert T. McCracken, Stanley F. Coar* and *C. Russell Phillips* for petitioner. *Solicitor General McGrath, Sewall Key* and *J. Louis Monarch* for the United States. Reported below: 152 F. 2d 759.

No. 1003. CHAPMAN ET AL. *v.* KING. April 1, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Charles J. Bloch* for petitioners. *Harry S. Strozier* for respondent. Reported below: 154 F. 2d 460.

No. 813. NEW YORK EX REL. BISTANY *v.* FOSTER, WARDEN. April 1, 1946. Petition for writ of certiorari to the Supreme Court of New York denied.

No. 861. TOLEDO *v.* RAGEN, WARDEN. April 1, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 865. HARDWICK *v.* RAGEN, WARDEN. April 1, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 866. CASTIGLIONE *v.* RAGEN, WARDEN. April 1, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 867. BARRON *v.* RAGEN, WARDEN. April 1, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 868. WILSON *v.* ILLINOIS. April 1, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 869. KEENE *v.* ILLINOIS. April 1, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 872. ROSS *v.* RAGEN, WARDEN. April 1, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 882. BRANIC *v.* WHEELING STEEL CORP. April 1, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Edward G. Bothwell* for petitioner. *J. R. Dickie* for respondent. Reported below: 152 F. 2d 887.

No. 895. TAIT *v.* RAGEN, WARDEN. April 1, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 896. HIGGINS *v.* PARKER, WARDEN. April 1, 1946. Petition for writ of certiorari to the Supreme Court of Missouri denied.

No. 897. SAIN *v.* RAGEN, WARDEN. April 1, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 901. HUGHES *v.* TENNESSEE. April 1, 1946. Petition for writ of certiorari to the Supreme Court of Tennessee denied. *Robert M. Donihi* for petitioner. *Roy H. Beeler,* Attorney General of Tennessee, and *Nat Tipton* for respondent.

No. 903. ZITTING ET AL. *v.* YOUNG, SHERIFF. April 1, 1946. Petition for writ of certiorari to the Supreme Court of Utah denied.

No. 905. JOHNSON *v.* RAGEN, WARDEN. April 1, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 906. KRELL *v.* RAGEN, WARDEN. April 1, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 923. HAINES *v.* NIERSTHEIMER, WARDEN. April 1, 1946. Petition for writ of certiorari to the Circuit Court of Randolph County, Illinois, denied.

No. 924. ANDERSON *v.* RAGEN, WARDEN. April 1, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 937. WHITE *v.* RAGEN, WARDEN. April 1, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied.

No. 938. WHEELER *v.* ILLINOIS. April 1, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 993. FLORIDA EX REL. BAILEY *v.* BROCK, SHERIFF. April 1, 1946. Petition for writ of certiorari to the Supreme Court of Florida denied. *Wm. W. Flournoy* for petitioner.

No. 862. WELLS *v.* ILLINOIS. April 1, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied for the reason that application therefor was not made within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C. § 350.

No. 852. REYNOLDS ET AL. *v.* UNITED STATES. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Samuel M. Johnston* for petitioners. *Solicitor General McGrath* and *Robert S. Erdahl* for the United States. Reported below: 152 F. 2d 586.

No. 871. UPCHURCH PACKING CO., INC. *v.* UNITED STATES. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Joseph B. Brennan* for petitioner. *Solicitor General McGrath, Sewall Key* and *Helen R. Carloss* for the United States. Reported below: 151 F. 2d 983.

No. 884. ALASKA PACIFIC CONSOLIDATED MINING CO. *v.* WALLING, ADMINISTRATOR. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *DeWitt Williams* for petitioner. *Solicitor General McGrath, Bessie Margolin* and *Joseph M. Stone* for respondent. Reported below: 152 F. 2d 812.

No. 899. FEDERAL NATIONAL BANK *v.* CONTINENTAL SUPPLY CO. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mark Goode* for petitioner. Reported below: 152 F. 2d 300.

No. 912. SMART *v.* COMMISSIONER OF INTERNAL REVENUE. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Julius L. Neidle* for petitioner. *Solicitor General McGrath, Sewall Key* and *Helen R. Carloss* for respondent. Reported below: 152 F. 2d 333.

No. 913. CIVILETTI *v.* COMMISSIONER OF INTERNAL REVENUE. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Paul O'Dwyer* for petitioner. *Solicitor General McGrath, Sewall Key* and *Helen R. Carloss* for respondent. Reported below: 152 F. 2d 332.

No. 915. UNITED STATES *v.* PETTERSON LIGHTERAGE & TOWING CORP. ET AL. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General McGrath* for the United States. *Robert S. Erskine* for respondents. Reported below: 152 F. 2d 657.

No. 954. MERANDO, TRADING AS MERANDO COMPANY, *v.* MATHY ET AL., TRADING AS MATHY COMPANY. April 22, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *William F. Kelly* and *P. J. J. Nicolaides* for petitioner. *Thos. Morton Gittings* for respondents. Reported below: 152 F. 2d 21.

No. 967. AUTOCAR SALES & SERVICE CO. *v.* LEONARD ET AL., TRUSTEES OF CENTRAL MANUFACTURING DISTRICT. April 22, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. *J. Glenn Shehee* for petitioner. *Harold A. Smith* for respondents. Reported below: 392 Ill. 182, 64 N. E. 2d 477.

No. 805. LENTIN, DOING BUSINESS AS J. LENTIN LUMBER CO. *v.* PORTER, PRICE ADMINISTRATOR. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Henry H. Koven* for petitioner. *Solicitor General McGrath, Walter J. Cummings, Jr., Milton Klein* and *David London* for respondent. Reported below: 151 F. 2d 615.

No. 889. ESTATE OF SEWELL *v.* COMMISSIONER OF INTERNAL REVENUE. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Oliver C. Hancock* for petitioner. *Solicitor General McGrath, Sewall Key, Helen R. Carloss* and *Hilbert P. Zarky* for respondent. Reported below: 151 F. 2d 806.

No. 904. ARROW PACKING CORP. ET AL. *v.* UNITED STATES. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Irving Spieler, Samuel Mezansky* and *Moses Polakoff* for petitioners. *Solicitor General McGrath, Robert S. Erdahl* and *Andrew F. Oehmann* for the United States. Reported below: 153 F. 2d 669.

No. 919. BOARD OF COUNTY COMMISSIONERS ET AL. *v.* UNITED STATES. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *W. E. Utterback* for petitioners. *Solicitor General McGrath, J. Edward Williams, Roger P. Marquis, John C. Harrington* and *Walter J. Cummings, Jr.* for the United States. Reported below: 152 F. 2d 540.

No. 922. HARPER *v.* TEXAS. April 22, 1946. Petition for writ of certiorari to the Court of Civil Appeals, of Texas, denied. *David Elmer Hume* for petitioner. Reported below: 188 S. W. 2d 400.

No. 935. MODERN PRODUCTS SUPPLY CO. *v.* DRACHENBERG. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Will Freeman* and *S. L. Wheeler* for petitioner. *Clarence B. Zewadski* and *Howard H. Campbell* for respondent. Reported below: 152 F. 2d 203.

No. 953. MCGRATH ET AL., TRUSTEES, ET AL. *v.* FOX. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *John P. McGrath* for petitioners. *Walter Bruchhausen* for respondent. Reported below: 152 F. 2d 616.

No. 870. TAYLOR ET AL. *v.* PORTER, PRICE ADMINISTRATOR. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. Petitioners *pro se*. *Solicitor General McGrath, Milton Klein* and *David London* for respondent. Reported below: 152 F. 2d 311.

No. 921. WICHITA COCA-COLA BOTTLING CO. *v.* UNITED STATES. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *A. H. Britain* for petitioner. *Solicitor General McGrath, Sewall Key, Robert N. Anderson* and *Melva M. Graney* for the United States. Reported below: 152 F. 2d 6.

No. 940. CANNON ET AL. *v.* PARKER ET AL. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *J. N. Saye* for petitioners. Reported below: 152 F. 2d 706.

No. 944. EDNER, TRUSTEE IN BANKRUPTCY, *v.* MATHEWS, EXECUTRIX; and

No. 945. EDNER, TRUSTEE IN BANKRUPTCY, *v.* MASSACHUSETTS MUTUAL LIFE INSURANCE CO. ET AL. April 22, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *August G. Gutheim* for petitioner. *Edward N. Mills* for Mathews, Executrix, respondent. Reported below: 151 F. 2d 335.

No. 960. UNITED STATES EX REL. FURTON ET AL. *v.* DUFFY, JUDGE. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *William B. Rubin* for petitioners. *Emil Hersh* for respondent.

No. 966. STERN *v.* HARRISON, COLLECTOR OF INTERNAL REVENUE. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *A. J. Pflaum* and *Harry N. Wyatt* for petitioner. *Solicitor General McGrath, Sewall Key, J. Louis Monarch* and *Helen Goodner* for respondent. Reported below: 152 F. 2d 321.

No. 977. ALLEN, TRUSTEE, *v.* UNION TRANSFER CO., DOING BUSINESS AS UNION FREIGHTWAYS. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Louis R. Gates* for petitioner. *Inghram D. Hook* for respondent. Reported below: 152 F. 2d 633.

No. 1002. BRAILAS *v.* SHEPARD STEAMSHIP CO. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *George J. Engelman* for petitioner. *Corydon B. Dunham* for respondent. Reported below: 152 F. 2d 849.

No. 699. WILLIAMS *v.* OVERHOLSER, SUPERINTENDENT. April 22, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. Petitioner *pro se*. *Solicitor General McGrath* and *Robert S. Erdahl* for respondent. Reported below: 151 F. 2d 457.

No. 740. MCGREGOR *v.* RAGEN, WARDEN. April 22, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied. Petitioner *pro se*. *George F. Barrett*, Attorney General of Illinois, and *William C. Wines*, Assistant Attorney General, for respondent.

No. 755. GRECO *v.* PARKER, WARDEN. April 22, 1946. Petition for writ of certiorari to the Supreme Court of Missouri denied.

