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UNITED STATES REPORTS

VOLUME 328

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1945

FROM APRIL 22, 1946 (CONCLUDED) TO AND INCLUDING
JUNE 10, 1946 (END OF TERM)

WALTER WYATT
REPORTER

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ERRATUM.—315 U. S. 118, eleventh line from bottom, "is" should be "it".

31891

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.

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[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 327 U. S. p. v. Before he was stricken, he had delivered his dissenting opinions in *Seas Shipping Co.* v. *Sieracki, post,* pp. 85, 103, and *Girouard* v. *United States, post,* pp. 61, 70, but not the opinions of the Court in *Heiser* v. *Woodruff,* 327 U. S. 726; *United States* v. *Rice,* 327 U. S. 742; and *Swanson* v. *Marra Bros., post,* p. 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.)

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

SWANSON *v.* MARRA BROTHERS, INC.

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

No. 405. Argued February 1, 1946.—Decided April 22, 1946.

1. A longshoreman in the employ of a stevedoring company, while on a pier and engaged in loading cargo on a ship lying alongside in a harbor, was struck by a life raft which fell from the vessel and injured him. *Held*, he has no right of recovery against his employer under the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688. *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50; *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36, differentiated. Pp. 2, 7.
2. By legislation subsequent to the Jones Act and the decision in the *Haverty* case, Congress has expressed its purpose to restrict the liability of the employer under federal statutes to injuries to his employees occurring on navigable waters or inflicted upon an employee who is either a master or a member of a crew of the vessel, injured in the course of his employment as such. P. 5.
3. The effect of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 33 U. S. C. 901 *et seq.*, is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the *Haverty* case only such rights to compensation as are given by the Longshoremen's Act. P. 7.
4. Since the Longshoremen's Act is restricted to compensation for injuries occurring on navigable waters, it excludes from its own terms and from the Jones Act any remedies against the employer for injuries inflicted on shore. P. 7.

5. It leaves the injured employees in such cases to pursue the remedies afforded by the local law, which this Court has often held permits recovery against the employer for injuries inflicted by land torts on his employees who are not members of the crew of a vessel. P. 7.
6. It leaves unaffected the rights of members of the crew of a vessel to recover under the Jones Act when injured while pursuing their maritime employment whether on board or on shore. Pp. 7–8.

149 F. 2d 646, affirmed.

Petitioner, a longshoreman in the employ of respondent stevedoring company, sued to recover under the Jones Act, 41 Stat. 1007, for injuries suffered while on a pier and engaged in loading cargo on a vessel lying alongside in the harbor. The District Court dismissed the complaint. 57 F. Supp. 456. The Circuit Court of Appeals affirmed. 149 F. 2d 646. This Court granted certiorari. 326 U. S. 710. *Affirmed*, p. 8.

Abraham E. Freedman argued the cause for petitioner. With him on the brief was *Charles Lakatos.*

Joseph W. Henderson argued the cause for respondent. With him on the brief was *George M. Brodhead.*

Opinion of the Court by Mr. Chief Justice Stone, announced by Mr. Justice Black.

Petitioner, a longshoreman in the employ of respondent stevedoring company, while on a pier and engaged in loading cargo on a vessel lying alongside in the harbor of Philadelphia, was struck by a life raft which fell from the vessel and injured him. The question for decision, which was reserved in *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 43, 44, is whether petitioner may maintain a suit against his employer to recover for the injury, under the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688.

Petitioner, after having sought and received compensation for his injury under the state employers liability

act of Pennsylvania, brought the present suit in the District Court for Eastern Pennsylvania "pursuant to the Maritime Law as modified by Section 33 of the Merchant Marine Act of 1920" (the Jones Act). He alleged as the cause of the injury respondent's breach of duty in failing to provide a safe and seaworthy vessel and appliances and a safe place for petitioner to work, and in failing to make the life raft secure and to make adequate inspection of it. The district court dismissed the complaint, holding that there could be no recovery under the Jones Act by one not a seaman for an injury suffered by him while on shore. 57 F. Supp. 456. The Court of Appeals for the Third Circuit affirmed. 149 F. 2d 646. We granted certiorari, 326 U. S. 710, because of the novelty and importance of the question presented.

The Jones Act provides in pertinent part:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . ."

The Act thus made applicable to seamen, injured in the course of their employment, the provisions of the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.*, which give to railroad employees a right of recovery for injuries resulting from the negligence of their employer, its agents or employees. *Panama R. Co.* v. *Johnson*, 264 U. S. 375; *The Arizona* v. *Anelich*, 298 U. S. 110, 118.

We have held that a stevedore who was injured while storing cargo, and while on but not employed by a vessel lying in navigable waters, was authorized by the Jones Act to bring suit against his employer to recover for injury caused by the employer's negligence. *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50; *Uravic* v. *Jarka*

Co., 282 U. S. 234. It was thought that both the language and the policy of the Act indicated that by taking over principles of recovery already established for the employees of interstate railroads and in making them applicable in the admiralty setting, Congress intended to extend them to stevedores, the employees of an independent contractor, while working on a vessel in navigable waters and while rendering services customarily performed by seamen. *International Stevedoring Co.* v. *Haverty, supra,* 52; see *O'Donnell* v. *Great Lakes Dredge & Dock Co., supra,* 38, 39.

Petitioner, in urging that the doctrine of the *Haverty* case be extended so as to allow him to recover for his injuries sustained on shore, places his reliance on *O'Donnell* v. *Great Lakes Dredge & Dock Co., supra.* We there held the ship owner liable, under the Jones Act, for injuries caused to a seaman by a fellow servant while the former was on shore engaged in repairing a conduit which was a part of the vessel and used for discharging its cargo. But in that case we sustained the recovery because the injured person was a seaman and an employee of the vessel, engaged in the course of his employment as such. An incident to his employment by the vessel as a seaman was his right to maintenance and cure for injuries received in the course of his employment, a cause of action traditionally cognizable in admiralty. *The Osceola,* 189 U. S. 158, 175; *Calmar S. S. Corp.* v. *Taylor,* 303 U. S. 525, 527–528. The jurisdiction of admiralty over such a cause of action depends, not on the place where the injury is inflicted, compare *The Plymouth,* 3 Wall. 20; *Cleveland Terminal R. Co.* v. *Steamship Co.,* 208 U. S. 316; see *Minnie* v. *Port Huron Co.,* 295 U. S. 647; *The Admiral Peoples,* 295 U. S. 649, but on the nature of the seaman's service, his status as a member of the vessel, and his relationship as such to the vessel and its operation in navigable waters. *O'Don-*

nell v. *Great Lakes Dredge & Dock Co., supra,* 42–43; cf. *Calmar S. S. Corp.* v. *Taylor, supra.*

Congress, in thus enlarging an admiralty remedy, was exercising its constitutional power to regulate commerce, and to make laws which shall be necessary and proper to carry into execution powers vested by the Constitution in the Government or any department of it, Art. I, § 8, cl. 18, including the judicial power which, by Art. III, § 2, extends "to all Cases of admiralty and maritime Jurisdiction." By § 9 of the Judiciary Act of 1789, 1 Stat. 76, 28 U. S. C. § 371, (Third), Congress conferred on the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it . . ." By the grant of admiralty and maritime jurisdiction in the Judiciary Article, and by § 9 of the Judiciary Act, the national Government took over the traditional body of rules, precepts and practices known to lawyers and legislators as the maritime law, so far as the courts invested with admiralty jurisdiction should accept and apply them. See *O'Donnell* v. *Great Lakes Dredge & Dock Co., supra,* 40, and cases cited.

We have no occasion to consider here whether Congress, by the Jones Act, undertook to or could give a remedy against the employer for injuries caused by a vessel to his employees, not members of the crew of the vessel, while working on shore. For Congress, by later legislation, has expressed its purpose to restrict the liability of the employer under federal statutes to injuries to his employees occurring on navigable waters or inflicted upon an employee who is either a master or a member of a crew of the vessel, injured in the course of his employment as such.

Within six months after the decision in the *Haverty* case and nearly sixteen years before our decision in the *O'Donnell* case, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U. S. C. § 901 *et seq.*, which gave a remedy against employers by way of compensation for disability or death suffered on navigable waters by any employee not a "master or member of a crew of any vessel." § 903. The liability of employers to pay the prescribed compensation is, by § 905, made "exclusive and in place of all other liability of such employer to the employee," his legal representative and any other person entitled to recover damages "at law or in admiralty" from the employer for the injury or death. By § 903 (a) (1) recovery may be had under the Act only "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

The Act both imposes liability on the employer for injuries on navigable waters to employees not including the master or members of a crew of a vessel, and makes the prescribed liability to employees within the coverage of the Act exclusive. The Act thus excludes from its benefits stevedores not members of the crew who are injured on navigable waters from recovering under the Jones Act as interpreted by the *Haverty* case. Those provisions make it plain that Congress' own interpretation of the Jones Act is such as to preclude the extension of the doctrine of that case to the specified employees injured on land.

We can hardly suppose that Congress, while explicitly denying a right of recovery under the Jones Act to maritime workers not members of a crew who are injured on board a vessel, either thought that the Jones Act extended to injuries inflicted on shore to employees not members of a crew, see *State Industrial Commission* v. *Nordenholt Corp.*, 259 U. S. 263, 273; *Smith & Son* v. *Taylor*, 276 U. S.

179, or intended that there should be established for such workers injured on shore, by extension of the doctrine of the *Haverty* case, a right of recovery which it at the same time withdrew from such workers when injured on navigable waters. The Senate Judiciary Committee, in recommending the legislation which became the Longshoremen's and Harbor Workers' Compensation Act, expressed doubt as to the constitutional power of Congress to give recovery to such employees injured on shore, saying "These men are mainly employed in loading, unloading, refitting, and repairing ships; but it should be remarked that injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States." Sen. Rep. No. 973, 69th Cong., 1st Sess., p. 16. Cf. *Cleveland Terminal R. Co.* v. *Steamship Co., supra; The Admiral Peoples, supra.*

We must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the *Haverty* case only such rights to compensation as are given by the Longshoremen's Act. But since this Act is restricted to compensation for injuries occurring on navigable waters, it excludes from its own terms and from the Jones Act any remedies against the employer for injuries inflicted on shore. The Act leaves the injured employees in such cases to pursue the remedies afforded by the local law, which this Court has often held permits recovery against the employer for injuries inflicted by land torts on his employees who are not members of the crew of a vessel. *State Industrial Commission* v. *Nordenholt Corp., supra; Smith & Son* v. *Taylor, supra;* cf. *Minnie* v. *Port Huron Co., supra.* And it leaves unaf-

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fected the rights of members of the crew of a vessel to recover under the Jones Act when injured while pursuing their maritime employment whether on board, *Warner* v. *Goltra,* 293 U. S. 155; *Norton* v. *Warner Co.,* 321 U. S. 565; see *South Chicago Co.* v. *Bassett,* 309 U. S. 251, 255–6, or on shore. *O'Donnell* v. *Great Lakes Dredge & Dock Co., supra.*

Affirmed.

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

ILLINOIS EX REL. GORDON, DIRECTOR OF LABOR, *v.* UNITED STATES.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 749. Argued March 28, 1946.—Decided April 22, 1946.

1. Under R. S. § 3466, which provides that where an insolvent debtor makes a voluntary assignment of his property "the debts due to the United States shall be first satisfied," a claim of the United States for taxes under the Social Security Act is entitled to priority over the claim of a State for taxes under the state Unemployment Compensation Act. Pp. 9, 11.
2. Priority of the United States under R. S. § 3466 in such case is not inconsistent with either the express language or the purpose of the Social Security Act. P. 11.

391 Ill. 29, 62 N. E. 2d 537, affirmed.

The State Supreme Court sustained a claim of the United States to priority over the claim of the State in the property of an insolvent debtor. 391 Ill. 29, 62 N. E. 2d 537. This Court granted certiorari. 327 U. S. 771. *Affirmed,* p. 12.

Albert E. Hallett, Assistant Attorney General of Illinois, argued the cause for petitioner. With him on the brief was *George F. Barrett,* Attorney General.

J. Louis Monarch argued the cause for the United States. With him on the brief were *Solicitor General McGrath, Acting Assistant Attorney General Sewall Key* and *Helen Goodner.*

MR. JUSTICE BLACK delivered the opinion of the Court.

In this case the Supreme Court of Illinois held that certain tax claims of the Federal Government against an insolvent taxpayer must be satisfied in full before the State of Illinois can recover amounts due as taxes under its Unemployment Compensation Act. 391 Ill. 29, 62 N. E. 2d 537. This decision is substantially in conflict with that of the Supreme Court of Rhode Island in *Rivard* v. *Bijou Furniture Co.*, 67 R. I. 251, 21 A. 2d 563, 68 R. I. 358, 27 A. 2d 853, and we granted certiorari to resolve this conflict.

The claim of the United States is for federal unemployment compensation taxes under Title 9 and federal insurance contributions taxes under Title 8 of the Social Security Act, 49 Stat. 620.[1] The priority claimed by the United States rests on R. S. 3466, which provides in part that "Whenever any person indebted to the United States . . ., not having sufficient property to pay all his debts, makes a voluntary assignment" of his property, "the debts due to the United States shall be first satisfied."

The State concedes that the facts here bring the United States' tax claims within the general priority provisions of § 3466. The taxpayer while insolvent had made a voluntary assignment of all his property for the benefit of creditors. And it is well settled that taxes are debts within the meaning of § 3466. *United States* v. *Waddill Co.*, 323 U. S. 353, 355. The State's only contention is that the

[1] A small part of the Government's claim was for capital stock taxes, but this fact is of no significance here.