No. 853. COOK *v.* HOWARD, WARDEN. April 22, 1946. Petition for writ of certiorari to the Supreme Court of Indiana denied. Reported below: 64 N. E. 2d 25.

No. 883. KNIGHT *v.* OHIO. April 22, 1946. Petition for writ of certiorari to the Supreme Court of Ohio denied. *E. B. Wetherill* and *W. B. Price* for petitioner. Reported below: 146 Ohio St. 130, 64 N. E. 2d 323.

No. 885. HICKMAN, ADMINISTRATOR, *v.* TAYLOR ET AL., TRADING AS TAYLOR & ANDERSON TOWING & LIGHTERAGE CO., ET AL. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Abraham E. Freedman* for petitioner. *Samuel B. Fortenbaugh, Jr.* for respondents. Reported below: 153 F. 2d 212.

No. 893. SHAVER *v.* FIDELITY BANKERS TRUST CO., TRUSTEE. April 22, 1946. Petition for writ of certiorari to the Supreme Court of Tennessee denied. *W. O. Lowe* for petitioner. *James A. Fowler* for respondent.

No. 898. GRAY ET AL. *v.* BRACEY ET AL. April 22, 1946. Petition for writ of certiorari to the District Court of Appeal, 3d Appellate District, of California, denied. Reported below: 65 Cal. App. 2d 282, 150 P. 2d 564.

No. 936. DOUGLASS *v.* TENNESSEE. April 22, 1946. Petition for writ of certiorari to the Supreme Court of Tennessee denied. *David Hanover* for petitioner. *Roy H. Beeler,* Attorney General of Tennessee, and *Ernest F. Smith,* Assistant Attorney General, for respondent.

No. 949. DALE *v.* CALIFORNIA ET AL. April 22, 1946. Petition for writ of certiorari to the Supreme Court of California denied.

No. 962. SINGER *v.* RAGEN, WARDEN. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 964. WEGRZYN *v.* RAGEN, WARDEN. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 965. BRILL *v.* RAGEN, WARDEN. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 980. BARTELL *v.* NIERSTHEIMER, WARDEN. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Randolph County, Illinois, denied.

No. 991. BUCHALTER *v.* ILLINOIS;
No. 992. BECKLEY *v.* ILLINOIS;
No. 1025. RISTICH *v.* ILLINOIS;
No. 1026. CASTIGLIONE *v.* ILLINOIS;
No. 1027. PRIDGEN *v.* ILLINOIS;
No. 1028. PROVOST *v.* ILLINOIS;
No. 1029. HARRIS *v.* ILLINOIS; and
No. 1030. COLLINS *v.* RAGEN, WARDEN. April 22, 1946. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 1031. BAKER *v.* UTECHT, WARDEN. April 22, 1946. Petition for writ of certiorari to the Supreme Court of Minnesota denied.

No. 1036. MARR *v.* RAGEN, WARDEN. April 22, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1038. MORRIS *v.* RAGEN, WARDEN. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 1039. RUCKER *v.* ILLINOIS; and
No. 1044. SKINNER *v.* ILLINOIS. April 22, 1946. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 1046. DAVIDSON *v.* RAGEN, WARDEN. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 1054. WEBB *v.* RAGEN, WARDEN; and

No. 1057. JUDD *v.* ILLINOIS. April 22, 1946. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 1058. DUNCAN *v.* RAGEN, WARDEN. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 1059. SKENE *v.* RAGEN, WARDEN. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Kane County, Illinois, denied.

No. 1060. WRIGHT *v.* RAGEN, WARDEN;

No. 1061. FEHRER *v.* RAGEN, WARDEN;

No. 1062. THOMPSON *v.* RAGEN, WARDEN;

No. 1063. FARRIS *v.* ILLINOIS; and

No. 1064. ELY *v.* RAGEN, WARDEN. April 22, 1946. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 1072. BARNARD *v.* RAGEN, WARDEN. April 22, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 1082. FOG *v.* ILLINOIS; and

No. 1083. CASTIGLIONE *v.* RAGEN, WARDEN. April 22, 1946. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 963. FOWLER *v.* RAGEN, WARDEN. On petition for writ of certiorari to the Supreme Court of Illinois;

No. 985. O'NEIL *v.* BURKE, WARDEN. On petition for writ of certiorari to the Supreme Court of Pennsylvania;

No. 1045. JAMES *v.* RAGEN, WARDEN. On petition for writ of certiorari to the Supreme Court of Illinois; and

No. 1066. TROMBLEY *v.* MICHIGAN. On petition for writ of certiorari to the Supreme Court of Michigan. April 22, 1946. The petitions for writs of certiorari are denied for the reason that applications therefor were not made within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C. § 350.

ORDERS GRANTING REHEARING, FROM JANUARY 29, 1946, THROUGH APRIL 22, 1946.

No. 290. HALLIBURTON OIL WELL CEMENTING CO. *v.* WALKER ET AL., DOING BUSINESS AS DEPTHOGRAPH COMPANY. February 25, 1946. The petition for rehearing in this case is granted and the case is restored to the docket for reargument before a full bench. The motion to withhold issuance of the mandate is also granted. *Earl Babcock* and *H. C. Robb, Sr.* for petitioner. 326 U. S. 696.

No. 402. BRUCE'S JUICES, INC. *v.* AMERICAN CAN CO. March 11, 1946. The petition for rehearing in this case is granted and the case is restored to the docket for reargument before a full bench. The motion to withhold issuance of the mandate is also granted. *Cody Fowler, R. W. Shackleford* and *Thurman Arnold* for petitioner. *Wright Patman* filed a memorandum as *amicus curiae,* in support of petitioner. 327 U. S. 758.

No. 410. MACGREGOR *v.* WESTINGHOUSE ELECTRIC & MANUFACTURING CO. March 11, 1946. The petition for rehearing in this case is granted and the case is restored

to the docket for reargument before a full bench. The issuance of the mandate is stayed. *William B. Jaspert* for petitioner. *Jo. Baily Brown* for respondent. 327 U. S. 758.

ORDERS DENYING REHEARING, FROM JANUARY 29, 1946, THROUGH APRIL 22, 1946.*

No. 203. COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF HOLMES. February 4, 1946. 326 U. S. 480.

No. 306. MASON *v.* PARADISE IRRIGATION DISTRICT. February 4, 1946. 326 U. S. 536.

No. 375. WILSON *v.* UNITED STATES. February 4, 1946. 326 U. S. 788.

No. 382. BURT *v.* COE, COMMISSIONER OF PATENTS. February 4, 1946. 326 U. S. 789.

No. 409. PRICE *v.* UNITED STATES. February 4, 1946. 326 U. S. 789.

No. 520. POPE *v.* UNITED STATES. February 4, 1946. 326 U. S. 780.

No. 564. KITHCART *v.* METROPOLITAN LIFE INSURANCE Co. February 4, 1946. Second petition for rehearing denied. 326 U. S. 812.

---

*See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

No. 37. ORDER OF RAILWAY CONDUCTORS OF AMERICA ET AL. *v.* PITNEY ET AL., TRUSTEES OF CENTRAL RAILROAD CO. OF NEW JERSEY, ET AL. February 11, 1946. 326 U. S. 561.

No. 58. FERNANDEZ, COLLECTOR OF INTERNAL REVENUE, *v.* WIENER ET AL. February 11, 1946. 326 U. S. 340.

No. 59. UNITED STATES *v.* ROMPEL, ADMINISTRATOR. February 11, 1946. 326 U. S. 367.

No. 360. HUNTER *v.* UNITED STATES. February 11, 1946. 326 U. S. 787.

No. 363. MCFARLAND *v.* UNITED STATES. February 11, 1946. 326 U. S. 788.

No. 600. HOUSE *v.* FLORIDA ET AL. February 11, 1946. 326 U. S. 792.

No. 112. GREGORY *v.* UNITED STATES. February 11, 1946. Second petition for rehearing denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application. 326 U. S. 811.

No. 633. SLATTERY *v.* MCDONALD, SHERIFF. February 11, 1946. 326 U. S. 787.

No. 475. PHILLIPS *v.* NEW YORK. February 25, 1946. 326 U. S. 789.

No. 649. TOUCEY *v.* NEW YORK LIFE INSURANCE CO. February 25, 1946.

No. 706. EAGLE *v.* CHERNEY ET AL. February 25, 1946.

No. 78, Misc. MCMAHAN *v.* BENNETT, DIRECTOR. February 25, 1946. 326 U. S. 697.

No. 79, Misc. KINNER MOTORS, INC. *v.* BEAUMONT, U. S. DISTRICT JUDGE. February 25, 1946. 326 U. S. 697.

No. 82, Misc. SMITH *v.* MAGUIRE, JUSTICE, ET AL. February 25, 1946. 326 U. S. 698.

No. 83, Misc. HARDING *v.* LAGUARDIA, MAYOR, ET AL. February 25, 1946. 326 U. S. 698.

No. 653. GAS RIDGE, INC. *v.* SUBURBAN AGRICULTURAL PROPERTIES, INC. February 25, 1946. 326 U. S. 796.

No. 667. WEST *v.* COMMISSIONER OF INTERNAL REVENUE (326 U. S. 795);

No. 668. WEST *v.* COMMISSIONER OF INTERNAL REVENUE (326 U. S. 795);

No. 669. ESTATE OF WEST ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE (326 U. S. 796); and

No. 670. WEST *v.* COMMISSIONER OF INTERNAL REVENUE (326 U. S. 796). February 25, 1946. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these applications.

No. 188. LAWRENCE *v.* ILLINOIS. February 25, 1946. The motion for leave to file a fifth petition for rehearing is denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application. 326 U. S. 812.

No. 208. DENORMAND ET AL. *v.* UNITED STATES. February 25, 1946. The motion for leave to file a third petition for rehearing is denied. 326 U. S. 811.