Social Security Act evinces a congressional purpose to free state unemployment tax claims from the general priority provisions of § 3466.

The State draws its inference not from an express declaration of congressional purpose, but from what it deems to be broad implications behind the general scheme of the Social Security Act. The contention is that enforcement of priorities over state unemployment compensation tax claims would weaken state unemployment compensation funds and thus tend to frustrate the manifest purpose of Congress to foster, in the national interest, sound financial and stable state unemployment compensation systems. The State points to the following as showing Congress' interest in state systems. Title 9 of the Social Security Act contains provisions intended to induce states to set up sound unemployment compensation in accordance with congressionally prescribed standards. To this end state systems that meet these standards are permitted to build up their own funds by collection from employers within the state of 90% of the tax those employers would otherwise have to pay to the Federal Government. State funds must be paid into the United States Treasury, to be credited to a special fund, and can be withdrawn only for paying unemployment benefits. Furthermore, the federal portion of unemployment compensation taxes can be used to help states pay administrative expenses. And Congress, since passage of the original Act, has enacted legislation guaranteeing the solvency of state funds. 58 Stat. 790. All of these facts, and some others to which the State refers, are said to show that the paramount purpose of the social security legislation was to treat unemployment relief as a problem to be solved by the Federal Government by its assumption of the primary burden of making state systems a success.

We agree that the social security legislation provides a method for accomplishing state and federal unemployment relief systems, integrated in plan, function, and purpose, and that sound state systems are essential to complete success of the congressional plan. But we cannot agree that Congress thereby intended in effect to amend § 3466, by making its priority provisions inapplicable to state unemployment tax claims. For while the state and federal governments were to cooperate, the underlying philosophy of the Federal Act was to keep the state and federal systems separately administered. The Act nowhere indicates a purpose to treat a state unemployment claim as the State here urges us to treat its claim—"tantamount to a claim of the United States."

Furthermore, §§ 807 (c) and 905 (b) of the Federal Act, and the provisions they incorporated by reference, made applicable to social security taxes all other provisions of law relating to the assessment and collection of other taxes unless such other remedies are inconsistent with the Social Security Act. While there is no evidence that Congress in these sections had § 3466 specifically in mind, these provisions indicate that Congress intended, so far as practicable, to apply to social security taxes all of the remedies available to the Federal Government in collecting other taxes. Section 3466 provides one of these remedies. Since, as has been indicated, it is not inconsistent with either the express language or purpose of the Social Security Act, it must be applied here.

Previous decisions of this Court relied on by the State do not support its contention. Those cases, insofar as they held that § 3466 did not give the United States priority over certain other types of claims, did so because later Acts were found to contain provisions plainly inconsistent with United States priority. *Cook County Na-*

tional Bank v. *United States,* 107 U. S. 445; *United States* v. *Guaranty Trust Co.,* 280 U. S. 478. Cf. *United States* v. *Emory,* 314 U. S. 423, 431–432. We find no such inconsistency here. And "only the plainest inconsistency would warrant our finding an implied exception to the operation of so clear a command as that of § 3466." *United States* v. *Emory, supra,* 433.

Affirmed.

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

EL DORADO OIL WORKS ET AL. *v.* UNITED STATES ET AL.

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

No. 428. Argued January 30 and March 26, 1946.—Decided April 22, 1946.

A shipper who rented tank cars for transporting its products in interstate commerce brought suit in the District Court against the car company for the amount by which allowances received by the car company from carriers for use of the cars exceeded the rental. This Court, in *General American Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U. S. 422, ordered the District Court to stay its hand until the Interstate Commerce Commission could determine the administrative problems involved. In response to a petition of the shipper, the Commission found that an allowance to the shipper in excess of the rental would be unjust, unreasonable and unlawful, and ordered the proceeding before it discontinued. *Held:*

1. The action of the Commission was a reviewable "order," and a suit to enjoin or set it aside was within the jurisdiction of a District Court of three judges. 28 U. S. C. §§ 41 (28), 47. P. 18.

2. The Commission's determination as to what constituted a just and reasonable allowance to the shipper was valid although it related to past transactions. P. 19.

(a) The Commission made its determination, as to the lawfulness of the past practices, upon the application of the shipper. P. 19.

(b) The determination of the Commission was authorized by the decision of this Court in the *Tank Car* case, as well as by the Interstate Commerce Act. P. 19.

(c) The Commission was not required in this proceeding to establish uniform rates for the future for all shippers. P. 20.

3. The finding of the Commission that the allowances to this shipper were unjust and unreasonable was based on uniform treatment of all shipper-lessees, whom the Commission was justified in treating as a class apart. P. 20.

4. It is the duty of the Commission to abolish all practices which result in rebates or preferences. P. 21.

5. The fact that the freight was paid by the consignees at the regular rate does not preclude the finding that the practices here in question involved rebates or preferences to the shipper which are prohibited by the Interstate Commerce Act and the Elkins Act. P. 22.

59 F. Supp. 738, affirmed.

Appellants' suit to set aside an order of the Interstate Commerce Commission, 258 I. C. C. 371, was dismissed by a District Court of three judges for want of jurisdiction, 59 F. Supp. 738, and appellants appealed to this Court. *Affirmed* on other grounds, p. 22.

W. F. Williamson argued the cause and filed briefs for appellants. *H. Russell Bishop* entered an appearance for the El Dorado Oil Works, appellant.

Daniel W. Knowlton argued the cause for the United States and the Interstate Commerce Commission, appellees. With him on the brief were *Solicitor General McGrath* and *Walter J. Cummings, Jr.* *Mr. Knowlton* also filed a brief for the Interstate Commerce Commission.

Allan P. Matthew argued the cause for the General American Transportation Corporation, appellee. With him on the briefs were *Kenneth F. Burgess* and *Douglas F. Smith.*

J. Carter Fort and *Thomas L. Preston* filed a brief for the Alabama Great Southern Railroad Company et al., appellees.

MR. JUSTICE BLACK delivered the opinion of the Court.

Appellants filed a complaint in the District Court under 28 U. S. C. 41 (28), challenging action taken by the Interstate Commerce Commission allegedly pursuant to instructions contained in an earlier opinion rendered by this Court in connection with these proceedings. 308 U. S. 422. The District Court dismissed the complaint for want of jurisdiction on the ground that the Commission's action did not amount to a reviewable "order" within the meaning of 28 U. S. C. 41 (28). The case is before us on direct appeal. 28 U. S. C. 345.

The following facts constitute the background of this proceeding:

El Dorado Oil Works, one of the appellants, processes, sells, and ships coconut oil in interstate commerce. Special kinds of tank cars are necessary for that distribution. The appellee, General American Tank Car Corporation,[1] owns tank cars which it rents and leases to various shippers. In 1933, Oil Works made a contract with the Car Company to rent, for a period of three years, fifty tank cars at $27.50 per car per month, and such additional cars as it might need at $30 per car per month. The outstanding railroad tariffs, prescribing payment by the railroad of 1½¢ per mile for the use of tank cars, contained rules which provided that the mileage would be paid only to the "party" whose "reporting marks" appeared on the cars. During part of the rental period here in question the rules provided that "mileage for the use of cars of private ownership will be paid . . . only to the car owner—not to a

[1] General American Transportation Corporation has become the successor of the General American Tank Car Corporation.

lessee." Since under the agreement the cars were to bear the "reporting marks" of the Car Company and not the Oil Works, and since Oil Works was a lessee, no tariffs authorized railroad mileage payments to Oil Works. Nevertheless, under the agreement Oil Works was to receive the full mileage allowance prescribed by the tariffs. The rent Oil Works was to pay to Car Company was to be taken out by Car Company from the mileage allowances it received from the railroads and the balance was to be paid by it to Oil Works. The railroad payments proved to be greatly in excess of the rental obligations, and Car Company regularly paid the difference to Oil Works, until July 1, 1934.

July 2, 1934, the Interstate Commerce Commission, after an exhaustive investigation, handed down its findings, opinion, and conclusion in *Use of Privately Owned Refrigerator Cars,* 201 I. C. C. 323. It there drew a distinction between car owners as a class and car renters as a class. It found that car owners must have sufficient rental allowances, whether they rented to railroads or to shippers, to pay a reasonable return on investment, taking into consideration cost of maintenance, idle cars, etc. On the other hand the Commission found that car renters had no such fixed costs. The Commission's conclusion was that costs of rented cars to a shipper, including rent and incidentals, was the only allowance the shipper-lessee should receive from a railroad, directly or indirectly, and that if he receives more, the cost of transportation to him would be less than the cost of transportation to shippers generally, especially those who use cars furnished by the carriers. To make the railroad pay more for use of a car rented by a shipper than the rent he had to pay, was, according to the Commission, a violation of § 15 (13) of the Interstate Commerce Act, 49 U. S. C. 15 (13), in that it required the railroad to pay more for the car than was

"just and reasonable." The Commission was of the opinion that refunds of car mileage in excess of the rent charged the shipper-lessee was the equivalent of an unlawful concession or rebate, prohibited by the Elkins Act. While the Commission's findings were limited to refrigerator cars, it stated that "the general principles enunciated apply equally to all other types of private cars." *Id.* at 382.

After the Commission's decision in the refrigerator case, the Car Company declined to pay over to Oil Works any part of the excess mileage. In 1935 El Dorado Terminal Company, one of the appellants acting as assignee of Oil Works, brought suit against the Car Company to recover accrued excess mileage earnings. Car Company defended on the ground that further refunds would violate Interstate Commerce legislation, particularly the Elkins Act. 49 U. S. C. 41. The district judge found that the contract was in violation of the Elkins Act, and rendered judgment for the Car Company. The Circuit Court of Appeals reversed. 104 F. 2d 903. The Car Company filed a petition for certiorari which was supported here by the Solicitor General and the Interstate Commerce Commission. Their claim that the Circuit Court of Appeals erred rested on the following major grounds: (1) The railroad's payments to Car Company, which provided no facilities to the railroad, were unauthorized; (2) since no published tariff authorized payments to a shipper-lessee such as Oil Works, its only recourse to collect allowances for the cars it had furnished was to institute proceedings before the Commission for recovery of a reasonable allowance; (3) payment to Oil Works of excess mileage earnings received by Car Company would violate the Elkins Act. In reply to the Commission's brief urging certiorari, Oil Works contended that the case did not raise a question "within the administrative or primary control of the Commission."

We granted certiorari and reversed the judgment of the Circuit Court of Appeals. 308 U. S. 422. While we rejected the Commission's contention that the District Court had no jurisdiction to hear the case, we accepted its contention that determination of the validity of the challenged past practices was for the Commission. We pointed out that the tariffs approved by the Commission fixed no uniform rate to be paid by railroads to the shipper directly for the use of cars originally rented by the shipper. We pointed out further that Oil Works had never "applied to the Commission for its decision as to what was a proper allowance for the cars furnished by it." We said that the Oil Works was "entitled, under the plain terms of § 15 (13) [of the Interstate Commerce Act], to be paid by the carrier a just and reasonable allowance" for providing the cars. The opinion stated that questions such as whether the shipper was "reaping a substantial profit from the use of the cars," and whether, on the one hand, the "allowances and practices" were lawful and reasonable or, on the other hand, violated the Elkins Act, were all administrative problems calling for investigation and determination by the Commission. The District Court was accordingly ordered to stay its hand so that the Commission could render its decision.

On remand Oil Works and Terminal Company filed a petition with the Commission praying that it hold hearings and enter an order to the effect that Car Company could pay the mileage earnings to Oil Works without violating the Elkins Act and that such payment would not constitute a rebate or concession. The Commission found that a just and reasonable allowance to Oil Works would be the cost incurred by it in furnishing the cars, namely the monthly rental to the Car Company, that any amount in excess of that would be unjust and unreasonable in violation of § 15 (13) and would "constitute a rebate and discrimination and involve a departure from the tariff

rules applicable, prohibited by section 1 of the Elkins Act, and section 6 (7) of the Interstate Commerce Act . . ." [2] The Commission further ordered that the proceeding before it be discontinued. On this appeal both sides argued the jurisdictional question as well as questions going to the merits.

Before we reach the merits of the controversy we must at the outset briefly dispose of the jurisdictional question. As the facts already stated reveal, the Commission's findings and determination if upheld constitute far more than an "abstract declaration." *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 143. "Legal consequences"

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[2] The Commission did not rule that a shipper-lessee would always be entitled to allowances equal to the cost to him of the cars he rented. The Commission's opinion makes it clear that a shipper-lessee is only entitled to receive a just and reasonable allowance for cars while they are actually used by the railroad, even though this allowance might be less than the car rent paid by the shipper. On that subject the Commission said:

> "In administering the provisions of section 15 (13) we have consistently adhered to two principles, bearing in mind that we were to prescribe the *maximum* amount which the carrier might pay: (1) The amount paid should not be more than was just and reasonable for the service or instrumentality furnished, and (2) that the amount which might be paid should not exceed the reasonable cost to the owner of the goods of performing the service or furnishing the instrumentality used. Whichever of these sums was the lower marked the maximum the carrier might pay."