Nos. 587, 588 and 589. CREEL *v.* CREEL. February 25, 1946. The motion to defer consideration of the petition for rehearing is denied. The petition for rehearing is also denied. 326 U. S. 782.

No. 21. MARTINO *v.* MICHIGAN WINDOW CLEANING CO. March 4, 1946. 327 U. S. 173.

No. 152. CANIZIO *v.* NEW YORK. March 4, 1946. 327 U. S. 82.

No. 383. WRIGHT *v.* JOHNSTON, WARDEN. March 4, 1946. 326 U. S. 786.

No. 703. HUDSON COAL CO. *v.* WATKINS ET AL. March 4, 1946.

No. 705. FEDERAL NATIONAL BANK *v.* NEW YORK LIFE INSURANCE CO. March 4, 1946.

No. 112. GREGORY *v.* UNITED STATES. March 4, 1946. The motion for leave to file a third petition for rehearing is denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application. *Ante*, p. 814.

No. 115. UNITED STATES *v.* JOHNSON; and

No. 116. UNITED STATES *v.* SOMMERS ET AL. March 4, 1946. MR. JUSTICE MURPHY took no part in the consideration of decision of this application. 327 U. S. 106.

No. 723. REPUBLIC PICTURES CORP. *v.* KAPPLER. March 11, 1946.

No. 653. GAS RIDGE, INC. *v.* SUBURBAN AGRICULTURAL PROPERTIES, INC. March 11, 1946. Second petition for rehearing denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

No. 94, Misc. MCCONNELL *v.* DOWD, WARDEN. March 25, 1946.

No. 350. ALL SERVICE LAUNDRY CORP. *v.* PHILLIPS, ADMINISTRATRIX, ET AL. March 25, 1946.

No. 444. BIGELOW ET AL. *v.* RKO RADIO PICTURES, INC. ET AL. March 25, 1946. 327 U. S. 251.

No. 763. CARRUTHERS *v.* UNITED STATES. March 25, 1946.

No. 817. HARTSHORN *v.* KUZMIER ET AL. March 25, 1946.

No. 381. ASHCRAFT ET AL. *v.* TENNESSEE. March 25, 1946. The petition for rehearing of John Ware is denied. 327 U. S. 274.

No. 77. UNITED STATES *v.* PETTY MOTOR CO.;

No. 78. UNITED STATES *v.* BROCKBANK, DOING BUSINESS AS BROCKBANK APPAREL CO.;

No. 79. UNITED STATES *v.* GRIMSDELL, DOING BUSINESS AS GROCER PRINTING CO.;

No. 80. UNITED STATES *v.* WIGGS, DOING BUSINESS AS CHICAGO FLEXIBLE SHAFT CO.;

No. 81. UNITED STATES *v.* INDEPENDENT PNEUMATIC TOOL CO.;

No. 82. UNITED STATES *v.* GALIGHER COMPANY; and

No. 83. UNITED STATES *v.* GRAY-CANNON LUMBER CO. March 25, 1946. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this application. 327 U. S. 372.

No. 706. EAGLE *v.* CHERNEY ET AL. March 25, 1946. Second petition for rehearing denied.

No. 188. LAWRENCE *v.* ILLINOIS. March 25, 1946. The motion for leave to file a sixth petition for rehearing is denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application.

No. 640. ROBERTSON *v.* NEW YORK LIFE INSURANCE CO. April 1, 1946. 326 U. S. 786.

No. 710. ANDREWS *v.* ATKINSON, JUDGE. April 1, 1946.

No. 721. CAPITOL WINE & SPIRIT CORP. *v.* BERKSHIRE, DEPUTY COMMISSIONER OF INTERNAL REVENUE, ET AL. April 1, 1946.

No. 806. WAGNER *v.* RAGEN, WARDEN. April 1, 1946.

Nos. 823, 824 and 825. HUMMEL, TRUSTEE IN BANKRUPTCY, *v.* CARDWELL ET AL. April 1, 1946.

No. 763. CARRUTHERS *v.* UNITED STATES. April 1, 1946. Second petition for rehearing denied.

Nos. 658 and 659. GRIERSON *v.* ASHE, WARDEN, ET AL. April 22, 1946.

No. 743. SPENSKY *v.* ASHE, WARDEN. April 22, 1946.

No. 796. FARRELL *v.* MASSACHUSETTS. April 22, 1946.

No. 830. REA *v.* McDONALD, WARDEN. April 22, 1946.

No. 847. IN RE WHISTLER. April 22, 1946.

No. 917. IVERSEN ET AL. *v.* UNITED STATES ET AL. April 22, 1946.

No. 94, Misc. McCONNELL *v.* DOWD, WARDEN; and
No. 383. WRIGHT *v.* JOHNSTON, WARDEN. April 22, 1946. The motions for leave to file second petitions for rehearing are granted. The petitions for rehearing are denied.

No. 112. GREGORY *v.* UNITED STATES. April 22, 1946. The motion for leave to file a fourth petition for rehearing is denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application. *Ante*, p. 816.

FEDERAL RULES OF CRIMINAL PROCEDURE

Effective March 21, 1946

Chapters I, II, III, IV, V, VI and IX, and the Appendix of Forms, were prescribed by the Supreme Court of the United States pursuant to the Act of June 29, 1940, c. 445, 54 Stat. 688. See 323 U. S. 821. They were transmitted by the Chief Justice to the Attorney General for report to Congress. See letters of transmittal and submittal, *post*, pp. 823, 824. The first regular session of the 79th Congress having adjourned on December 21, 1945, these Rules became effective, in accordance with the provision of Rule 59, on March 21, 1946.

Chapters VII and VIII were prescribed by the Supreme Court of the United States pursuant to the Act of February 24, 1933, as amended (c. 119, 47 Stat. 904; 18 U. S. C. § 688). Pursuant to an order of the Court, entered February 8, 1946, *post*, p. 825, they became effective on March 21, 1946.

LETTER OF TRANSMITTAL.

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C.

Chambers of

THE CHIEF JUSTICE

1929 Twenty-fourth Street NW.

DECEMBER 26, 1944.

Honorable FRANCIS BIDDLE,

Attorney General of the United States,

Washington, D. C.

MY DEAR MR. ATTORNEY GENERAL: By direction of the Supreme Court, I transmit to you herewith the Rules of Criminal Procedure for the District Courts of the United States governing proceedings in criminal cases prior to and including verdict, finding of guilty or not guilty by the court, or plea of guilty, which have been prescribed by the Supreme Court pursuant to the Act of June 29, 1940, c. 445, 54 Stat. 688.

The Court requests you, as provided in that Act, to report these Rules to the Congress at the beginning of the regular session in January next.

I have the honor to remain,

Respectfully yours,

HARLAN F. STONE,

Chief Justice of the United States.

LETTER OF SUBMITTAL.

DEPARTMENT OF JUSTICE,
OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., January 3, 1945.

To the Senate and House of Representatives of the United States of America in Congress assembled:

I have the honor to report to the Congress, under the provisions of the act of June 29, 1940, chapter 445 (54 Stat. 688; U. S. C., title 18, sec. 687), at the beginning of a regular session thereof commencing on the 3d day of January 1945, the enclosed Rules of Criminal Procedure for the District Courts of the United States, governing proceedings prior to and including verdict, finding of guilty or not guilty by the court, or plea of guilty.

By letter of December 26, 1944, from the Chief Justice of the United States, a copy of which appears as a prefix to the rules transmitted herewith, I am advised that such rules have been prescribed by the Supreme Court pursuant to the act of June 29, 1940, chapter 445; and I am requested by the Supreme Court to report these rules to the Congress at the beginning of the regular session in January 1945.

Respectfully,

FRANCIS BIDDLE,
Attorney General.

ORDER.

IT IS ORDERED on this eighth day of February, 1946, that the annexed Rules governing proceedings in criminal cases after verdict, finding of guilty or not guilty by the court, or plea of guilty, be prescribed pursuant to the Act of February 24, 1933, c. 119, as amended (47 Stat. 904; U. S. Code, Title 18, § 688) for the District Courts of the United States, the United States Circuit Courts of Appeals, the United States Court of Appeals for the District of Columbia, and the Supreme Court of the United States, and that said Rules shall become effective on the twenty-first day of March, 1946.

IT IS FURTHER ORDERED that these Rules and the Rules heretofore promulgated by order dated December 26, 1944, governing proceedings prior to and including verdict, finding of guilty or not guilty by the court, or plea of guilty, shall be consecutively numbered as indicated and shall be known as the Federal Rules of Criminal Procedure.

FEBRUARY 8, 1946.

FEDERAL RULES OF CRIMINAL PROCEDURE

Table of Contents

FEDERAL RULES OF CRIMINAL PROCEDURE

I. SCOPE, PURPOSE, AND CONSTRUCTION.

Rule 1. Scope.

These rules govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings, with the exceptions stated in Rule 54.

Rule 2. Purpose and Construction.

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

II. PRELIMINARY PROCEEDINGS.

Rule 3. The Complaint.

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States.

Rule 4. Warrant or Summons Upon Complaint.

(a) Issuance. If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a

warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) FORM.

(1) *Warrant.* The warrant shall be signed by the commissioner and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available commissioner.

(2) *Summons.* The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a commissioner at a stated time and place.

(c) EXECUTION OR SERVICE; AND RETURN.

(1) *By Whom.* The warrant shall be executed by a marshal or by some other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action.

(2) *Territorial Limits.* The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.

(3) *Manner.* The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a

defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by mailing it to the defendant's last known address.

(4) *Return.* The officer executing a warrant shall make return thereof to the commissioner or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to the commissioner by whom it was issued and shall be cancelled by him. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the commissioner before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the commissioner to the marshal or other authorized person for execution or service.

RULE 5. PROCEEDINGS BEFORE THE COMMISSIONER.

(a) APPEARANCE BEFORE THE COMMISSIONER. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

(b) STATEMENT BY THE COMMISSIONER. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform

the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

(c) PRELIMINARY EXAMINATION. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him.

III. INDICTMENT AND INFORMATION.

RULE 6. THE GRAND JURY.