Here the Commission has applied these uniform criteria in such a way as to permit the shipper-lessee to receive as much as the full rental he paid. Were it not for these proceedings resulting from the Car Company's refusal to continue payments to the shipper, the railroad would have had to pay as it did pay 1½¢ per mile, which proved far in excess of the rental. It may be that in other cases a just and reasonable rate would fall below the rental. It may be that in this case the rental exceeded what would be a just and reasonable allowance with respect to the use of the cars by the railroad. But this would serve to further reduce the rate to which appellants were actually entitled; appellants, therefore, have no interest in challenging the Commission's order on this point.

(*id.* at 132) would follow which would finally fix a "right or obligation" (*id.* at 131) on appellants' part. These findings are more than a mere "stage in an incomplete process of administrative adjudication," for the Commission here has discontinued further proceedings. *Id.* at 143. We, therefore, think that the Commission's action falls within the class of "orders" which *Rochester Telephone Corp.* v. *United States, supra,* held to be reviewable by a district court of three judges. The District Court erred in dismissing the complaint for want of jurisdiction.

On the merits, appellants' major contention is that the Interstate Commerce Act and our earlier opinion in this case do not authorize the Commission to determine, as it here has done, the justice and reasonableness of mileage allowances which appellants were to receive on past transactions. The contention is that both our opinion and the Act authorize the Commission to do no more than determine what uniform allowance shippers as a class would be permitted to charge in the future. In part the argument is that insofar as the order is based on a treatment of shipper-lessees as a class apart, and on a limitation of their allowance to the cost to them of the cars they furnish, the order is invalid, in that it neither rests on, nor brings about, a uniform rate to all shippers, or even all shipper-lessees. We cannot agree with the above contentions.

First, it must be noted that the Commission made its determination as to the lawfulness of these past practices on the basis of appellants' own application, asking the Commission to do so. Second, our previous opinion, as well as the Interstate Commerce Act, authorized the Commission to make this determination. The question before us when this case was first here did not relate to future but to past allowances. Relying on past decisions, we held that the "reasonableness and legality" of the past dealings here involved were matters which Congress had entrusted to the Commission. See e. g. *Great Northern R.*

Co. v. *Merchants Elevator Co.*, 259 U. S. 285, 291, and other cases cited in our previous opinion. And we rejected appellants' petition for rehearing which presented substantially the argument now repeated, namely that any order the Commission might make "could only be effective as to the future," that the Commission's determination "could not affect the contract . . . in this case," that the Commission's action would be "futile," and that consequently our judgment and opinion would provide no "guidance" for the District Court. Our first opinion, buttressed by our rejection of the motion for rehearing, was a plain authorization for the Commission to determine the justice and reasonableness of the past allowances to this shipper. The Commission did not have to establish future uniform rates to determine the questions we sent to it. Consequently, insofar as appellants' argument is that the Commission failed to treat all shippers or all shipper-lessees uniformly because it did not fix future uniform rates, the answer is that it was not required to do so.

Insofar as appellants' argument as to lack of uniform treatment of shippers and shipper-lessees seeks to attack the basis of the Commission's finding that the past allowances here were unjust and unreasonable, it also lacks merit. We think the Commission's finding was based on a uniform treatment of all shipper-lessees. While it is true, as appellants contend, that under the Commission's rule different shipper-lessees might receive different allowances, the rule is uniform in that it permits no shipper-lessee to receive allowances exceeding the rental he pays. All shipper-lessees are prohibited from making profits at the expense of the railroads on cars rented to transport goods in interstate commerce. Since the facts before the Commission were enough to enable it to find that such profits amount to rebates to shipper-lessees which result in a discrimination against shippers that own cars or use

cars furnished by the railroad, the Commission was justified in treating shipper-lessees as a class apart. As the Commission pointed out in its Refrigerator opinion, the history of railroad practices shows that rebates, concessions, and favoritism have frequently grown out of the private car system. Notwithstanding the very great transportation service supplied by private cars, designed and equipped to meet special needs, the Commission acts within its power when it attempts to regulate their use so as to put a stop to existing prohibited evils. It must test violations of the Interstate Commerce Act by results. *Union Pacific R. Co.* v. *United States,* 313 U. S. 450, 462. It is the duty of the Commission to nullify practices that result in rebates or preferences, "whatever form they take and in whatsoever guise they may appear," *O'Keefe* v. *United States,* 240 U. S. 294, 297.[3]

The appellants' remaining contentions challenge the sufficiency of the evidence. They rest primarily on the premise that the Commission lacked authority to determine what we had directed it to find. Insofar as these contentions rest on that premise, they have been disposed of by what we have already said. The only contention as to alleged insufficiency of evidence that requires further

[3] Appellants contend that if the car rental cost is the maximum allowable payment, the mileage payments to the Car Company were unlawful. That these payments by the railroad to Oil Works were "apparently" unlawful and recoverable by the railroad, was the position taken by the Commission in its brief filed when this case was first before us. And in our opinion we stated that since the shipper, not the Car Company, had furnished the cars to the railroad, "It seems clear that no rule or regulation of the carrier may provide for the payment of such allowance to any other person" except Oil Works. But appellants can not benefit from the unlawfulness of payments to the Car Company. On the contrary, such a conclusion would strengthen the position of the Commission, namely that a "just and reasonable" allowance to Oil Works must be determined by the Commission without regard to the mileage payments to Car Company.

attention is that there could be no finding that the practices here involved resulted in rebates or concessions to Oil Works, since the freight on the oils transported was not paid by it, but was allegedly always paid by the consignees and at the regular rate. Oil Works, however, was a shipper who supplied cars to be used as facilities for transportation. For supplying these cars, it could not consistently with § 15 (13) receive from the railroad, directly or indirectly, more than a "just and reasonable" allowance. This allowance was "in respect to transportation." See *Union Pacific R. Co.* v. *United States, supra,* 462. Payment by the railroad of more than the just value of the services inevitably resulted in its carrying Oil Works' product at less than the regular freight rate, even though it collected the full rate from the consignees. The reduced rate at which Oil Works could thus have its products transported justified the Commission's finding that Oil Works got a concession and an advantage over other shippers who made no such profits on tank cars. Whether Oil Works or its consignees paid the freight makes no difference. Cf. *Elgin, J. & E. R. Co.* v. *United States,* 253 F. 907, 911. A practice which accomplishes this result is prohibited by the Interstate Commerce Act and the Elkins Act.

The judgment dismissing the complaint is affirmed, but on the ground that the Commission's order is valid, and that the appellants were consequently not entitled to the relief prayed for.

Affirmed.

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

MR. JUSTICE DOUGLAS, dissenting in part.

I do not think it should be left to the shipper and the car owner to determine what portion of the tariff paid by the railroad should be paid to the shipper. But that is

exactly what the Court permits when it measures the shipper's allowance by the amount of rental he has agreed to pay the car owner.

As Commissioner Splawn pointed out in his dissent from the opinion of the Interstate Commerce Commission (258 I. C. C. 371, 382–383), the Commission in following this course failed to comply with our opinion in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422. We there said (pp. 429–430):

> "As the Circuit Court of Appeals has pointed out, different shippers may have differing costs in respect of privately owned cars furnished the carriers. Nevertheless, as the allowances to be made them by the carriers for the use of such cars must be the subject of published schedules, and must be just and reasonable, the Commission is compelled to ascertain in the light of past and present experience a fair and reasonable compensation to cover such costs and prescribe a uniform rate which will reflect such experience. It is inevitable that some shippers may be able to furnish facilities at less than the published allowance while others may find their costs in excess of it. This fact, however, does not militate against the fixing of a uniform rate applicable to shippers properly classified by the Commission." [1]

Unless that course is followed, a situation is sanctioned in which concessions and discriminations condemned by § 1

[1] Sec. 15 (13) of the Interstate Commerce Act, 49 U. S. C. § 15 (13), provides:

> "If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this chapter and shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

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of the Elkins Act, 32 Stat. 847, 34 Stat. 587, 49 U. S. C. § 41, are likely to thrive.

There is a further objection to the course which the Court sanctions. As stated by Commissioner Splawn in his dissenting opinion (258 I. C. C. at 384):

> "It is elementary that the form of an allowance for the use of cars must be such as to reflect the extent of the use by the railroads of the facilities furnished. Whenever we have had occasion to determine such allowances, we have prescribed either per diem or mileage allowances. The railroads cannot be held responsible for the amount of rent reserved by the Car Corporation in an agreement with the shipper as the car may be left idle during the entire period. The car has value to the railroad only when it is used in transporting lading and results in the payment of freight charges."

Any allowance based on cost to the shipper rather than on the use of the facility furnished violates that principle.

Only an appropriate uniform rate would obviate both of the objections I have mentioned.[2] I would remand the

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[2] The Commission's finding was "That the rental paid or to be paid by El Dorado Oil Works to General American Tank Car Corporation under the terms of the lease agreement between those parties, dated September 28, 1933, was the only cost incurred by the former in furnishing the tank cars in which its shipments moved. A just and reasonable allowance as a maximum to have been paid by the respondents, rail carrier or carriers, to the Oil Works for the furnishing of such cars would have been an amount not to exceed such rental. Such an amount and allowance has been paid to the Oil Works through credits made to the account of the Oil Works by the Tank Car Corporation."

There are no facts of record which show the relationship between the rental paid and the extent of the use by the railroads of the facilities furnished. The Commission made no findings in that regard.

Whether a uniform rate which is just and reasonable would be greater or less than the rental is wholly conjectural on the present record.

case to the Commission so that it could now do what, according to my understanding, we originally intended it to do in accordance with the requirements of § 15 (13) of the Interstate Commerce Act.[3]

BURTON-SUTTON OIL CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 361. Argued March 25, 28, 1946.—Decided April 22, 1946.

1. The taxpayer, an operating company for the production of oil, was assignee of a contract relating to oil land, whereby the grantee agreed to pay to the grantor 50% of net profits from operations. The contract required the grantee to drill promptly, to account for production, and to sell the production to the grantor on specified terms, if the grantor desired to purchase. The land owner and the grantor's transferor retained underlying and overriding royalties. *Held*, under the Revenue Acts of 1934 and 1936, that the 50% payments made by the taxpayer to the grantor were deductible from the taxpayer's gross income. Pp. 26, 32.
2. The contract here involved could not properly be construed as a sale; it was, rather, an assignment of the right to exploit the property, with a reservation in the assignor of an economic interest in the oil. P. 37.
3. Ownership of a royalty or other economic interest in addition to the right to net profits is not essential to make the possessor of a right to a share of the net profit the owner of an economic interest in the oil in place. P. 32.
4. *Helvering* v. *Elbe Oil Land Co.*, 303 U. S. 372, distinguished. P. 36.

150 F. 2d 621, reversed.

The Tax Court sustained the Commissioner's determination of a deficiency in petitioner's income tax. 3

[3] Note 1, *supra*.

T. C. 1187. The Circuit Court of Appeals affirmed. 150 F. 2d 621. This Court granted certiorari. 326 U. S. 755. *Reversed*, p. 37.

Norman F. Anderson argued the cause for petitioner. With him on the brief was *Cullen R. Liskow*.

Solicitor General McGrath, Acting Assistant Attorney General Sewall Key, Helen R. Carloss and *Hilbert P. Zarky* submitted on brief for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

The taxpayer, the petitioner here, is the operating company for the production of oil from Louisiana lands. The taxpayer acquired a contract from J. G. Sutton, grantee in the contract, that imposed upon the grantee the obligation to develop the oil land. For that purpose the contract transferred to the grantee all oil rights previously obtained by S. W. Sweeney by a lease from the owners of the land, the Cameron Parish School Board. Through another transaction the grantor in the Sutton contract, the Gulf Refining Company of Louisiana, acquired these rights from Sweeney. An underlying oil royalty was retained by the School Board and an overriding oil royalty by Sweeney. The contract between Gulf and Sutton required the grantee-operator, who is now this taxpayer, to pay to the grantor, Gulf, 50% of the proceeds of the oil produced and sold from the land, deducting from the proceeds certain itemized expenses of the producer. Those expenses are so general in character that it may be said fairly that Gulf was to receive 50% of the net from operations.

The issue here is the correctness of the taxpayer's manner of handling this 50% net from operations, paid to Gulf, in its return for federal income tax for its fiscal years ending during 1936, 1937 and 1938 under the Revenue

Acts of 1934 and 1936. The taxpayer deducted these payments of 50% of net income from its income for each of the years from the oil sold from the property. It claimed that Gulf retained an economic interest in the oil in place to the extent of this 50% payment. The Tax Court upheld the Commissioner's inclusion of an amount equal to these 50% payments in the taxpayer's gross income. They were included by the Commissioner in the income on the theory that the 50% payments represented capital investment by the taxpayer. That is, they were a part of the cost of the lease. 3 T. C. 1187. If this theory is correct, it is proper to add an equivalent sum, as the Commissioner did, to the taxpayer's gross income.[1] The Circuit Court of Appeals affirmed the Tax Court. *Burton-Sutton Oil Co.* v. *Commissioner,* 150 F. 2d 621.

A decision on the category of expenditures to which these 50% disbursements belong affects both the operators who make them and the owners, lessors, vendors, grantors, however they may be classed, who receive them. If they are capital investments to one, they are capital sales to the other. If they are rents or royalties paid out to one, they are rents or royalties received by the other.[2] The decision below conflicts in principle with *Commissioner* v. *Felix Oil Co.,* 144 F. 2d 276. *Kirby Petroleum Co.* v. *Commissioner,* 326 U. S. 599, involved payments of a share of net income by a producer but differs from this case because the lessor there was a landowner who reserved a royalty as well as a share in the net profits. Consequently, we granted certiorari, 327 U. S. 771.