(a) SUMMONING GRAND JURIES. The court shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

(b) OBJECTIONS TO GRAND JURY AND TO GRAND JURORS.

(1) *Challenges.* The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or

summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

(2) *Motion to Dismiss.* A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

(c) FOREMAN AND DEPUTY FOREMAN. The court shall appoint one of the jurors to be foreman and another to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreman, the deputy foreman shall act as foreman.

(d) WHO MAY BE PRESENT. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

(e) SECRECY OF PROCEEDINGS AND DISCLOSURE. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring

before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

(f) FINDING AND RETURN OF INDICTMENT. An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a judge in open court. If the defendant has been held to answer and 12 jurors do not concur in finding an indictment, the foreman shall so report to the court in writing forthwith.

(g) DISCHARGE AND EXCUSE. A grand jury shall serve until discharged by the court but no grand jury may serve more than 18 months. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.

RULE 7. THE INDICTMENT AND THE INFORMATION.

(a) USE OF INDICTMENT OR INFORMATION. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

(b) WAIVER OF INDICTMENT. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment.

(c) NATURE AND CONTENTS. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

(d) SURPLUSAGE. The court on motion of the defendant may strike surplusage from the indictment or information.

(e) AMENDMENT OF INFORMATION. The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

(f) BILL OF PARTICULARS. The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraign-

ment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires.

RULE 8. JOINDER OF OFFENSES AND OF DEFENDANTS.

(a) JOINDER OF OFFENSES. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) JOINDER OF DEFENDANTS. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

RULE 9. WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION.

(a) ISSUANCE. Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information, if it is supported by oath, or in the indictment. The clerk shall issue a summons instead of a warrant upon the request of the attorney for the government or by direction of the court. Upon like request or direction he shall issue more than one warrant or summons for the same defendant. He shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) FORM.

(1) *Warrant.* The form of the warrant shall be as provided in Rule 4 (b) (1) except that it shall

be signed by the clerk, it shall describe the offense charged in the indictment or information and it shall command that the defendant be arrested and brought before the court. The amount of bail may be fixed by the court and endorsed on the warrant.

(2) *Summons.* The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before the court at a stated time and place.

(c) EXECUTION OR SERVICE; AND RETURN.

(1) *Execution or Service.* The warrant shall be executed or the summons served as provided in Rule 4 (c) (1), (2) and (3). A summons to a corporation shall be served by delivering a copy to an officer or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the corporation's last known address within the district or at its principal place of business elsewhere in the United States. The officer executing the warrant shall bring the arrested person promptly before the court or, for the purpose of admission to bail, before a commissioner.

(2) *Return.* The officer executing a warrant shall make return thereof to the court. At the request of the attorney for the government any unexecuted warrant shall be returned and cancelled. On or before the return day the person to whom a summons was delivered for service shall make return thereof. At the request of the attorney for the government made at any time while the indictment or information is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the clerk to the marshal or other authorized person for execution or service.

IV. ARRAIGNMENT, AND PREPARATION FOR TRIAL.

Rule 10. Arraignment.

Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead.

Rule 11. Pleas.

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections.

(a) Pleadings and Motions. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and *nolo contendere*. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) The Motion Raising Defenses and Objections.

(1) *Defenses and Objections Which May Be Raised.* Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in

the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(4) *Hearing on Motion.* A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.

(5) *Effect of Determination.* If a motion is determined adversely to the defendant he shall be permitted to plead if he had not previously pleaded. A plea previously entered shall stand. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be held in custody or that his bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any act of Congress relating to periods of limitations.

Rule 13. Trial Together of Indictments or Informations.

The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

Rule 14. Relief From Prejudicial Joinder.

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Rule 15. Depositions.

(a) When Taken. If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a defendant and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

(b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and

address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time.

(c) DEFENDANT'S COUNSEL AND PAYMENT OF EXPENSES. If a defendant is without counsel the court shall advise him of his right and assign counsel to represent him unless the defendant elects to proceed without counsel or is able to obtain counsel. If it appears that a defendant at whose instance a deposition is to be taken cannot bear the expense thereof, the court may direct that the expenses of travel and subsistence of the defendant's attorney for attendance at the examination shall be paid by the government. In that event the marshal shall make payment accordingly.

(d) HOW TAKEN. A deposition shall be taken in the manner provided in civil actions. The court at the request of a defendant may direct that a deposition be taken on written interrogatories in the manner provided in civil actions.

(e) USE. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: That the witness is dead; or that the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

(f) OBJECTIONS TO ADMISSIBILITY. Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

Rule 16. Discovery and Inspection.

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

Rule 17. Subpoena.

(a) For Attendance of Witnesses; Form; Issuance. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a commissioner in a proceeding before him, but it need not be under the seal of the court.

(b) Indigent Defendants. The court or a judge thereof may order at any time that a subpoena be issued upon motion or request of an indigent defendant. The motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence of the witness is material to the defense, that the defendant cannot safely go to trial without the witness and that the defendant does not have sufficient means and is actually unable to pay the fees of the wit-

ness. If the court or judge orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.

(c) FOR PRODUCTION OF DOCUMENTARY EVIDENCE AND OF OBJECTS. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

(d) SERVICE. A subpoena may be served by the marshal, by his deputy or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to him the fee for 1 day's attendance and the mileage allowed by law.

(e) PLACE OF SERVICE.

(1) *In United States.* A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States.

(2) *Abroad.* A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in the Act of July 3, 1926, c. 762, §§ 2, 3, 4, 44 Stat. 835–836; 28 U. S. C. §§ 712, 713, 714.

(f) FOR TAKING DEPOSITION; PLACE OF EXAMINATION.

(1) *Issuance.* An order to take a deposition authorizes the issuance by the clerk of the court for the

district in which the deposition is to be taken of subpoenas for the persons named or described therein.

(2) *Place.* A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person. A nonresident of the district may be required to attend only in the county where he is served with a subpoena or within 40 miles from the place of service or at such other place as is fixed by the court.

(g) CONTEMPT. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a commissioner.

V. VENUE.

RULE 18. DISTRICT AND DIVISION.

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed, but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed.

RULE 19. TRANSFER WITHIN THE DISTRICT.

In a district consisting of two or more divisions the arraignment may be had, a plea entered, the trial conducted or sentence imposed, if the defendant consents, in any division and at any time.

RULE 20. TRANSFER FROM THE DISTRICT FOR PLEA AND SENTENCE.

A defendant arrested in a district other than that in which the indictment or information is pending against him may state in writing, after receiving a copy of the indictment or information, that he wishes to plead guilty or *nolo contendere,* to waive trial in the district in which

the indictment or information is pending and to consent to disposition of the case in the district in which he was arrested, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is held and the prosecution shall continue in that district. If after the proceeding has been transferred the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced and the proceedings shall be restored to the docket of that court. The defendant's statement shall not be used against him unless he was represented by counsel when it was made.

Rule 21. Transfer from the District or Division for Trial.

(a) For Prejudice in the District or Division. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.

(b) Offense Committed in Two or More Districts or Divisions. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

(c) Proceedings on Transfer. When a transfer is ordered the clerk shall transmit to the clerk of the court to

which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, and the prosecution shall continue in that district or division.

Rule 22. Time of Motion to Transfer.

A motion to transfer under these rules may be made at or before arraignment or at such other time as the court or these rules may prescribe.

VI. TRIAL.

Rule 23. Trial by Jury or by the Court.

(a) Trial by Jury. 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.

(b) Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12.

(c) Trial without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially.

Rule 24. Trial Jurors.

(a) Examination. The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

(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.

(c) ALTERNATE JURORS. The court may direct that not more than 4 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, and 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

RULE 25. JUDGE; DISABILITY.

If by reason of absence from the district, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satis-

fied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

Rule 26. Evidence.

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Rule 27. Proof of Official Record.

An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions.

Rule 28. Expert Witnesses.

The court may order the defendant or the government or both to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any, and may thereafter be called to testify by the court or by any party. He shall be subject to cross-examination by each party. The court may determine the reasonable compensation of such a witness and direct its payment out of such funds as may be provided by law. The parties also may call expert witnesses of their own selection.

Rule 29. Motion for Acquittal.

(a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal.

Rule 30. Instructions.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed.

691100°—47——58

No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 31. Verdict.

(a) Return. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

(b) Several Defendants. If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

(d) Poll of Jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

VII. JUDGMENT.

Rule 32. Sentence and Judgment.

(a) Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

(b) JUDGMENT. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(c) PRESENTENCE INVESTIGATION.

(1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) *Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

(d) WITHDRAWAL OF PLEA OF GUILTY. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

(e) PROBATION. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law.

RULE 33. NEW TRIAL.

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if

entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

Rule 34. Arrest of Judgment.

The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period.

Rule 35. Correction or Reduction of Sentence.

The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

Rule 36. Clerical Mistakes.

Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

VIII. APPEAL.

Rule 37. Taking Appeal; and Petition for Writ of Certiorari.

(a) Taking Appeal.

(1) *Notice of Appeal.* An appeal permitted by law from a district court to the Supreme Court or to a circuit court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate. Petitions for allowance of appeal, citations and assignments of error in cases governed by these rules are abolished. The notice of appeal shall set forth the title of the case, the name and address of the appellant and of appellant's attorney, a general statement of the offense, a concise statement of the judgment or order, giving its date and any sentence imposed, the place of confinement if the defendant is in custody and a statement that the appellant appeals from the judgment or order. If the appeal is directly to the Supreme Court, the notice shall be accompanied by a jurisdictional statement as prescribed by the rules of the Supreme Court. The notice of appeal shall be signed by the appellant or appellant's attorney, or by the clerk if the notice is prepared by the clerk as provided in paragraph (2) of this subdivision. The duplicate notice of appeal and a statement of the docket entries shall be forwarded immediately by the clerk of the district court to the clerk of the appellate court. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to adverse parties, but his failure so to do does not affect the validity of the appeal.