The applicable provisions in the Revenue Acts of 1934 and 1936 and the Regulations thereunder are substan-

[1] The Commissioner and the Tax Court allowed the taxpayer depletion upon its entire income, so adjusted, under § 114 (b).

[2] *Kirby Petroleum Co.* v. *Commissioner,* 326 U. S. 599, 603–605; *Anderson* v. *Helvering,* 310 U. S. 404, 407.

tially the same for the two Acts. We insert below those that seem pertinent.[3] The issue of the character of these 50% payments is not settled, however, by the statutes or regulations. These prescribe the federal income tax accounting procedure after a determination that an expendi-

[3] Revenue Act of 1936, Ch. 690, 49 Stat. 1648, 1660, 1686:

"SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

. . . . . .

(m) DEPLETION.—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. . . . In the case of leases the deductions shall be equitably apportioned between the lessor and lessee. . . ."

"SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

(b) BASIS FOR DEPLETION.—

(3) PERCENTAGE DEPLETION FOR OIL AND GAS WELLS.—In the case of oil and gas wells the allowance for depletion under section 23 (m) shall be 27½ per centum of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. . . ."

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

"ART. 23 (m)–1 [as amended by T. D. 5413, 1944 Cum. Bull. 124]. Depletion of mines, oil and gas wells, other natural deposits, and timber; depreciation of improvements.—

. . . . . .

(g) The term 'gross income from the property,' as used in sections 114 (b) (3) and 114 (b) (4) and . . . articles 23 (m)–1 to 23 (m)–28 of Regulations . . . 94 . . . means the following:

In the case of oil and gas wells, 'gross income from the property' as used in section 114 (b) (3) means the amount for which the taxpayer sells the oil and gas in the immediate vicinity of the well. . . .

In all cases there shall be excluded in determining the 'gross income from the property' an amount equal to any rents or royalties which were paid or incurred by the taxpayer in respect of the property and are not otherwise excluded from the 'gross income from the property.' . . ."

ture of an operator is or is not a rent, a royalty or an ordinary business expense, but throw little light on what is a rent or royalty.

In the *Kirby* case, we held that a payment of a share of the net profits from oil production by the operator to the owner of the land was a rent or royalty and taxable to the landowner as income from the oil property. Therefore the owner could take from the payment the 27½ per centum allowance for depletion provided by § 114 (b) (3). The reason given in the *Kirby* case for holding that the payment of a part of the net return from the property to the landowner was a royalty or rent,[4] was that the owner had a capital investment—an economic interest—in the oil with a possibility of profit from that interest or investment solely from the extraction of the oil. As hereinbefore indicated, the landowner in the *Kirby* case had retained also a one-sixth oil royalty and had received a bonus. It was conceded that as both the bonus and the royalty represented a return for the sale in part of the lessor's investment in the oil in place, the lessor was entitled to depletion on both.[5]

The respondent urges that in the *Kirby* case it was the lessor's economic interest in some of the oil itself, or its proceeds, because of the bonus and royalty rights, which made the net profit payments subject to depletion in the

[4] A reading of § 114 (b) (3) shows that the "gross income from the property" means income from the oil and gas wells on the property. *Helvering* v. *Twin Bell Syndicate,* 293 U. S. 312; *Helvering* v. *Producers Corp.,* 303 U. S. 376, 382. Other income would not be depletable under that section. "Rents or royalties" in the section are those payable for the privilege of extraction.

[5] *Kirby Petroleum Co.* v. *Commissioner, supra,* pp. 601–602; *Burnet* v. *Harmel,* 287 U. S. 103, 111; *Murphy Oil Co.* v. *Burnet,* 287 U. S. 299, 302.

lessor's hands; that net profits received are not depletable unless the recipient is entitled also to oil royalties.[6] Consequently, the Government contends that in this case where there is only a share in profits due to the assignor, Gulf, the *Kirby* case conclusion on the right to depletion should not be extended but that the judgment below should be affirmed on the ground that the profit payment was a part of the purchase price. In dealing with the operator's exclusion from gross income of agreed payments to lessors or assignors of leases out of net profits and with the lessor's or assignor's rights to depletion, the Tax Court has not followed consistently the principle that a reserved royalty is necessary to make a net profit payment depletable to the lessor and deductible from gross income from the property by the operator.[7] A number of the Tax

[6] The principle upon which the Tax Court and the Circuit Court of Appeals decided this case for respondent differs from respondent's present contention. This principle was that an obligation to pay a part of net proceeds is a personal covenant of the obligor and was the purchase price for the assignment. *Burton-Sutton Oil Co.* v. *Commissioner,* 150 F. 2d 621, 622; 3 T. C. 1187, 1194, relying upon *Quintana Petroleum Co.* v. *Commissioner,* 143 F. 2d 588, 590–91; 44 B. T. A. 624, 627; *Helvering* v. *Elbe Oil Land Co.,* 303 U. S. 372.

[7] In *W. S. Green,* 26 B. T. A. 1017, the lessor was allowed depletion on a net income payment in addition to his royalty on the ground that the net income payment was like a bonus.

In *Marrs McLean,* 41 B. T. A. 565, 573, which was decided after the *Elbe* case, the Tax Court said a transfer of leases for cash and a share of the profits was a sale. Where only a three-fourths interest in the lease was transferred and the transferor was to have one-fourth of the net profits, depletion was allowed the assignor.

In *Felix Oil Co.,* T. C. Docket No. 107148, decided December 18, 1942, a lessor corporation that had leased its oil lands for a cash payment plus 50% of the net profits as defined in the lease and no royalty, was held to have "retained an interest in the oil in place" through its ownership of the land. "Clearly, petitioner retained an interest in

Court cases on depletion and deduction cited in the preceding note did involve reserved royalties as well as payments of net profits. The *Felix Oil Company* and *A. B.*

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the oil produced because it could compel the lessee to sell 50 percent of the production elsewhere if it became dissatisfied with amounts realized by the lessee." Memorandum op., p. 13. See *Commissioner* v. *Felix Oil Co.*, 144 F. 2d 277, affirming. Compare *A. B. Innis*, T. C. Docket Nos. 2735–2736, June 29, 1945.

In *Kirby Petroleum Co.*, 2 T. C. 1258, 1261, the Tax Court relied on the latter ruling in *Marrs McLean* and held that the lessor could deplete its net profits payment, as well as its royalty. It later explained this ruling as based on the Kirby Company's retention of a "one-sixth oil royalty, thus reserving to itself an interest in the oil in place." *Estate of Dan A. Japhet*, 3 T. C. 86, 93.

In the *Japhet* case, depletion on net profits from an assignee's operation was denied an assignor of a lease who had received a cash payment but had not reserved a royalty. It was said no "economic interest" was reserved.

In *A. B. Innis*, T. C. Docket Nos. 2735–2736, June 29, 1945, a similar problem arose as to deductibility by gold lease operators from their gross income of a share in net profits paid to the sub-lessor of the lease. The Tax Court found no difference between such a payment to a sub-lessor and one to a lessor. Both were said to have economic interests and therefore depletable rights. *Felix Oil Co., supra,* was followed and *Quintana, supra,* distinguished as a sale by assignment rather than sublease. *Williams Bar Dredging Co.* is in accord. T. C. Docket Nos. 3284, 4074, June 30, 1945.

In *Quintana Petroleum Co.*, 44 B. T. A. 624, an operator-assignee acquired an oil lease by an agreement that called for payment by the assignee to the assignor of one-fourth of the net proceeds from the leased property with no reservation of royalty. The Board concluded that the assignment was a purchase and no deduction of the amount of net profits paid was allowable. See also *Quintana Petroleum Co.* v. *Commissioner*, 143 F. 2d 588.

In *Euleon Jock Gracey*, 5 T. C. 296, 302, decided June 21, 1945, the Tax Court under similar circumstances followed *Quintana* and held an operator-assignee was entitled to depletion on gross production but could not exclude the net profit payment to his assignee from his gross, as the transfer of the lease, in consideration of a net profit payment only, was a sale.

Innis did not. We do not agree with the Government that ownership of a royalty or other economic interest in addition to the right to net profits is essential to make the possessor of a right to a share of the net profit the owner of an economic interest in the oil in place. The decision in *Kirby* did not rest on that point.

To let the character of the net profit payments turn wholly on the ownership of a royalty of some sort by the one who received the net profit would make the right to depletion a form of words. No such mechanical application of a national tax act is desirable. Compare *Burnet* v. *Harmel,* 287 U. S. 103, 110–11. This taxpayer's acquisition of Sutton's contract with Gulf places the taxpayer in Sutton's situation as operator of the School Board lease. The School Board and Sweeney, the original parties to the lease, unquestionably have royalties which would compel a determination that net income payments would be subject to depletion if paid to them in addition to their royalties. It does not logically follow, it seems to us, that the mere receipt of the net income payments by different lessors or assignors can change the character of the taxpayer's arrangements from leases to purchases.

It seems generally accepted that it is the owner of a capital investment or economic interest in the oil in place who is entitled to the depletion. *Anderson* v. *Helvering,* 310 U. S. 404, 407; *Euleon Jock Gracey,* 5 T. C. 296, 302; *Kirby Petroleum Co.* v. *Commissioner, supra.* Whether the instrument creating the rights is a lease, a sublease or an assignment has not been deemed significant from the federal tax viewpoint in determining whether or not the taxpayer had an economic interest in the oil in place. *Palmer* v. *Bender,* 287 U. S. 551, 557, 558. Nor has the title to the oil in place been considered by this Court as decisive of the capital investment of the taxpayer in the

oil.[8] Technical title to the property depleted would ordinarily be required for the application of depletion or depreciation. It is not material whether the payment to the assignor is in oil or in cash which is the proceeds of the oil, *Helvering* v. *Twin Bell Syndicate,* 293 U. S. 312, 321, nor that some of the payments were in the form of a bonus for the contract. *Burnet* v. *Harmel,* 287 U. S. 103, 111; *Murphy Oil Co.* v. *Burnet,* 287 U. S. 299, 302. Congress, however, has recognized the peculiar character of the business of extracting natural resources.[9] Leases are a method of exploitation of the land for oil and payments under leases are "income to the lessor, like payments of rent." [10] Receipts from oil sales are gross income to the operator and subject to statutory deductions. Since lessors as well as lessees and other transferees of the right to exploit the land for oil may retain for themselves through their control over the exploitation of the land valuable benefits arising from and dependent upon the extraction of the oil,[11] Congress provided as early as the Revenue Act

[8] 287 U. S. at 557: "The language of the statute is broad enough to provide, at least, for every case in which the taxpayer has acquired, by investment, any interest in the oil in place, and secures, by any form of legal relationship, income derived from the extraction of the oil, to which he must look for a return of his capital."

287 U. S. at 558: "Even though legal ownership of it, in a technical sense, remained in their lessor, they, as lessees, nevertheless acquired an economic interest in it which represented their capital investment and was subject to depletion under the statute." *Lynch* v. *Alworth-Stephens Co.,* 267 U. S. 364; *Burnet* v. *Harmel,* 287 U. S. 103, 109–10; *Bankers Coal Co.* v. *Burnet,* 287 U. S. 308; *Kirby Petroleum Co.* v. *Commissioner, supra,* p. 603.

[9] *Stratton's Independence* v. *Howbert,* 231 U. S. 399, 413–14.

[10] *Burnet* v. *Harmel,* 287 U. S. 103, 107–8.

[11] See *Lynch* v. *Alworth-Stephens Co.,* 267 U. S. 364, 370; *Palmer* v. *Bender,* 287 U. S. 551, 556.

of 1918 [12] for equitable apportionment of the depletion allowance between them to correct what was said to be an existing inequality in the law or its administration.[13]

In the present case, the assignor of the petitioner before assignment had an economic interest in the oil in place through its control over extraction. Under the contract with petitioner, its assignor retained a part of this interest—fifty per cent of net. Like the other holders of such economic interest through royalties, the petitioner looked to the special depletion allowances of § 114 (b) (3) to return whatever capital investment it had. The cost of that investment to the beneficiary of the depletion under § 114 (b) (3) is unimportant. Depletion depends only upon production. It is the lessor's, lessee's or transferee's "possibility of profit" from the use of his rights over production, "dependent solely upon the extraction and sale of

[12] 40 Stat. 1057, 1067, 1078, §§ 214 (a) (10), 234 (a) (9).

[13] H. Rep. No. 767, 65th Cong., 2d Sess., September 3, 1918, Deductions (5) and for corporations, Deductions (4).

The inequality referred to under the Revenue Act of 1916, 39 Stat. 759, § 5, Eighth (a), arose from the preferred treatment given the owner over the lessee. See Hearings, House Committee on Ways and Means, 65th Cong., 2d Sess., pp. 455, 516–17, 523–28, 530–31. Regulations 33, Income Tax, promulgated January 2, 1918, Art. 170; Regulations 45, 1920 ed., Income Tax, promulgated January 28, 1921, Art. 201.

The applicable law for allowance of depletion in oil and gas wells appears in § 114 (b) (3). It is identical with I. R. C. § 114 (b) (3). This section is the result of administrative experience with oil and gas depletion. Hearings, Sen. Com. on Finance, 69th Cong., 1st Sess., pp. 177–78; Hearings, House Com. on Ways and Means, 69th Cong., p. 1006. See H. Rep. No. 1, 69th Cong., 1st Sess., December 7, 1925, Discovery Value; § 204 (c) (2), 44 Stat. 16. For discussion see *Helvering* v. *Twin Bell Syndicate,* 293 U. S. 312, and *Kirby Petroleum Co.* v. *Commissioner, supra,* pp. 602, 603. Depletion is now an arbitrary percentage allowance based on production from the wells without regard to cost or value of the property.

the oil," which marks an economic interest in the oil. See *Kirby Petroleum Co.* v. *Commissioner, supra,* page 604. Through retention of certain rights to payments from oil or its proceeds in himself, each of these assignors of partial exploitation rights in oil lands has maintained a capital investment or economic interest in the oil or its proceeds.[14] As the oil is extracted and sold, that economic interest in the oil in place is reduced and the holder or owner of the interest is entitled to his equitable proportion of the depletion as rent or royalty. The operator, of course, may deduct such payments from the gross receipts.

Of course, such a transferor, whether the landowner or any intermediate assignor, may completely divest himself of any interest, economic or otherwise, in the extraction of the oil. As the record shows no reservation of an economic interest by Sutton, the assignee of Gulf and the assignor of petitioner, he appears to have done so in this case. See *Helvering* v. *Elbe Oil Land Co.,* 303 U. S. 372. While, as pointed out above, the payment of proceeds in cash, the form of the instrument of transfer and its effect on the title to the oil under local law are not decisive of the right to participation in depletion under §§ 23 (m) and 114 (b) (3), there must be a determination under federal tax law as to "whether the transferor has made an absolute sale or has retained" such economic interest as we have just described in the preceding paragraph. *Kirby Petroleum Co.* v. *Commissioner, supra,* page 606. We have said that the instrument should be construed as a sale when a large cash payment was made with a reserved payment that could be satisfied by future sales of the transferred property without extraction of the oil. Obviously

[14] A participation in net profits disassociated from an economic interest does not enable a recipient of such profits to benefit from depletion. *Helvering* v. *O'Donnell,* 303 U. S. 370.

there could be no depletion without extraction. *Anderson* v. *Helvering,* 310 U. S. 404, 412. On the other hand, we have construed an assignment of oil leases for cash and a deferred payment, "payable out of oil only, if, as and when produced," as the reservation of an economic interest in the oil—not a sale. *Thomas* v. *Perkins,* 301 U. S. 655.

The Government contends that *Helvering* v. *Elbe Oil Land Co.,* 303 U. S. 372, controls this case. The transfer of the leases in *Elbe* was held an absolute sale. There the transfer was for cash, deferred payments in cash, if the assignee did not take advantage of a stipulation for abandonment, and a one-third interest in the net profits of the assignee. It was further provided that Elbe, the assignor after the transfer, should have "no interest in or to said properties," except in the case of an abandonment of the property by the assignee. This provision for the transfer of all interest of the assignor was emphasized as a significant part of the agreement for transfer. The issue upon which this Court passed was the classification of the deferred payments. Were they gross income from the property or receipts from a sale of the leases? These deferred payments were not payable out of oil sales but were payable absolutely, unless there was an abandonment. This Court concluded that the addition of a provision for the payment of a share of net profits did not qualify "in any way the effect of the transaction as an absolute sale." Page 375. In view of what we have said in this and in the *Kirby Petroleum* case as to the economic interest in the oil of a recipient of a share of net profits, the holding of *Elbe* should not be extended to the facts of this agreement.

The assignor, Gulf, in the assignment here involved, required the grantee to drill promptly, to account for production, to pay over fifty per cent of receipts, less agreed

costs and expenses, and to sell the production on defined terms to grantor, if grantor desired to purchase. This last clause did not appear in the Elbe contract. Such a transfer of rights to exploit could not, we think, properly be construed as a sale. It is rather an assignment to the operator, petitioner here, of the right to exploit the property [15] with a reservation in the assignor of an economic interest in the oil.

Reversed.

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

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent.

MR. JUSTICE FRANKFURTER.

The tortuous process by which the result in this case has evidently to be reached by the Court justifies calling attention again to the present unsatisfactory state of tax litigation. It is of course idle to expect that the complexities of our economic life permit revenue measures to be drawn with such simplicity and particularity as to avoid much litigation. But it is not a counsel of perfection to assume that a system of judicial oversight of fiscal administration can be devised sufficiently rational to avoid the unedifying series of cases relating to income from oil operations culminating, for the present at least, in this case. The Court made a brave effort in *Dobson* v. *Commissioner*, 320 U. S. 489, to meet some of the difficulties of the present distribution of judicial authority in tax cases by lodging practical finality in a Tax Court decision unless it invokes a "clear-cut mistake of law." *Id.* at 502. An attempt to give adequate scope to such a doctrine of judicial abstention by dealing with the practicalities of

[15] See the discussion of *Felix Oil Co.* in note 7, *supra*.

tax matters instead of relying on the grab-bag concepts of "law" and "fact" as a basis of review has not, however, commended itself to the Court. See *Trust of Bingham* v. *Commissioner,* 325 U. S. 365.

To be sure, even the adoption of this view would not make the Tax Court the Exchequer Court of the country inasmuch as tax litigation can go through the district courts as well as through the Tax Court. It would, however, largely centralize review in the Tax Court of Treasury determinations, assuming that the bulk of tax litigation will continue to find its way to the Tax Court.

It is suggested that the Tax Court makes differentiations from case to case which to the uninitiated look suspiciously like conflicting opinions. But it is impossible to escape nice distinctions in the application of complicated tax legislation. And so far as over-nice distinctions are to be made, I do not see that it helps the administration of law for this Court rather than the Tax Court to make them.

Nothing better illustrates the gossamer lines that have been drawn by this Court in tax cases than the distinction made in the Court's opinion between *Helvering* v. *Elbe Oil Land Co.,* 303 U. S. 372, and this case. To draw such distinctions, which hardly can be held in the mind longer than it takes to state them, does not achieve the attainable certainty that is such a desideratum in tax matters, nor does it make generally for respect of law. Perhaps it is inherent in the scheme which Congress has provided for review of tax litigation that we have such an unsatisfactory series of decisions as those which are sought to be reconciled by the present opinion. If so, then the call for legislation voiced in responsible quarters to reform the situation may well be heeded. See *e. g.,* Griswold, *The Need for a Court of Tax Appeals* (1944) 57 Harv. L. Rev. 1153.

Counsel for Parties.

UTAH JUNK CO. *v.* PORTER, PRICE ADMINISTRATOR.

CERTIORARI TO THE EMERGENCY COURT OF APPEALS.

No. 400. Argued February 26, 1946.—Decided April 22, 1946.

1. The amendment of § 203 (a) of the Emergency Price Control Act of 1942 by § 106 of the Stabilization Act of 1944 authorized any person subject to a price schedule to file a protest "at any time." *Held* that, although the time within which a protest could be filed under the original Act had expired, a person whose rights were affected was entitled to file a protest under the amendatory Act, notwithstanding that the basis of his objection to the price schedule had been removed prospectively by modification of the price schedule prior to the filing of the protest. P. 43.
2. The considerations of fairness which led Congress to liberalize the right of protest under the price control legislation apply equally to a regulation that has been revised and to a new regulation, where the superseded regulation continues to govern the validity of transactions that occurred under its rule. P. 44.
3. The contentions that the Administrator ought not to be burdened with issues arising under superseded regulations, and that the protestant here could test the validity of the price schedule by other procedures, do not warrant the construction urged by the Administrator. Pp. 44–45.

150 F. 2d 963, reversed.

The Price Administrator denied a protest filed with him by the petitioner under the Emergency Price Control Act. The Emergency Court of Appeals dismissed petitioner's complaint. 150 F. 2d 963. This Court granted certiorari. 326 U. S. 710. *Reversed*, p. 45.

Keith L. Seegmiller submitted on brief for petitioner.

Richard H. Field argued the cause for respondent. With him on the brief were *Solicitor General McGrath*, *John R. Benney* and *Jacob D. Hyman*.

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MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is one of a series of cases calling for the construction of amendments to the Emergency Price Control Act of 1942.

Section 203 of that Act, 56 Stat. 23, 31; 50 U. S. C. App. § 923, confined within narrow limits the right to protest to the Administrator against a price schedule promulgated by him. The Stabilization Act of 1944, 58 Stat. 632, 638; 50 U. S. C. App. § 923, greatly liberalized this right to protest. The view taken by the United States Emergency Court of Appeals of the scope of this liberalization, 150 F. 2d 963, based on its prior ruling in *Thomas Paper Stock Co.* v. *Bowles,* 148 F. 2d 831, led us to bring the case here. 326 U. S. 710.

The facts relevant to the immediate issue can be quickly stated. The Administrator established maximum prices for iron and steel scrap. Revised Price Schedule No. 4, 7 Fed. Reg. 1207 (February 21, 1942). This schedule, § 1304.13 (f), *id.* at 1212, made no special provision for smelter fluxing scrap, scrap prepared for use in lead blast furnaces. Petitioner, a scrap dealer, operating in Utah, was engaged in the preparation and sale of fluxing scrap. Between April 25, 1942, and February 10, 1943, it sold a considerable amount of fluxing scrap to one of its customers, for which it was to be paid, in addition to the ceiling price for the scrap, $1.50 per ton for preparing the scrap. Inasmuch as the petitioner had been notified by the Office of Price Administration that such a charge was a violation of the price schedule, it merely billed its customer for the additional $1.50 per ton but abstained from collecting it, so as to avoid the penal provisions of the Price Control Act.

The controversy concerns petitioner's lawful right to collect this processing charge as previously agreed upon

between the parties to the contract. Claiming that the price schedule governing the sales in question was invalid insofar as it failed to permit an allowance for processing, petitioners filed a protest with the Administrator. The Administrator and the Emergency Court of Appeals ruled that the protest came too late. It was timely, in any event, only if the amendment to § 203 (a) of the Price Control Act of 1942 made by § 106 of the Stabilization Act of 1944, 58 Stat. 632, 638, can be invoked after the ground of objection to a price schedule had been prospectively removed.[1] For the Administrator had completely met petitioner's objection by the time that the petitioner could avail itself of whatever enlarged right of protest the 1944 amendments conferred. The Administrator did so, in part, on December 21, 1943, by authorizing a Regional Office of the Price Administration to grant upon application an allowance of up to $1.50 per ton for processing scrap; and on June 30, 1944, the very day that the Act of 1944 became effective, the schedule was revised to permit such a charge on all future sales of scrap. 9 Fed. Reg. 7330.

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[1] § 203 (a) reads as follows; the bracketed material was deleted by the 1944 amendment, the italicized material added by that amendment: "[Within a period of sixty days] *At any time* after the issuance of any regulation or order under section 2, or in the case of a price schedule, [within a period of sixty days] *at any time* after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. [At any time after the expiration of such sixty days any person subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days.]" 56 Stat. 23, 31; 58 Stat. 632, 638; 50 U. S. C. App. § 923 (a).

This brings us to the controlling legislation. The procedure established by the Emergency Price Control Act of 1942 authorized "any person subject to any provision" of a price schedule issued by the Administrator to "file a protest specifically setting forth objections to any such provision," with a right of appeal to the Emergency Court of Appeals from denial of such protest by the Administrator. §§ 203 (a) and 204 (a), 56 Stat. 23, 31. But such protest had to be made "within a period of sixty days after the effective date" of a price schedule. By the Stabilization Act of June 30, 1944, 58 Stat. 632, 638, Congress amended the procedure so that a protest against any provision of a price schedule could be filed "at any time" after the effective date.

If one had only the words of the 1944 amendment to go on, it would be dubious to infer that Congress had not only removed the bar of sixty days for protests to which the future may give rise but had also revived a right of protest which had expired through non-user under the Act of 1942. But such, it appears, is the meaning of the amendment. On this point the legislative history is decisive. A Senate report furnishes an authoritative gloss: "The committee was concerned . . . by the fact that in the early days of price control many people unfamiliar with the provisions of the act might have lost their right to challenge the basic validity of a regulation by excusable failures to file a protest within the statutory period. The committee therefore recommends that with respect to all regulations issued before July 1, 1944, a new period of 60 days from that date be provided for the filing of protests. . . ." S. Rep. No. 922, 78th Cong., 2d Sess. (1944) 10. It will be noted that the Senate proposed a reviver of barred claims for only sixty days. Even this limitation was removed when the measure was amended by the House

and subsequently became law. See H. R. Rep. No. 1593, 78th Cong., 2d Sess. (1944) 5; H. R. Rep. 1698, 78th Cong., 2d Sess. (1944) 21.

Congress was evidently impressed by the need for relief of rights lost through what it deemed excusable failure to enforce them under the original Price Control Act. Since, then, Congress lifted the sixty-day limitation retrospectively, we are relieved from considering whether, in the circumstances of this case, petitioner's right of protest would have been barred even under the 1942 Act so long as the controverted price schedule remained unmodified.[2] But this takes us only part of the way. We need still ascertain whether the 1944 amendment authorizes a protest without a time limit only against a price schedule contemporaneously active. Does it, that is, preclude a right of protest like petitioner's against a schedule that had been superseded, although it continues to govern the validity of transactions that occurred under its rule?