(2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10

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

(b) PETITION FOR REVIEW ON WRIT OF CERTIORARI.

(1) *Petition.* Petition to the Supreme Court for writ of certiorari shall be made as prescribed in its rules.

(2) *Time of Making Petition.* Petition for writ of certiorari may be made within 30 days after entry of the judgment or within such further time not exceeding 30 days as the Court or a justice thereof for cause shown may fix within the 30-day period following judgment. If the judgment was entered in a district court in Alaska, Hawaii, Puerto Rico, Canal Zone or Virgin Islands, the petition shall be deemed in time if mailed under a postmark dated within such 30-day period.

RULE 38. STAY OF EXECUTION, AND RELIEF PENDING REVIEW.

(a) STAY OF EXECUTION.

(1) *Death.* A sentence of death shall be stayed if an appeal is taken.

(2) *Imprisonment.* A sentence of imprisonment shall be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail.

(3) *Fine.* A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the district court or by the circuit court of appeals upon such terms as the court deems proper. The court

may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating his assets.

(4) *Probation.* An order placing the defendant on probation shall be stayed if an appeal is taken.

(b) BAIL. Admission to bail upon appeal or certiorari shall be as provided in these rules.

(c) APPLICATION FOR RELIEF PENDING REVIEW. If application is made to a circuit court of appeals or to a circuit judge or to a justice of the Supreme Court for bail pending appeal or for an extension of time for docketing the record on appeal or for any other relief which might have been granted by the district court, the application shall be upon notice and shall show that application to the court below or a judge thereof is not practicable or that application has been made and denied, with the reasons given for the denial, or that the action on the application did not afford the relief to which the applicant considers himself to be entitled.

RULE 39. SUPERVISION OF APPEAL.

(a) SUPERVISION IN APPELLATE COURT. The supervision and control of the proceedings on appeal shall be in the appellate court from the time the notice of appeal is filed with its clerk, except as otherwise provided in these rules. The appellate court may at any time entertain a motion to dismiss the appeal, or for directions to the district court, or to modify or vacate any order made by the district court or by any judge in relation to the prosecution of the appeal, including any order fixing or denying bail.

(b) THE RECORD ON APPEAL.

(1) *Preparation and Form.* The rules and practice governing the preparation and form of the record

on appeal in civil actions shall apply to the record on appeal in all criminal proceedings, except as otherwise provided in these rules.

(2) *Use of Typewritten Record.* The circuit court of appeals may dispense with the printing of the record on appeal and review the proceedings on the typewritten record.

(c) DOCKETING OF APPEAL AND RECORD ON APPEAL. The record on appeal shall be filed with the appellate court and the proceeding there docketed within 40 days from the date the notice of appeal is filed in the district court, but if more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date the first notice of appeal is filed. In all cases the district court or the appellate court or, if the appellate court is not in session, any judge thereof may for cause shown extend the time for filing and docketing.

(d) SETTING THE APPEAL FOR ARGUMENT. Unless good cause is shown for an earlier hearing, the appellate court shall set the appeal for argument on a date not less than 30 days after the filing in that court of the record on appeal and as soon after the expiration of that period as the state of the calendar will permit. Preference shall be given to appeals in criminal cases over appeals in civil cases.

IX. SUPPLEMENTARY AND SPECIAL PROCEEDINGS.

RULE 40. COMMITMENT TO ANOTHER DISTRICT; REMOVAL.

(a) ARREST IN NEARBY DISTRICT. If a person is arrested on a warrant issued upon a complaint in a district other than the district of the arrest but in the same state, or on a warrant issued upon a complaint in another state but at a place less than 100 miles from the place of arrest,

or without a warrant for an offense committed in another district in the same state or in another state but at a place less than 100 miles from the place of the arrest, he shall be taken before the nearest available commissioner or other nearby officer described in Rule 5 (a); preliminary proceedings shall be conducted in accordance with Rule 5 (b) and (c); and if held to answer, he shall be held to answer to the district court for the district in which the prosecution is pending or, if the arrest was without a warrant, for the district in which the offense was committed. If such an arrest is made on a warrant issued on an indictment or information, the person arrested shall be taken before the district court in which the prosecution is pending or, for the purpose of admission to bail, before a commissioner in the district of the arrest in accordance with provisions of Rule 9 (c) (1).

(b) ARREST IN DISTANT DISTRICT.

(1) *Appearance before Commissioner or Judge.* If a person is arrested upon a warrant issued in another state at a place 100 miles or more from the place of arrest, or without a warrant for an offense committed in another state at a place 100 miles or more from the place of arrest, he shall be taken without unnecessary delay before the nearest available commissioner or a nearby judge of the United States in the district in which the arrest was made.

(2) *Statement by Commissioner or Judge.* The commissioner or judge shall inform the defendant of the charge against him, of his right to retain counsel and of his right to have a hearing or to waive a hearing by signing a waiver before the commissioner or judge. The commissioner or judge shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him, shall allow him reasonable opportunity to consult counsel and shall admit him to bail as provided in these rules.

(3) *Hearing; Warrant of Removal or Discharge.* The defendant shall not be called upon to plead. If the defendant waives hearing, the judge shall issue a warrant of removal to the district where the prosecution is pending. If the defendant does not waive hearing, the commissioner or judge shall hear the evidence. If the commissioner hears the evidence he shall report his findings and recommendations to the judge. At the hearing the defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If it appears from the commissioner's report or from the evidence adduced before the judge that sufficient ground has been shown for ordering the removal of the defendant, the judge shall issue a warrant of removal to the district where the prosecution is pending. Otherwise he shall discharge the defendant. If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment. If the prosecution is by information or complaint, a warrant of removal shall issue upon the production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the defendant is guilty of the offense charged. If a warrant of removal is issued, the defendant shall be admitted to bail for appearance in the district in which the prosecution is pending in accordance with Rule 46. After a defendant is held for removal or is discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

(4) *Hearing and Removal on Arrest without a Warrant.* If a person is arrested without a warrant, the hearing may be continued for a reasonable time, upon a showing of probable cause to believe that he is guilty of the offense charged; but he may not be

removed as herein provided unless a warrant issued in the district in which the offense was committed is presented.

RULE 41. SEARCH AND SEIZURE.

(a) AUTHORITY TO ISSUE WARRANT. A search warrant authorized by this rule may be issued by a judge of the United States or of a state or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

(b) GROUNDS FOR ISSUANCE. A warrant may be issued under this rule to search for and seize any property

(1) Stolen or embezzled in violation of the laws of the United States; or

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of the Act of June 15, 1917, c. 30, title VIII, § 4, 40 Stat. 226, and title XI, § 22, 40 Stat. 230, as amended by the Act of March 28, 1940, c. 72, § 8, 54 Stat. 80; 18 U. S. C. § 98.

(c) ISSUANCE AND CONTENTS. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The

warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

(d) EXECUTION AND RETURN WITH INVENTORY. The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) MOTION FOR RETURN OF PROPERTY AND TO SUPPRESS EVIDENCE. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of

fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

(f) RETURN OF PAPERS TO CLERK. The judge or commissioner who has issued a search warrant shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

(g) SCOPE AND DEFINITION. This rule supersedes the Act of June 15, 1917, c. 30, title XI, §§ 1–6, 10, 11, 12–16, 40 Stat. 228, 229, 18 U. S. C. §§ 611–616, 620, 621, 623–626, and any other provision of chapter 30 of that Act inconsistent with this rule. It does not modify any other act, inconsistent with this rule, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects.

RULE 42. CRIMINAL CONTEMPT.

(a) SUMMARY DISPOSITION. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) DISPOSITION UPON NOTICE AND HEARING. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable

time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

X. GENERAL PROVISIONS.

Rule 43. Presence of the Defendant.

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35.

Rule 44. Assignment of Counsel.

If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign

counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.

Rule 45. Time.

(a) Computation. In computing any period of time the day of the act or event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. When a period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal.

(c) Unaffected by Expiration of Term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act in a criminal proceeding.

(d) For Motions; Affidavits. A written motion, other than one which may be heard *ex parte,* and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing unless a different

period is fixed by rule or order of the court. For cause shown such an order may be made on *ex parte* application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and opposing affidavits may be served not less than 1 day before the hearing unless the court permits them to be served at a later time.

(e) ADDITIONAL TIME AFTER SERVICE BY MAIL. Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon him and the notice or other paper is served upon him by mail, 3 days shall be added to the prescribed period.

RULE 46. BAIL.

(a) RIGHT TO BAIL.

(1) *Before Conviction.* A person arrested for an offense not punishable by death shall be admitted to bail. A person arrested for an offense punishable by death may be admitted to bail by any court or judge authorized by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense.

(2) *Upon Review.* Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determined by the appellate court. Bail may be allowed by the trial judge or by the appellate court or by any judge thereof or by the circuit justice. The court or the judge or justice allowing bail may at any time revoke the order admitting the defendant to bail.

(b) BAIL FOR WITNESS. If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness, in an amount fixed by the court or commissioner. If the person fails to give bail the court or com-

missioner may commit him to the custody of the marshal pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement as to bail.

(c) AMOUNT. If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant.

(d) FORM, AND PLACE OF DEPOSIT. A person required or permitted to give bail shall execute a bond for his appearance. One or more sureties may be required, cash or bonds or notes of the United States may be accepted and in proper cases no security need be required. Bail given originally on appeal shall be deposited in the registry of the district court from which the appeal is taken.

(e) JUSTIFICATION OF SURETIES. Every surety, except a corporate surety which is approved as provided by law, shall justify by affidavit and may be required to describe in the affidavit the property by which he proposes to justify and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by him and remaining undischarged and all his other liabilities. No bond shall be approved unless the surety thereon appears to be qualified.

(f) FORFEITURE.

(1) *Declaration.* If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.

(2) *Setting Aside.* The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

(3) *Enforcement.* When a forfeiture has not been set aside, the court shall on motion enter a

691100°—47——59

judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses.

(4) *Remission.* After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

(g) EXONERATION. When the condition of the bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody.

RULE 47. MOTIONS.

An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit.

RULE 48. DISMISSAL.

(a) BY ATTORNEY FOR GOVERNMENT. The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

(b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

Rule 49. Service and Filing of Papers.

(a) Service: When Required. Written motions other than those which are heard *ex parte,* written notices, designations of record on appeal and similar papers shall be served upon the adverse parties.

(b) Service: How Made. Whenever under these rules or by an order of the court service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided in civil actions.

(c) Notice of Orders. Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party affected thereby a notice thereof and shall make a note in the docket of the mailing.

(d) Filing. Papers required to be served shall be filed with the court. Papers shall be filed in the manner provided in civil actions.

Rule 50. Calendars.

The district courts may provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings as far as practicable.

Rule 51. Exceptions Unnecessary.

Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought,

makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

Rule 52. Harmless Error and Plain Error.

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

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

Rule 53. Regulation of Conduct in the Court Room.

The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court.

Rule 54. Application and Exception.

(a) Courts and Commissioners.

(1) *Courts.* These rules apply to all criminal proceedings in the district courts of the United States, which include the District Court of the United States for the District of Columbia, the District Court for the Territory of Alaska, the United States District Court for the Territory of Hawaii, the District Court of the United States for Puerto Rico and the District Court of the Virgin Islands; in the United States circuit courts of appeals, which include the United States Court of Appeals for the District of Columbia; and in the Supreme Court of the United States. The rules governing proceedings after verdict or finding of guilt or plea of guilty apply in the United States District Court for the District of the Canal Zone.

(2) *Commissioners.* The rules applicable to criminal proceedings before commissioners apply to sim-

ilar proceedings before judges of the United States or of the District of Columbia. They do not apply to criminal proceedings before other officers empowered to commit persons charged with offenses against the United States.

(b) PROCEEDINGS.

(1) *Removed Proceedings.* These rules apply to criminal prosecutions removed to the district courts of the United States from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law.

(2) *Offenses Outside a District or State.* These rules apply to proceedings for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, except that such proceedings may be had in any district authorized by the Act of March 3, 1911, c. 231, § 41, 36 Stat. 1100, Judicial Code § 41, 28 U. S. C. § 102.

(3) *Peace Bonds.* These rules do not alter the power of judges of the United States or of United States commissioners to hold to security of the peace and for good behavior under the Act of March 3, 1911, c. 231, § 270, 36 Stat. 1163, Judicial Code § 270, 28 U. S. C. § 392, and under Revised Statutes § 4069, 50 U. S. C. § 23, but in such cases the procedure shall conform to these rules so far as they are applicable.

(4) *Trials before Commissioners.* These rules do not apply to proceedings before United States commissioners and in the district courts under the Act of October 9, 1940, c. 785, 54 Stat. 1058–1059, 18 U. S. C. §§ 576–576d, relating to petty offenses on federal reservations.

(5) *Other Proceedings.* These rules are not applicable to extradition and rendition of fugitives; forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties.

They do not apply to proceedings under the Federal Juvenile Delinquency Act so far as they are inconsistent with that Act. They do not apply to summary trials for offenses against the navigation laws under Revised Statutes §§ 4300–4305, 33 U. S. C. §§ 391–396, or to proceedings involving disputes between seamen under Revised Statutes §§ 4079–4081, as amended, 22 U. S. C. §§ 256–258, or to proceedings for fishery offenses under the Act of June 28, 1937, c. 392, 50 Stat. 325–327, 16 U. S. C. §§ 772–772i, or to proceedings against a witness in a foreign country under the Act of July 3, 1926, c. 762, 44 Stat. 835, 26 U. S. C. §§ 711–718.

(c) APPLICATION OF TERMS. As used in these rules the term "State" includes District of Columbia, territory and insular possession. "Law" includes statutes and judicial decisions. "Act of Congress" includes any act of Congress locally applicable to and in force in the District of Columbia, in a territory or in an insular possession. "District court" includes all district courts named in subdivision (a), paragraph (1) of this rule. "Civil action" refers to a civil action in a district court. "Oath" includes affirmations. "District judge" includes a justice of the District Court of the United States for the District of Columbia. "Judge of a circuit court of appeals" includes a justice of the United States Court of Appeals for the District of Columbia. "Senior circuit judge" includes the chief justice of the United States Court of Appeals for the District of Columbia. "Attorney for the government" means the attorney general, an authorized assistant of the attorney general, a United States attorney and an authorized assistant of a United States attorney. The words "demurrer," "motion to quash," "plea in abatement," "plea in bar" and "special plea in bar," or words to the same effect, in any act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12.

Rule 55. Records.

The clerk of the district court and each United States commissioner shall keep such records in criminal proceedings as the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of Senior Circuit Judges, may prescribe.

Rule 56. Courts and Clerks.

The circuit court of appeals and the district court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Sundays and legal holidays.

Rule 57. Rules of Court.

(a) Rules by District Courts and Circuit Courts of Appeals. Rules made by district courts and circuit courts of appeals for the conduct of criminal proceedings shall not be inconsistent with these rules. Copies of all rules made by a district court or by a circuit court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts. The clerk of each court shall make appropriate arrangements, subject to the approval of the Director of the Administrative Office of the United States Courts, to the end that all rules made as provided herein be published promptly and that copies of them be available to the public.

(b) Procedure Not Otherwise Specified. If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

Rule 58. Forms.

The forms contained in the Appendix of Forms are illustrative and not mandatory.

Rule 59. Effective Date.

These rules take effect on the day which is 3 months subsequent to the adjournment of the first regular session of the 79th Congress, but if that day is prior to September 1, 1945, then they take effect on September 1, 1945. They govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending.

Rule 60. Title.

These rules may be known and cited as the Federal Rules of Criminal Procedure.

APPENDIX OF FORMS

Table of Forms

FORM 1. INDICTMENT FOR MURDER IN THE FIRST DEGREE OF FEDERAL OFFICER.

In the District Court of the United States for the .....
District of ....., ... Division

UNITED STATES OF AMERICA	No. .....
v.	(18 U. S. C. §§ 452, 253)
JOHN DOE	

The grand jury charges:

On or about the ..... day of ....., 19...., in the ..... District of ....., John Doe with premeditation and by means of shooting murdered John Roe, who was then an officer of the Federal Bureau of Investigation of the Department of Justice engaged in the performance of his official duties.

A True Bill.

....., *Foreman.*

....., *United States Attorney.*

FORM 2. INDICTMENT FOR MURDER IN THE FIRST DEGREE ON FEDERAL RESERVATION.

In the District Court of the United States for the .....
District of ....., ... Division

UNITED STATES OF AMERICA	No. .....
v.	(18 U. S. C. §§ 451, 452)
JOHN DOE	

The grand jury charges:

On or about the ..... day of ....., 19...., in the ..... District of ....., and on lands acquired for the use of the United States and under the (exclusive) (concurrent) jurisdiction of the United States, John Doe with premeditation shot and murdered John Roe.

A True Bill.

....., *Foreman.*

....., *United States Attorney.*

FORM 3. INDICTMENT FOR MAIL FRAUD.

In the District Court of the United States for the .....
District of ....., ... Division

UNITED STATES OF AMERICA	No. .....
v.	(Criminal Code § 215,
JOHN DOE ET AL.	18 U. S. C. § 338)

The grand jury charges:

1. Prior to the ..... day of ....., 19...., and continuing to the ..... day of ....., 19....[1], the defendants John Doe, Richard Roe, John Stiles and Richard Miles devised and intended to devise a scheme and artifice to defraud purchasers of stock of XY Company, a California corporation, and to obtain money and property by means of the following false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be false when made: That the XY Company owned a mine at or near San Bernardino, California; that the mine was in actual operation; that gold ore was being obtained at the mine and sold at a profit; that the current earnings of the company would be sufficient to pay dividends on its stock at the rate of six per cent per annum.

2. On the ..... day of ....., 19...., in the ..... District of ....., the defendants for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Mrs. Mary Brown, 110 Main Street, Stockton, California, to be sent or delivered by the Post Office Establishment of the United States.

SECOND COUNT

1. The Grand Jury realleges all of the allegations of the first count of this indictment, except those contained in the last paragraph thereof.

2. On the ..... day of ....., 19...., in the ..... District of ....., the defendants, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Mr. John J. Jones, 220 First Street, Batavia, New York, to be sent or delivered by the Post Office Establishment of the United States.

A True Bill.

....., *Foreman.*

....., *United States Attorney.*

[1] Insert last mailing date alleged.

FORM 4. INDICTMENT FOR SABOTAGE.

In the District Court of the United States for the .....
District of ....., ... Division

UNITED STATES OF AMERICA
v.
JOHN DOE
No. .....
(50 U. S. C. § 103)

The grand jury charges:

On or about the ..... day of ....., 19...., within the ..... District of ....., while the United States was at war, John Doe, with reason to believe that his act might injure, interfere with or obstruct the United States in preparing for or carrying on the war, wilfully made and caused to be made in a defective manner certain war material consisting of shells, in that he placed and caused to be placed certain material in a cavity of the shells so as to make them appear to be solid metal, whereas in fact the shells were hollow.

A True Bill.

.....,
Foreman.

.....,
United States Attorney.

FORM 5. INDICTMENT FOR INTERNAL REVENUE VIOLATION.

In the District Court of the United States for the .....
District of ....., ... Division

UNITED STATES OF AMERICA
v.
JOHN DOE
No. .....
(26 U. S. C. § 2833)

The grand jury charges:

On or about the ..... day of ....., 19...., in the ..... District of ....., John Doe carried on the business of a distiller without having given bond as required by law.

A True Bill.

.....,
Foreman.

.....,
United States Attorney.

FORM 6. INDICTMENT FOR INTERSTATE TRANSPORTATION OF STOLEN MOTOR VEHICLE.