The Administrator argues that this restriction upon the enlargement of the right of protest made by the Act of 1944 is immanent in what Congress said. This is what Congress said: "At any time after the issuance of any regulation or order . . ., or in the case of a price schedule, at any time after the effective date thereof . . . any per-

[2] The price schedule in controversy was reissued on February 21, 1942, 7 Fed. Reg. 1207, and the sixty days for protest, under the 1942 Act, expired on April 21, 1942. But it was not until April 25, 1942, that petitioner was notified by the O. P. A. that the schedule applied to its sales of fluxing scrap. Under the original Act, the sixty-day limitation did not apply to "a protest based solely on grounds arising after the expiration of such sixty days." We need not decide whether petitioner could have brought itself under this escape clause. See *Galban Lobo Co.* v. *Henderson,* 132 F. 2d 150; *United States Gypsum Co.* v. *Brown,* 137 F. 2d 803; *R. E. Schanzer, Inc.* v. *Bowles,* 141 F. 2d 262; *Marlene Linens* v. *Bowles,* 144 F. 2d 874.

son subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest . . ." We find nothing in this language of the 1944 amendment of § 203 (a), or in its history, or in any illumination otherwise shed upon the terms of this legislation, to justify reading in a qualification that Congress has left out.

All construction is the ascertainment of meaning. And literalness may strangle meaning. But in construing a definite procedural provision we do well to stick close to the text and not import argumentative qualifications from broad, unexpressed claims of policy. Insofar as such considerations are relevant here, however, they tell against cutting down the natural meaning of the language Congress chose.

Congress liberalized the right to challenge the validity of price regulations so extensively as it did, even reviving rights theretofore lapsed, because it felt, as we have seen, that rights were unfairly lost through unfamiliarity with the technical requirements of emergency legislation. Price-fixing is not static; it is a continuing process. The considerations of fairness that led Congress to give relief are the same whether a regulation was revised or remained unchanged. There is not a hint that Congress intended to draw a line so artificial as the one the Administrator would have us draw.

This conclusion is left undisturbed by the arguments advanced on behalf of the Administrator. It is urged that he ought not to be burdened with issues arising under superseded regulations. But as a matter of law enforcement a regulation continues to survive its supersession as a contemporaneous price schedule. *United States* v. *Hark*, 320 U. S. 531. The Administrator has the duty of enforcing the Act, and in a proceeding for suspension of a license

or for treble damages or penalties, it is immaterial that the basis of the suit is violation of a superseded price regulation. It is also suggested that the protest proceedings under § 203 (a) as amended are not available to a protestant in petitioner's plight because the validity of the old schedule may be otherwise tested. The only other way implies the readiness of the customer to pay the contract price for the processing charge and its acceptance by the petitioner, subjecting both to civil and criminal actions for violations of the Act. With the consent of the trial court, the Emergency Court of Appeals could then pass on the schedule. § 204 (e), 58 Stat. 632, 639; 50 U. S. C. App. § 924 (e). It surely does not commend itself to good sense to bar a direct protest to the Administrator so easily justified by an unstrained reading of the Act, because leave might be obtained to litigate the issue in a roundabout way, involving violations of a presumptively valid regulation. And in the event that the Administrator's insistence on the validity of the old maximum scrap price schedule is not challenged by violation, it could not be tested by bringing a suit on the contract for the additional price. *Yakus* v. *United States,* 321 U. S. 414.

Finally, apart from a construction of the statute which we are bound to reject, the Administrator seeks to invoke "the general doctrine of laches" against the petitioner, upon the particular facts of this case. The Emergency Court of Appeals may consider that issue when, upon remand, it disposes of this case in conformity with this opinion.

Judgment reversed.

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

COLLINS ET AL. *v.* PORTER, PRICE ADMINISTRATOR.

CERTIORARI TO THE EMERGENCY COURT OF APPEALS.

No. 393. Argued February 26, 1946.—Decided April 22, 1946.

1. The decision of this case on the merits is governed by *Utah Junk Co.* v. *Porter, ante,* p. 39. P. 49.
2. While a suit for treble damages under § 205 (e) of the Emergency Price Control Act was pending in the District Court against petitioners, they filed with the Price Administrator a protest under § 203 (a) seeking to have the regulation on which the enforcement proceeding was based declared invalid or inapplicable. The protest was dismissed by the Price Administrator, and petitioners' ensuing complaint in the Emergency Court of Appeals was dismissed by that court without opinion. Upon a complaint filed by leave of the District Court under § 204 (e) of the Act, the Emergency Court of Appeals sustained the validity of the regulation but refused to pass on its applicability to petitioners. *Held* that the judgment of the Emergency Court of Appeals dismissing the complaint in the protest proceeding under § 203 (a) was not rendered moot by its judgment sustaining the validity of the regulation in the proceeding under § 204 (e). P. 48.
3. The fact that Congress by the 1944 amendment of the Emergency Price Control Act granted a limited opportunity for review of a regulation by the Emergency Court of Appeals by leave of a district court in which an enforcement proceeding is pending, neither repealed nor qualified the protest proceeding originally authorized by § 203 (a). The two methods of securing a hearing on the validity and applicability of a price regulation are cumulative and not alternative. P. 49.
4. A person against whom a treble damage suit for violation of a regulation under the Emergency Price Control Act is pending, is a "person subject to . . . such regulation" within the meaning of § 203 (a) of the Act, although the regulation has since been revoked or superseded. *United States* v. *Hark,* 320 U. S. 531. P. 49.

Reversed.

Petitioners filed with the Price Administrator a protest under the Emergency Price Control Act. The Price Administrator denied the protest. The Emergency Court of Appeals dismissed the petitioners' complaint. This Court granted certiorari. 326 U. S. 710. *Reversed,* p. 49.

Mac Asbill argued the cause for petitioners. With him on the brief were *Allen P. Dodd, Sr.* and *Max O'Rell Truitt.*

Richard H. Field argued the cause for respondent. With him on the brief were *Solicitor General McGrath, John R. Benney, Jacob D. Hyman* and *John O. Honnold, Jr.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Petitioners were stockholders in a distilling corporation on the dissolution of which in December, 1942, they received as their share of the assets warehouse receipts covering the bulk whiskey owned by the corporation. Early in January, 1943, they sold these receipts at a price above that fixed by the Administrator for bulk whiskey, Maximum Price Regulation 193, 7 Fed. Reg. 6006 (August 4, 1942), on the assumption that the receipts constituted "securities" expressly exempt from the pricing provisions.

On the basis of the sale of these certificates the Administrator, under § 205 (e) of the Emergency Price Control Act, 56 Stat. 23, 34; 50 U. S. C. App. § 925 (e), brought a suit for treble damages against the petitioners to recover approximately $6,800,000. That suit is still pending. In May, 1945, petitioners, invoking the authority of § 203 (a), 56 Stat. 23, 31, 58 Stat. 632, 638; 50 U. S. C. App. § 923 (a), sought to have the regulation on which the enforcement proceedings against them were based de-

cleared invalid or inapplicable by a protest filed with the Administrator. He dismissed it on the authority of *Thomas Paper Stock Co.* v. *Bowles,* 148 F. 2d 831, the ruling of which we have reversed in *Utah Junk Co.* v. *Porter,* decided this day, *ante,* p. 39. Petitioners then went to the Emergency Court, which dismissed the complaint without opinion, and we granted *certiorari.* 326 U. S. 710. Prior to the petition for *certiorari,* petitioners obtained leave of the trial court in the treble damage action to file a complaint with the Emergency Court under § 204 (e) of the Act, 58 Stat. 632, 639, 50 U. S. C. App. § 925 (e), and on January 10, 1946, that court sustained the validity of the regulation. *Collins* v. *Bowles,* 152 F. 2d 760.

The Government contends that the latter decision of the Emergency Court renders moot the judgment of that court dismissing the complaint, which is the only judgment now before us. This Court is powerless to decide a case if its decision "cannot affect the rights of the litigants in the case before it." *St. Pierre* v. *United States,* 319 U. S. 41, 42. The decision of this case may affect the rights of the litigants. The Emergency Court sustained the challenged regulation. It refused to pass on the applicability of the regulation to the petitioners. It left that question to the District Court before which the treble damage suit is pending. Had petitioners' contentions come before the Emergency Court through the protest proceedings under § 203 (a) that court would have adjudicated both issues. *Conklin Pen Co.* v. *Bowles,* 152 F. 2d 764; *Collins* v. *Bowles, supra.* And in the event that the Emergency Court had found the regulation inapplicable and such decision had been made before a judgment was rendered in the District Court, its ruling would be binding upon the District Court. Under § 204 (e) (2) (ii), consideration of a protest under § 203 (a) is not a ground for staying the

proceedings in the District Court, since the protest proceeding did not precede the suit in the District Court; and under the same provisions of the Act determination of the protest proceeding under § 203 (a) can have no retroactive effect once the District Court has entered its judgment. But the opportunity for securing a decision from the Emergency Court through the protest proceeding before a judgment in the District Court is entered, has practical significance and makes this a living and not a hypothetical controversy.

On the merits the case is governed by our decision in *Utah Junk Co.* v. *Porter.* The petitioners in this case had a right to have their protests considered by the Administrator and, in case of denial, to resort to the Emergency Court of Appeals. The fact that Congress in 1944 gave a limited opportunity to go to the Emergency Court by leave of the District Court before which an enforcement proceeding is pending, § 204 (e), neither repealed nor qualified the protest proceeding originally designed by § 203 (a). The two modes of securing a hearing on the validity and applicability of the price regulation are cumulative and not alternative. The Administrator advances no argument to distinguish the case from that of *Utah Junk Co.* v. *Porter.* His contention that the petitioners are not persons "subject to . . . [the] regulation," § 203 (a), is amply refuted by the continuing liability of the petitioners, *United States* v. *Hark,* 320 U. S. 531, for some $6,800,000, should their arguments as to the invalidity and inapplicability of the regulation be rejected when the case is considered on the merits.

It is superfluous to discuss other issues raised in this case.

Judgment reversed.

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

THOMAS PAPER STOCK CO. ET AL. *v.* PORTER, PRICE ADMINISTRATOR.

CERTIORARI TO THE EMERGENCY COURT OF APPEALS.

Nos. 67 and 578. Argued February 25, 26, 1946.—Decided April 22, 1946.

1. The Taft Amendment to the Emergency Price Control Act nullified price schedules based on standards, and no such schedules could be valid after that Amendment unless and until the Price Administrator "determined" that no other method of price control was practicable. P. 53.
2. Sales of wastepaper between July 16, 1943, the effective date of the Taft Amendment, and September 11, 1943, the date when the Price Administrator determined that other than by standardization no method of effective price control of such commodity was practicable, did not subject the sellers to the penalties of the Emergency Price Control Act, even though such sales were at prices in excess of a pre-Taft Amendment maximum price based on a standard. Pp. 51–52, 56.
3. The accommodation of the various interests involved in a system of price control is for Congress, not the courts; and the legislation is to be so construed as to give effect to the will of Congress. P. 55.

151 F. 2d 345, reversed.

No. 578. By leave of the District Court in which a prosecution of the petitioners for violation of a regulation under the Emergency Price Control Act was pending, petitioners sought in the Emergency Court of Appeals a declaration of the invalidity of the regulation. The Emergency Court of Appeals sustained the validity of the regulation. 151 F. 2d 345. This Court granted certiorari. 326 U.S. 715. *Reversed*, p. 56.

No. 67. Petitioners filed a protest with the Price Administrator under the Emergency Price Control Act. The Price Administrator denied the protest. The Emergency

Court of Appeals sustained the Price Administrator. 148 F. 2d 831. This Court granted certiorari. 325 U. S. 847. Writ of certiorari dismissed, p. 56.

Jack H. Oppenheim argued the cause for petitioners. With him on the briefs was *Claude A. Roth.*

Jacob D. Hyman argued the cause in No. 578, and *Richard H. Field* argued the cause in No. 67, for respondent. With them on the briefs were *Solicitor General McGrath, Ralph F. Fuchs* and *Josephine H. Klein.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Having been charged with violations of a price regulation, petitioners challenged its validity before the Emergency Court of Appeals by two different modes in two separate actions. The claim of invalidity in both proceedings was based on the Taft Amendment to the Price Control Act. Adjudication of this claim will dispose of both cases without consideration of procedural issues raised before the Emergency Court.

Thomas Paper Stock Company, a dealer in paper scrap, and its president were indicted under § 205 (b) of the Emergency Price Control Act, 56 Stat. 23, 33; 50 U. S. C. App. § 925 (b), for the sale of wastepaper in violation of Maximum Price Regulation No. 30, 7 Fed. Reg. 9732 (Nov. 24, 1942). Section 1347.14 (d) of that regulation fixed the maximum price for unsorted wastepaper in terms of a specification or standard. *Id.* at 9735. On similar allegations, the Administrator later began an action against petitioners for treble damages. § 205 (e), 56 Stat. 23, 34; 50 U. S. C. App. § 925 (e). Both proceedings involved sales of wastepaper between July 16, 1943 and September

11, 1943. The dates are crucial. July 16, 1943 is the effective date of the Taft Amendment, the proper construction of which is the controlling issue. On September 11, 1943, the Administrator, by an amendment to the Maximum Price Regulation No. 30, "determined" that "no practicable alternative exists for securing effective price control" with respect to such wastepaper except through the standardization defined in the pre-Taft Amendment Maximum Price Regulation No. 30. 8 Fed. Reg. 12554 (Sept. 14, 1943). The problem before us is whether, after the Taft Amendment, sales of wastepaper were governed by a maximum price based on a standard, prior to the determination by the Administrator on September 11, 1943 that there was no practicable alternative to such standardization.

And so we turn to the Taft Amendment. It added subsection (j) to § 2 of the Emergency Price Control Act. The relevant provisions of the Taft Amendment are these:

> "(j) Nothing in this Act shall be construed . . . (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency." 57 Stat. 566; 50 U. S. C. App. § 902 (j).