In the District Court of the United States for the .....
District of ....., ... Division

UNITED STATES OF AMERICA *v.* JOHN DOE	No. ..... (18 U. S. C. § 408)

The grand jury charges:

On or about the ..... day of ....., 19...., John Doe transported a stolen motor vehicle from ....., State of ....., to ....., State of ....., in ..... District of ....., and he then knew the motor vehicle to have been stolen.

A True Bill.

.....,
Foreman.

.....,
United States Attorney.

FORM 7. INDICTMENT FOR RECEIVING STOLEN MOTOR VEHICLE.

In the District Court of the United States for the .....
District of ....., ... Division

UNITED STATES OF AMERICA *v.* JOHN DOE	No. ..... (18 U. S. C. § 408)

The grand jury charges:

On or about the ..... day of ....., 19...., in the ..... District of ....., John Doe received and concealed a stolen motor vehicle, which was moving as interstate commerce, and he then knew the motor vehicle to have been stolen.

A True Bill.

.....,
Foreman.

.....,
United States Attorney.

FORM 8. INDICTMENT FOR IMPERSONATION OF FEDERAL OFFICER.

In the District Court of the United States for the .....
District of ....., ... Division

UNITED STATES OF AMERICA *v.* JOHN DOE	No. ..... (18 U. S. C. § 76)

The grand jury charges:

On or about the ..... day of ....., 19...., in the ..... District of ....., John Doe with intent to defraud the United States and Mary Major falsely pretended to be an officer and employee acting under the authority of the United States, namely, an agent of the Federal Bureau of Investigation, and falsely took upon himself to act as such, in that he falsely stated that he was a special agent of the Federal Bureau of Investigation engaged in pursuit of a person charged with an offense against the United States.

A True Bill.

.....,
Foreman.

.....,
United States Attorney.

FORM 9. INDICTMENT FOR OBTAINING MONEY BY IMPERSONATION OF FEDERAL OFFICER.

In the District Court of the United States for the .....
District of ....., ... Division

UNITED STATES OF AMERICA *v.* JOHN DOE	No. ..... (18 U. S. C. § 76)

The grand jury charges:

On or about the ..... day of ....., 19...., in the ..... District of ....., John Doe with intent to defraud the United States and Mary Major, falsely pretended to be an officer and employee acting under the authority of the United States, namely, an agent of the Alcohol Tax Unit of the Department of the Treasury, and in such pretended character demanded and obtained from Mary Major the sum of $100.

A True Bill.

.....,
Foreman.

.....,
United States Attorney.

FORM 10. INDICTMENT FOR PRESENTING FRAUDULENT CLAIM AGAINST THE UNITED STATES.

In the District Court of the United States for the .....
District of ....., ... Division

UNITED STATES OF AMERICA
v.
JOHN DOE
No. .....
(18 U. S. C. § 80)

The grand jury charges:

On or about the ..... day of ....., 19...., in the ..... District of ....., John Doe presented to the War Department of the United States for payment a claim against the Government of the United States for having delivered to the Government 100,000 lineal feet of No. 1 white pine lumber, and he then knew the claim to be fraudulent in that he had not delivered the lumber to the Government.

A True Bill.

.....,
Foreman.

.....,
United States Attorney.

FORM 11. INFORMATION FOR FOOD AND DRUG VIOLATION.

In the District Court of the United States for the .....
District of ....., ... Division

UNITED STATES OF AMERICA
v.
JOHN DOE
No. .....
(21 U. S. C. §§ 331, 333, 342)

The United States Attorney charges:

On or about the ..... day of ....., 19...., in the ..... District of ....., John Doe unlawfully caused to be introduced into interstate commerce by delivery for shipment from the city[1] of ....., ... (State), to the city[1] of ....., ... (State), a consignment of cans containing articles of food which were adulterated in that they consisted in whole or in part of decomposed vegetable substance.

.....,
United States Attorney.

[1] Name of city is stated only to preclude a motion for a bill of particulars and not because such a statement is an essential fact to be alleged.

FORM 12. WARRANT FOR ARREST OF DEFENDANT.

In the District Court of the United States for the .....
District of ....., ... Division

UNITED STATES OF AMERICA
v.
JOHN DOE
} No. .....

To .....:[1]

You are hereby commanded to arrest John Doe and bring him forthwith before the District Court for the ..... District of ..... in the city of ..... to answer to an indictment charging him with robbery of property of the First National Bank of ....., in violation of 12 U. S. C. § 588b.

....., *Clerk.*

By ....., *Deputy Clerk.*

[1] Insert designation of officer to whom warrant is issued, *e. g.*, "any United States Marshal or any other authorized officer"; or "United States Marshal for ----- District of -----"; or "any United States Marshal"; or "any Special Agent of the Federal Bureau of Investigation"; or "any United States Marshal or any Special Agent of the Federal Bureau of Investigation"; or "any agent of the Alcohol Tax Unit."

FORM 13. SUMMONS.

In the District Court of the United States for the .....
District of ....., ... Division

UNITED STATES OF AMERICA
v.
JOHN DOE
} No. .....

To JOHN DOE:

You are hereby summoned to appear before the District Court for the District of ..... at the Post Office Building in the city of ..... on the ..... day of ....., 19.... at 10 o'clock A. M. to answer to an information charging you with unlawful transportation of intoxicating liquor on which the internal revenue tax had not been paid.

....., *Clerk.*

By ....., *Deputy Clerk.*

This summons was received by me at ..... on .....

....., *Defendant.*

FORM 14. WARRANT OF REMOVAL.

In the District Court of the United States for the .....
District of ....., ... Division

To .....:

The grand jury of the United States for the ..... District of ..... having indicted John Doe on a charge of murder in the first degree, and John Doe having been arrested in this District and, after (waiving) hearing, having been committed by a United States Commissioner to your custody pending his removal to that district,

You are hereby commanded to remove John Doe forthwith to the ..... District of ..... and there deliver him to the United States Marshal for that District or to some other officer authorized to receive him.

....,
United States District Judge.

Dated at ..... this ..... day of ..... 19.....

FORM 15. SEARCH WARRANT (UNDER 18 U. S. C. § 287).

To .....:

Affidavit having been made before me by John Doe that he has reason to believe that on the premises known as ..... Street, in the city of ....., in the District of ....., there is now being concealed certain property, namely, certain dies, hubs, molds and plates, fitted and intended to be used for the manufacture of counterfeit coins of the United States, and as I am satisfied that there is probable cause to believe that the property so fitted and intended to be used is being concealed on the premises above described,

You are hereby commanded to search the place named for the property specified, serving this warrant and making the search in the daytime, and if the property be found there to seize it, prepare a written inventory of the property seized and bring the property before me.

Dated this ..... day of .....

....,
U. S. Commissioner for the .....
District of .....

691100°—47——60

FORM 16. MOTION FOR THE RETURN OF SEIZED PROPERTY AND THE SUPPRESSION OF EVIDENCE.

In the District Court of the United States for the .....
District of ....., ... Division

No. .....

John Doe hereby moves this Court to direct that certain property of which he is the owner, a schedule of which is annexed hereto, and which on the night of ....., 19...., at the premises known as ..... Street, in the city of ....., in the District of ....., was unlawfully seized and taken from him by two deputies of the United States Marshal for this District, whose true names are unknown to the petitioner, be returned to him and that it be suppressed as evidence against him in any criminal proceeding.

The petitioner further states that the property was seized against his will and without a search warrant.

.....,
Attorney for Petitioner.

FORM 17. APPEARANCE BOND.

In the District Court of the United States for the .....
District of ....., ... Division

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to the United States of America the sum of ..... Dollars ($.....).

The condition of this bond is that the defendant .....
..... is to appear in the District Court of the United States [1] for the ..... District of .....
at .....[2] in accordance with all orders and directions of the Court [3] relating to the appearance of the defendant before the Court [3] in the case of *United States* v. ....., File number .....; and if the defendant appears as ordered, then this bond is to be void, but if the defendant fails to perform this condition payment of the amount of the bond shall be due forthwith. If the bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in the District Court of the United States for the ..... District of

[1] If appearance is to be before a commissioner, change the words following "appear" to "before ....., United States Commissioner."

[2] Insert place.

[3] Change "Court" to "Commissioner" if necessary. See Note 1.

..... against each debtor jointly and severally for the amount above stated together with interest and costs, and execution may be issued or payment secured as provided by the Federal Rules of Criminal Procedure and by other laws of the United States.

This bond is signed on this ..... day of ....., 19.... at .....

.....,	.....,
Name of Defendant.	*Address.*
.....,	.....,
Name of Surety.	*Address.*
.....,	.....,
Name of Surety.	*Address.*

Signed and acknowledged before me this ..... day of ....., 19.....

.....

Approved: .....

JUSTIFICATION OF SURETIES

I, the undersigned surety, on oath say that I reside at .....; and that my net worth is the sum of ..... Dollars ($.....).

I further say that .....

.....

.....[4]

....., *Surety.*

Sworn to and subscribed before me this ..... day of ....., 19.... at .....

.....

[4] These lines are to provide for additional justification if the Commissioner or Court so directs.

FORM 18. WAIVER OF INDICTMENT.

In the District Court of the United States for the .....
District of ....., ... Division

UNITED STATES OF AMERICA
v.
JOHN DOE
} No. .....
(18 U. S. C. § 408)

John Doe, the above named defendant, who is accused of violating the National Motor Vehicle Theft Act, being advised of the nature of the charge and of his rights, hereby waives in open court prosecution by indictment and consents that the proceeding may be by information instead of by indictment.

....., *Defendant.*

....., *Witness.*

....., *Counsel for Defendant.*

FORM 19. MOTION BY DEFENDANT TO DISMISS THE INDICTMENT.

In the District Court of the United States for the .....
District of ....., ... Division

UNITED STATES OF AMERICA
v.
JOHN DOE
} No. .....

The defendant moves that the indictment be dismissed on the following grounds:

1. The court is without jurisdiction because the offense if any is cognizable only in the ..... Division of the ..... District of .....