We agree with the Emergency Court that Congress thus provided "three alternative situations in any one of which

[the Administrator] is authorized to employ specifications or standards in connection with price control." *Thomas Paper Stock Co.* v. *Bowles,* 148 F. 2d 831, 835. Thus, in the case of wastepaper, standardization is permitted under Clause (3) of the Amendment although the Administrator may define a standard which "had not previously been used by the wastepaper industry or required by another Government agency." *Id.* at 837. But we are also of opinion that beginning with July 16, 1943, the day the Taft Amendment came into force, it precluded standardized commodity prices unless and until the Administrator "determined" that no other method of price control was practicable. The terms of the Amendment, in the circumstances of its setting, see, *e. g.,* H. R. Rep. No. 697, 78th Cong., 1st Sess. (1943), bring us to this conclusion, but we need add little to the full discussion the Taft Amendment received in the opinion of the court and that of the dissent below. *Thomas Paper Stock Co.* v. *Bowles,* 151 F. 2d 345. For us the decisive consideration is that the Amendment was a rigorous limitation upon the powers of the Administrator based upon the Congressional view that standardizations outstanding at the time the Taft Amendment was passed had not been authorized by the more general language of the original Act. § 2 (h), 56 Stat. 23, 27; 50 U. S. C. App. § 902 (h).[1] Accordingly, Congress laid down a specific requirement for the validity of prices based on standards, and a fair reading of the Amendment in the light of its history requires that the Administrator must indicate that he has fulfilled this requirement. See *United States* v. *B. & O. R. Co.,* 293 U. S. 454. It would hardly satisfy the restriction which the Taft Amendment

[1] "The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act."

placed upon the Administrator's power to standardize to allow him to continue situations which, as Congress thought, needed correction.

In signing the joint resolution containing the Taft Amendment, the President did so with the understanding that it "preserved power in the Administrator to 'standardize' a commodity in any case on which this was absolutely essential to an effective system of fixing prices." See Statement of Price Administrator's Reasons Involved in the Issuance of Supplementary Order No. 64 (Sept. 11, 1943). Congress thus gave power to standardize; it did not stereotype past standardizations. With entire candor the Administrator conceded here that he "had many regulations outstanding which required re-examination in the light of the terms of the Taft Amendment." But although the Amendment apparently had the acquiescence of the Administrator, it contains no saving clause that all outstanding standardizing regulations were to be deemed continuingly valid, nor is there any intimation warranting such an implied limitation. The court below seemed to recognize the duty of a manifested determination by the Administrator of the need for a standardized price by suggesting that the Administrator showed "reasonable promptness" in making the determination applicable to wastepaper within two months after the Taft Amendment. But Congress did not sanction standardization for what we may deem a reasonable period after the enactment of the Taft Amendment without the Administrator's determination of its need.

This is too substantial a qualification to be made by judicial interpolation. Nor can we draw on broad arguments about inflationary pressures on price control in construing legislation dealing with so technically confining a provision as that of the Taft Amendment. The legislation was too specifically directed against prior unauthor-

ized regulations, promulgated no doubt with the best of motives in the great effort against inflation, for us to give it a meaning other than that which the language in the context of its history yields. Of course, all provisions of the Emergency Price Control Act are infused by its far-reaching aims. But the accommodation of the various interests involved in a system of price control is for Congress and not for us, and we must construe its legislation as fairly as we can to catch the will behind the words. That the construction we have placed upon the Taft Amendment does not touch the vital forces in price control is indicated by the Government's opposition to a review of this litigation on the ground that it was devoid of much practical significance.

It only remains to unsnarl the complicated procedures by which the petitioners sought to establish the invalidity of the regulation which they were charged with violating. On June 15, 1944, petitioners filed a protest against § 1347.14 (d) under § 203 (a) of the Act. 56 Stat. 23, 31, 58 Stat. 632, 638; 50 U. S. C. App. § 923 (a). By this time, as has been noted, the Administrator had amended the regulation to conform in terms with the Taft Amendment. The Administrator denied the protest on the merits and also expressed doubt as to his power to consider the validity of a regulation of which the alleged defects had been cured. The Emergency Court of Appeals sustained the Administrator on the ground that a corrected regulation bars protest. *Thomas Paper Stock Co.* v. *Bowles*, 148 F. 2d 831. We then brought the case here as one of a series of cases raising important issues in the enforcement of the Emergency Price Control Act. 326 U. S. 715.

In the meantime petitioners invoked § 204 (e) of the Act, 58 Stat. 632, 639; 50 U. S. C. App. § 924 (e), whereby they sought leave to file a complaint directly with the

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Emergency Court. The District Court, before which the criminal prosecution was pending, granted such leave pursuant to § 204 (e). The Emergency Court then passed on the merits of the claim of the invalidity of the regulation in controversy between the date of the Taft Amendment and September 11, 1943, when in Supp. Order 64, 8 Fed. Reg. 12554, the Administrator determined the necessity for standards. That court, as we have seen, held that the old regulation survived the Taft Amendment, *Thomas Paper Stock Co.* v. *Bowles*, 151 F. 2d 345, and we granted *certiorari*. 326 U.S. 715.

It is this latter judgment, in No. 578, that we now reverse with the result that disregard of the regulation based on standardized prices for wastepaper not "determined" by the Administrator prior to September 11, 1943, does not subject petitioners to the penalties of the Price Control Act. In view of disposition in No. 578 of the merits of petitioner's claim of invalidity under the Taft Amendment it would be futile to decide the issue on which judgment went in No. 67. Accordingly, the writ of *certiorari* issued in No. 67 will be dismissed.

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

MR. JUSTICE BLACK, dissenting.

The judgment which the Court just rendered permits these petitioners and others to keep profits obtained from sales made at inflationary prices expressly prohibited by Maximum Price Regulation No. 30. That Regulation establishes dollar and cent ceiling prices for thirty-two grades of wastepaper defined by the Price Administrator. It is the type of regulation, of which there have been many, which controls prices by first standardizing or grouping similar commodities, and then fixing one and

the same maximum price for each of the commodities in a particular classification. On July 16, 1943, long after Regulation No. 30 was promulgated and fully in force, Congress added the Taft Amendment (§ 2 (j)) to the Emergency Price Control Act of 1942. The Court holds that Congress intended by this Amendment to invalidate automatically Price Regulation No. 30, and all the numerous regulations like it, until such time as the Price Administrator should find it possible, amidst all his pressing duties, to investigate and make determinations, formally expressed in writing, that only by standardizing or grouping certain commodities could price control over them be successfully enforced. Since the task of rechecking all past regulations which contained standardization provisions was very great, the Administrator did not find time to reach the Regulation here involved until two months after the Amendment's enactment. The Court holds that during this interval the public had no protection whatever from inflationary prices prohibited by this Regulation. In my opinion this holding finds support neither in the Section's language nor its legislative history.

When the sponsor of the Taft Amendment offered it on the Senate floor his statement clearly indicated that it grew out of cooperative effort between the legislators and the Price Administrator, who certainly would not be interested in throwing a monkey wrench into O. P. A.'s enforcement of the existing regulations. Referring to provisions of the Act which his Amendment was intended to clarify, Senator Taft said: "Price Administrator Brown came before the committee and urged that it would seriously hamper his price regulations in a number of trades, regulations for which had already been issued, to many of which there was no objection. He submitted another

form of amendment, carrying out the same purpose, but making it perfectly clear that it would not interfere with those regulations, which are proper." Cong. Rec. July 6, 1943, Vol. 89, p. 7251.

In spite of this clear declaration on the part of Senator Taft of his intention to save "proper" existing regulations, the Court now gives the Taft Price Administrator Amendment a meaning which does "interfere with those regulations." It not only interferes with them; it completely destroys their effectiveness for an indefinite interval of time. These petitioners and others are wholly freed from any possible penalty for deliberate inflationary overcharges, forbidden by Congress, during the period between the passage of the Amendment and the Administrator's publication of his determinations. That the Regulation here involved was a "proper" regulation on the day the Taft Amendment was passed is conceded. That its standardization provisions were at all times necessary to the effective enforcement of the Act is shown both by the Administrator's later findings and by his original promulgation. Consequently, it is this Court, and not the Congress, which must take the responsibility for permitting petitioners to violate the price regulation with impunity.

Furthermore, the Taft Amendment's language offers no support for the Court's decision. For by its terms it neither repeals nor renders unenforceable or ineffective valid outstanding regulations which standardize commodities. And in addition to what has already been pointed out, the prevailing circumstances at the time of its enactment make it highly improbable that Congress intended such a result. At the time the Amendment was enacted the threat of inflation was the greatest since the outbreak of the war. Just in April the President had thought it necessary to issue his well-known "Hold-the-Line Order"

in order to tighten controls designed to stem the inflationary trend. Purchasing power was very great and consumer goods had become extremely scarce. Had Congress really intended to protect the public against inflation, as its legislation shows it did, it would not have chosen this time for relaxing government controls. The giving of free reign to inflationary pressure was likely to endanger seriously our economy and to bring great hardship to many individuals. I cannot, without a clear declaration to that effect with respect to any part of our economy, impute to Congress an intent to let inflation run riot during such critical times. I cannot conclude, therefore, as the opinion of the Court necessarily does, that Congress intended to suspend all Maximum Price Regulations containing standardization provisions until the Price Administrator reviewed them.

What then was the purpose of Congress in enacting the Taft Amendment? The Managers on the part of the House thus stated the Section's purpose in the Conference Report on the Amendment: It "is to meet the objection that the Price Administrator has exceeded *the limitations expressed* in section 2 (h) of . . . [the 1942 Price Control Act] in issuing certain regulations already promulgated." (Italics supplied.) Section 2 (h) provides: "The powers granted . . . shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, *except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.*" (Italics supplied.) As the Conference Report indicates, the Taft Amendment actually added little new, if anything at all, to the requirements already contained in § 2 (h). It was merely an explanation and elaboration of one phase of the requirements of § 2 (h).

Any regulation, including the one here held invalid, that was promulgated when § 2 (h) was in effect had to meet its requirements. As later explained by the Taft Amendment, the requirements of § 2 (h) which permitted the Administrator to require changed business practices to prevent "circumvention or evasion" included, in the case of regulations containing new standardization provisions, a determination that there was no practical alternative to effective price control. All standardization provisions, including the one here held invalid, in order to be valid under the old § 2 (h) had to be based on such a determination. The Taft Amendment was not, as the Court now holds, a declaration by Congress that all past standardization provisions had not been based on such a determination and that they were therefore invalid. Here the Regulation in question was promulgated while § 2 (h) was in full force and effect. Not only did petitioners fail to show that the Regulation was not based on the determination required by § 2 (h) as explained by the Taft Amendment, but the Administrator, after the Amendment was enacted, and before any proceedings were brought against petitioners, double checked the Regulation to make sure that it was based on the determination required. It is not denied, and apparently cannot be denied, that it was absolutely necessary for the Administrator to order these changed standardization practices in order to prevent circumvention or evasion. In my opinion, therefore, the wastepaper provisions of Maximum Price Regulation No. 30 were valid at all times, since they met the requirements of § 2 (h) as explained by § 2 (j). I would affirm the judgment below, which dismissed the complaint.

MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY join in this dissent.

GIROUARD *v.* UNITED STATES.

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

No. 572. Argued March 4, 1946.—Decided April 22, 1946.

An alien who is willing to take the oath of allegiance and to serve in the army as a non-combatant but who, because of religious scruples, is unwilling to bear arms in defense of this country may be admitted to citizenship under the Nationality Act of 1940, as amended by the Act of March 27, 1942. *United States* v. *Schwimmer*, 279 U. S. 644; *United States* v. *Macintosh*, 283 U. S. 605; and *United States* v. *Bland*, 283 U. S. 636, overruled. Pp. 64–70.
149 F. 2d 760, reversed.

A District Court admitted petitioner to citizenship. The Circuit Court of Appeals reversed. 149 F. 2d 760. This Court granted certiorari. 326 U. S. 714. *Reversed*, p. 70.

Homer Cummings and *William D. Donnelly* argued the cause for petitioner. With them on the brief was *David J. Coddaire*.

Frederick Bernays Wiener argued the cause for the United States. With him on the brief were *Solicitor General McGrath*, *Robert S. Erdahl* and *Leon Ulman*.

Ernest Angell, *Julien Cornell*, *John W. Davis* and *Osmond K. Fraenkel* filed a brief for the American Civil Liberties Union, as *amicus curiae*, in support of petitioner.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In 1943 petitioner, a native of Canada, filed his petition for naturalization in the District Court of Massachusetts. He stated in his application that he understood the prin-

ciples of the government of the United States, believed in its form of government, and was willing to take the oath of allegiance (54 Stat. 1157, 8 U. S. C. § 735 (b)) which reads as follows:

> "I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So help me God."

To the question in the application "If necessary, are you willing to take up arms in defense of this country?" he replied, "No (Non-combatant) Seventh Day Adventist." He explained that answer before the examiner by saying "it is a purely religious matter with me, I have no political or personal reasons other than that." He did not claim before his Selective Service board exemption from all military service, but only from combatant military duty. At the hearing in the District Court petitioner testified that he was a member of the Seventh Day Adventist denomination, of whom approximately 10,000 were then serving in the armed forces of the United States as non-combatants, especially in the medical corps; and that he was willing to serve in the army but would not bear arms. The District Court admitted him to citizenship. The Circuit Court of Appeals reversed, one judge dissenting. 149 F. 2d 760. It took that action on the authority of *United States* v. *Schwimmer*, 279 U. S. 644; *United States* v. *Macintosh*, 283 U. S. 605, and *United States* v. *Bland*, 283 U. S. 636, saying that the facts of the present case brought it squarely within the principle of those cases. The case is here on

a petition for a writ of certiorari which we granted so that those authorities might be re-examined.