2. The indictment does not state facts sufficient to constitute an offense against the United States.

3. The defendant has been acquitted (convicted, in jeopardy of conviction) of the offense charged therein in the case of *United States* v. ..... in the District Court for the ..... District of ....., Case No. ..... terminated on.....

4. The offense charged is the same offense for which the defendant was pardoned by the President of the United States on ..... day of ....., 19.....

5. The indictment was not found within three years next after the alleged offense was committed.

Signed: .....,
.....,
Address

FORM 20. SUBPOENA TO TESTIFY.

In the District Court of the United States for the .....
District of ....., ... Division

To .....:

You are hereby commanded to appear in the District Court of the United States for the ..... District of ..... at the Courthouse, in the city of ....., on the ..... day of ....., 19.... at 10 o'clock A. M. to testify in the case of *United States* v. *John Doe*.

This subpoena is issued on application of the (United States) (defendant).

....., *Clerk.*

By ....., *Deputy Clerk.*

FORM 21. SUBPOENA TO PRODUCE DOCUMENT OR OBJECT.

In the District Court of the United States for the .....
District of ....., ... Division

To .....:

You are hereby commanded to appear in the District Court of the United States for the ..... District of ..... at the Courthouse, in the city of ....., on the ..... day of ....., 19.... at 10 o'clock A. M. to testify in the case of *United States* v. *John Doe* and bring with you .....
.....
.....
.....

This subpoena is issued upon application of the (United States) (defendant).

....., *Clerk.*

By ....., *Deputy Clerk.*

FORM 22. WARRANT FOR ARREST OF WITNESS.

In the District Court of the United States for the .....
District of ....., ... Division

.....
v. } No. .....
.....

To .....:

You are hereby commanded to arrest John Doe and bring him forthwith before the District Court for the ..... District of ..... in the city of ....., for the reason that he wilfully failed to appear after having been served with subpoena to appear at the trial of the case of *United States* v. *Roe* on the ..... day of ....., 19.....

You are further commanded to detain him in your custody until he is discharged by the Court.

Upon order of Honorable ....., United States District Judge at ..... this ..... day of ....., 19.....

....., *Clerk.*

By ....., *Deputy Clerk.*

FORM 23. MOTION FOR NEW TRIAL.

In the District Court of the United States for the .....
District of ....., ... Division

UNITED STATES OF AMERICA
v.
JOHN DOE
No. .....

The defendant moves the court to grant him a new trial for the following reasons:

1. The court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.
2. The verdict is contrary to the weight of the evidence.
3. The verdict is not supported by substantial evidence.
4. The court erred in sustaining objections to questions addressed to the witness Richard Roe.
5. The court erred in admitting testimony of the witness Richard Roe to which objections were made.
6. The court erred in charging the jury and in refusing to charge the jury as requested.
7. The defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstances: the attorney for the government stated in his argument that the defendant had not taken the witness stand and that the defendant had been convicted of crime.
8. The court erred in denying the defendant's motion for a mistrial.

.....,
Attorney for Defendant.

FORM 24. MOTION IN ARREST OF JUDGMENT.

In the District Court of the United States for the .....
District of ....., ... Division

UNITED STATES OF AMERICA
v.
JOHN DOE
No. .....

The defendant moves the court to arrest the judgment for the following reasons:

1. The indictment does not state facts sufficient to constitute an offense against the United States.
2. This court is without jurisdiction of the offense, in that the offense if any was not committed in this district.

.....,
Attorney for Defendant.

FORM 25. JUDGMENT AND COMMITMENT.

In the District Court of the United States for the .....
District of ....., ... Division

UNITED STATES OF AMERICA
v. } No. .....
.....

JUDGMENT AND COMMITMENT

On this ..... day of ....., 19...., came the attorney for the government and the defendant appeared in person and [1]
.....

It is Adjudged that the defendant has been convicted upon his plea of [2] ..... of the offense of .....
as charged [3] .....; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of [4] .....
.....

It is Adjudged that [5] .....
.....

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

.....,
United States District Judge.

The Court recommends commitment to: [6] .....
.....

.....,
Clerk.

---

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "*nolo contendere*," as the case may be.

[3] Insert "in count(s) number ----------" if required.

[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of fine or fine and costs, or until he is otherwise discharged as provided by law.

[5] Enter any order with respect to suspension and probation.

[6] For use of Court wishing to recommend a particular institution.

[Endorsement]

RETURN

I have executed the within Judgment and Commitment as follows:
Defendant delivered on ..... to .....
Defendant noted appeal on .....
Defendant released on .....
Defendant elected, on ....., not to commence service of the sentence.
Defendant's appeal determined on .....
Defendant delivered on ..... to .....
at ....., the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

....,
United States Marshal.

FORM 26. NOTICE OF APPEAL.

In the District Court of the United States for the .....
District of ....., ... Division

UNITED STATES OF AMERICA
v.
JOHN DOE } No. .....

Name and address of appellant.....
Name and address of appellant's attorney .....
.....
Offense .....
Concise statement of judgment or order, giving date, and any sentence .....
Name of institution where now confined, if not on bail.....
.....

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the ..... Circuit from the above-stated judgment.

Dated .....

....,
Appellant.[1]

[1] Or "Appellant's Attorney" or "Clerk" as the case may be.

NOTE.—Compare *Form of Notice of Appeal under Rule 3, Form No. 1*, annexed to *Rules of Criminal Procedure after Plea of Guilty, Verdict or Finding of Guilt*, following 18 U. S. C. 688. See Rule 37 (a) (1) (Taking Appeal; and Petition for Writ of Certiorari—Taking Appeal: Notice of Appeal) *Federal Rules of Criminal Procedure.*

FORM 27. STATEMENT OF DOCKET ENTRIES.

In the District Court of the United States for the .....
District of ....., ... Division

UNITED STATES OF AMERICA
v.
JOHN DOE
} No. .....

1. Indictment or information for .....
..... Filed ....., 19....
2. Arraignment ....., 19....
3. Plea to indictment or information .....
....., 19....
4. Motion to withdraw plea of guilty denied .....
....., 19....
5. Trial by jury, or by court if jury waived .....
....., 19....
6. Verdict or finding of guilt .....
....., 19....
7. Judgment—(with terms of sentence) or order .....
..... Entered ....., 19....
8. Notice of appeal filed ....., 19....

Dated .....

Attest .....,
Clerk.

NOTE.—Compare *Form of Clerk's Statement of Docket Entries to be Forwarded under Rule 4, Form No. 3* (to accompany duplicate notice of appeal to the United States Circuit Court of Appeals), annexed to *Rules of Criminal Procedure after Plea of Guilty, Verdict of Finding of Guilt*, following 18 U. S. C. § 688.

INDEX

I. In General.

1. *Application of Constitution. Hawaii.* Organic Act secures to civilians in Hawaii constitutional guaranties, including fair trial. *Duncan* v. *Kahanamoku*, 304.

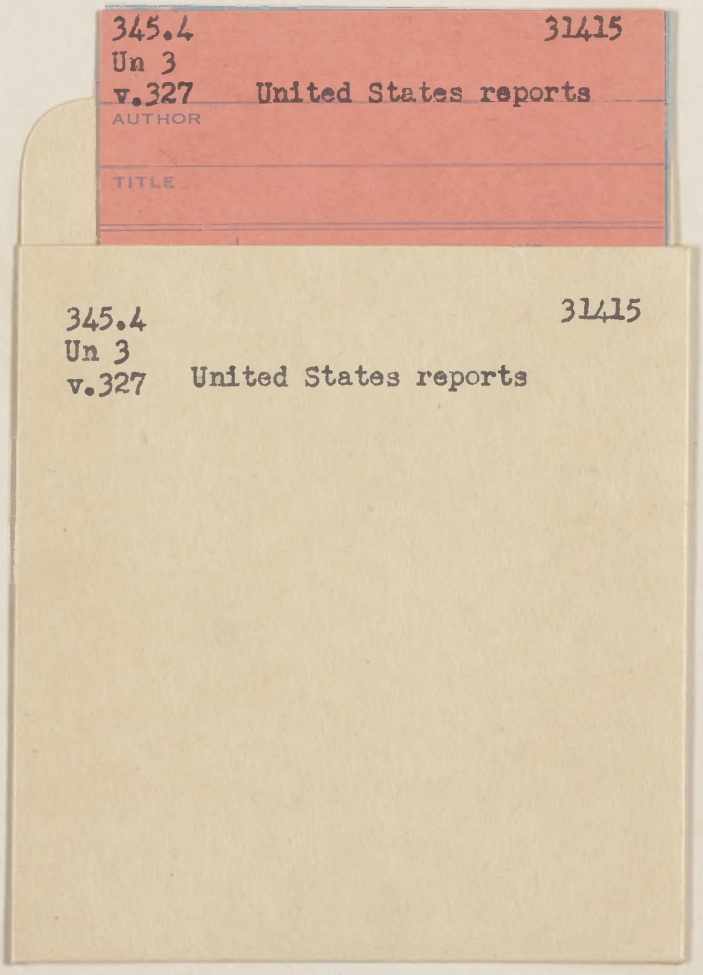
2. *Federal Legislation. Validity. Proof of Specific Evils.* Exercise of legislative power of Congress not conditioned on proof of existence of evils in particular situations. *North American Co.* v. *S. E. C.*, 686.

3. *Trial by Military Commission. Authority. Enemy Combatant.* Right of enemy combatant on trial before military commission for violation of law of war to defend on ground that Constitution or laws of United States withheld authority to proceed with trial. *In re Yamashita*, 1.

4. *Judicial Power. District Courts. Enjoining State Officer.* Jurisdiction of District Court to enjoin state officer from violating Emergency Price Control Act not inconsistent with Constitution. *Case* v. *Bowles*, 92.

691100°—47——61

691100°—47——62


345.4
31415
Un 3
v.327 United States reports
AUTHOR
TITLE
345.4
31415
Un 3
v.327 United States reports

DATE DUE	BORROWER'S NAME

DATE DUE	BORROWER'S NAME