The *Schwimmer, Macintosh* and *Bland* cases involved, as does the present one, a question of statutory construction. At the time of those cases, Congress required an alien, before admission to citizenship, to declare on oath in open court that "he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same." [1] It also required the court to be satisfied that the alien had during the five-year period immediately preceding the date of his application "behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." [2] Those provisions were reenacted into the present law in substantially the same form.[3]

While there are some factual distinctions between this case and the *Schwimmer* and *Macintosh* cases, the *Bland* case on its facts is indistinguishable. But the principle emerging from the three cases obliterates any factual distinction among them. As we recognized in *In re Summers,* 325 U. S. 561, 572, 577, they stand for the same general rule—that an alien who refuses to bear arms will not be admitted to citizenship. As an original proposition, we could not agree with that rule. The fallacies underlying

[1] Naturalization Act of 1906, § 4, 34 Stat. 596.

[2] *Id.*

[3] We have already set forth in the opinion the present form of the oath which is required. It is to be found in the Nationality Act of 1940, 54 Stat. 1137, 1157, 8 U. S. C. § 735 (b). Sec. 307 (a) of that Act, 8 U. S. C. § 707 (a), provides that no person shall be naturalized unless he has been for stated periods and still is "a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

it were, we think, demonstrated in the dissents of Mr. Justice Holmes in the *Schwimmer* case and of Mr. Chief Justice Hughes in the *Macintosh* case.

The oath required of aliens does not in terms require that they promise to bear arms. Nor has Congress expressly made any such finding a prerequisite to citizenship. To hold that it is required is to read it into the Act by implication. But we could not assume that Congress intended to make such an abrupt and radical departure from our traditions unless it spoke in unequivocal terms.

The bearing of arms, important as it is, is not the only way in which our institutions may be supported and defended, even in times of great peril. Total war in its modern form dramatizes as never before the great cooperative effort necessary for victory. The nuclear physicists who developed the atomic bomb, the worker at his lathe, the seamen on cargo vessels, construction battalions, nurses, engineers, litter bearers, doctors, chaplains—these, too, made essential contributions. And many of them made the supreme sacrifice. Mr. Justice Holmes stated in the *Schwimmer* case (279 U. S. p. 655) that "the Quakers have done their share to make the country what it is." And the annals of the recent war show that many whose religious scruples prevented them from bearing arms, nevertheless were unselfish participants in the war effort. Refusal to bear arms is not necessarily a sign of disloyalty or a lack of attachment to our institutions. One may serve his country faithfully and devotedly, though his religious scruples make it impossible for him to shoulder a rifle. Devotion to one's country can be as real and as enduring among non-combatants as among combatants. One may adhere to what he deems to be his obligation to God and yet assume all military risks to secure victory. The effort of war is indivisible; and those whose religious scruples prevent them from killing are no less patriots than those whose special traits or handicaps result in their

assignment to duties far behind the fighting front. Each is making the utmost contribution according to his capacity. The fact that his rôle may be limited by religious convictions rather than by physical characteristics has no necessary bearing on his attachment to his country or on his willingness to support and defend it to his utmost.

Petitioner's religious scruples would not disqualify him from becoming a member of Congress or holding other public offices. While Article VI, Clause 3 of the Constitution provides that such officials, both of the United States and the several States, "shall be bound by Oath or Affirmation, to support this Constitution," it significantly adds that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." The oath required is in no material respect different from that prescribed for aliens under the Nationality Act. It has long contained the provision "that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion . . ." R. S. § 1757, 5 U. S. C. § 16. As Mr. Chief Justice Hughes stated in his dissent in the *Macintosh* case (283 U. S. p. 631), "the history of the struggle for religious liberty, the large number of citizens of our country, from the very beginning, who have been unwilling to sacrifice their religious convictions, and in particular, those who have been conscientiously opposed to war and who would not yield what they sincerely believed to be their allegiance to the will of God"—these considerations make it impossible to conclude "that such persons are to be deemed disqualified for public office in this country because of the requirement of the oath which must be taken before they enter upon their duties."

There is not the slightest suggestion that Congress set a stricter standard for aliens seeking admission to citizen-

ship than it did for officials who make and enforce the laws of the nation and administer its affairs. It is hard to believe that one need forsake his religious scruples to become a citizen but not to sit in the high councils of state.

As Mr. Chief Justice Hughes pointed out (*United States* v. *Macintosh, supra,* p. 633), religious scruples against bearing arms have been recognized by Congress in the various draft laws. This is true of the Selective Training and Service Act of 1940 (54 Stat. 889, 50 U. S. C. App. § 305 (g))[4] as it was of earlier acts. He who is inducted into the armed services takes an oath which includes the provision "that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever . . ."[5] 41 Stat. 809, 10 U. S. C. § 1581. Congress has thus recognized that one may adequately discharge his obligations as a citizen by rendering non-combatant as well as combatant services. This respect by Congress over the years for the conscience of those having

[4] Sec. 305 (g) provides in part:

"Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction."

For earlier Acts see Act of February 24, 1864, 13 Stat. 6, 9; Act of January 21, 1903, 32 Stat. 775; Act of June 3, 1916, 39 Stat. 166, 197; Act of May 18, 1917, 40 Stat. 76, 78.

[5] And see *Billings* v. *Truesdell,* 321 U. S. 542, 549–550; Army Regulations No. 615–500, August 10, 1944, § II, 15 (f) (2).

religious scruples against bearing arms is cogent evidence of the meaning of the oath. It is recognition by Congress that even in time of war one may truly support and defend our institutions though he stops short of using weapons of war.

That construction of the naturalization oath received new support in 1942. In the Second War Powers Act, 56 Stat. 176, 182, 8 U. S. C., Supp. IV, § 1001, Congress relaxed certain of the requirements for aliens who served honorably in the armed forces of the United States during World War II and provided machinery to expedite their naturalization.[6] Residence requirements were relaxed, educational tests were eliminated, and no fees were required. But no change in the oath was made; nor was any change made in the requirement that the alien be attached to the principles of the Constitution. Yet it is clear that these new provisions cover non-combatants as well as combatants.[7] If petitioner had served as a non-

[6] Comparable provision was made in the Act of December 7, 1942, 56 Stat. 1041, 8 U. S. C., Supp. IV, § 723a, for those who served honorably in World War I, in the Spanish-American War, or on the Mexican Border.

[7] *In re Kinloch*, 53 F. Supp. 521, involved naturalization proceedings of aliens, one of whom, like petitioner in the present case, as a Seventh Day Adventist. He had been inducted into the army as a non-combatant. His naturalization was opposed by the Immigration Service on the ground that he could not promise to bear arms. The court overruled the objection, stating, p. 523:

> "If conscientious objectors, who are aliens, performing military duty, and wearing the uniform, are not granted the privileges of citizenship under this act, then the act would be meaningless. It would be so made if an applicant, being a conscientious objector, who has attained the status of a soldier, performs military duty, and honorably wears the uniform (as is admitted in the instant cases), is denied citizenship. If the oath of allegiance is to be construed as requiring such applicant to agree, without mental reservation, to bear arms, then the result would be a denial of citizenship, even though Congress has conferred such privilege upon him."

And see *In re Sawyer*, 59 F. Supp. 428.

combatant (as he was willing to do), he could have been admitted to citizenship by taking the identical oath which he is willing to take. Can it be that the oath means one thing to one who has served to the extent permitted by his religious scruples and another thing to one equally willing to serve but who has not had the opportunity? It is not enough to say that petitioner is not entitled to the benefits of the new Act since he did not serve in the armed forces. He is not seeking the benefits of the expedited procedure and the relaxed requirements. The oath which he must take is identical with the oath which both non-combatants and combatants must take. It would, indeed, be a strange construction to say that "support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic" demands something more from some than it does from others. That oath can hardly be adequate for one who is unwilling to bear arms because of religious scruples and yet exact from another a promise to bear arms despite religious scruples.

Mr. Justice Holmes stated in the *Schwimmer* case (279 U. S. pp. 654–55): "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country." The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle. As we

recently stated in *United States* v. *Ballard,* 322 U. S. 78, 86, "Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *Board of Education* v. *Barnette,* 319 U. S. 624." The test oath is abhorrent to our tradition. Over the years, Congress has meticulously respected that tradition and even in time of war has sought to accommodate the military requirements to the religious scruples of the individual. We do not believe that Congress intended to reverse that policy when it came to draft the naturalization oath. Such an abrupt and radical departure from our traditions should not be implied. See *Schneiderman* v. *United States,* 320 U. S. 118, 132. Cogent evidence would be necessary to convince us that Congress took that course.

We conclude that the *Schwimmer, Macintosh* and *Bland* cases do not state the correct rule of law.

We are met, however, with the argument that, even though those cases were wrongly decided, Congress has adopted the rule which they announced. The argument runs as follows: Many efforts were made to amend the law so as to change the rule announced by those cases; but in every instance the bill died in committee. Moreover, when the Nationality Act of 1940 was passed, Congress reenacted the oath in its pre-existing form, though at the same time it made extensive changes in the requirements and procedure for naturalization. From this it is argued that Congress adopted and reenacted the rule of the *Schwimmer, Macintosh* and *Bland* cases. Cf. *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 488–489.

We stated in *Helvering* v. *Hallock,* 309 U. S. 106, 119, that "It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines." It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law. We do not think under the circumstances of this legislative history that we can properly

place on the shoulders of Congress the burden of the Court's own error. The history of the 1940 Act is at most equivocal. It contains no affirmative recognition of the rule of the *Schwimmer, Macintosh* and *Bland* cases. The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of those cases. But, for us, it is enough to say that since the date of those cases Congress never acted affirmatively on this question but once and that was in 1942. At that time, as we have noted, Congress specifically granted naturalization privileges to non-combatants who like petitioner were prevented from bearing arms by their religious scruples. That was affirmative recognition that one could be attached to the principles of our government and could support and defend it even though his religious convictions prevented him from bearing arms. And, as we have said, we cannot believe that the oath was designed to exact something more from one person than from another. Thus the affirmative action taken by Congress in 1942 negatives any inference that otherwise might be drawn from its silence when it reenacted the oath in 1940.

Reversed.

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

MR. CHIEF JUSTICE STONE, dissenting.

I think the judgment should be affirmed, for the reason that the court below, in applying the controlling provisions of the naturalization statutes, correctly applied them as earlier construed by this Court, whose construction Congress has adopted and confirmed.

In three cases decided more than fifteen years ago, this Court denied citizenship to applicants for naturalization who had announced that they proposed to take the pre-

scribed oath of allegiance with the reservation or qualification that they would not, as naturalized citizens, assist in the defense of this country by force of arms or give their moral support to the government in any war which they did not believe to be morally justified or in the best interests of the country. See *United States* v. *Schwimmer,* 279 U. S. 644; *United States* v. *Macintosh,* 283 U. S. 605; *United States* v. *Bland,* 283 U. S. 636.

In each of these cases this Court held that the applicant had failed to meet the conditions which Congress had made prerequisite to naturalization by § 4 of the Naturalization Act of June 29, 1906, c. 3592, 34 Stat. 596, the provisions of which, here relevant, were enacted in the Nationality Act of October 14, 1940. See c. 876, 54 Stat. 1137, as amended by the Act of March 27, 1942, c. 199, 56 Stat. 176, 182–183, and by the Act of December 7, 1942, c. 690, 56 Stat. 1041, 8 U. S. C. §§ 707, 735. Section 4 of the Naturalization Act of 1906, paragraph "Third," provided that before the admission to citizenship the applicant should declare on oath in open court that "he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same." And paragraph "Fourth" required that before admission it be made to appear "to the satisfaction of the court admitting any alien to citizenship" that at least for a period of five years immediately preceding his application the applicant "has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same . . ." In applying these provisions in the cases mentioned, this Court held only that an applicant who is unable to take the oath of allegiance without the reservations or qualifications insisted upon by the applicants in those cases manifests his want of attachment to the principles of the Constitution and his unwillingness to meet

the requirements of the oath, that he will support and defend the Constitution of the United States and bear true faith and allegiance to the same, and so does not comply with the statutory conditions of his naturalization. No question of the constitutional power of Congress to withhold citizenship on these grounds was involved. That power was not doubted. See *Selective Draft Law Cases,* 245 U. S. 366; *Hamilton* v. *Regents,* 293 U. S. 245. The only question was of construction of the statute which Congress at all times has been free to amend if dissatisfied with the construction adopted by the Court.

With three other Justices of the Court I dissented in the *Macintosh* and *Bland* cases, for reasons which the Court now adopts as ground for overruling them.[1] Since this Court in three considered earlier opinions has rejected the construction of the statute for which the dissenting Justices contended, the question, which for me is decisive of the present case, is whether Congress has likewise rejected that construction by its subsequent legislative action, and has adopted and confirmed the Court's earlier construction of the statutes in question. A study of Congressional action taken with respect to proposals for amendment of the naturalization laws since the decision in the *Schwimmer* case, leads me to conclude that Congress has adopted and confirmed this Court's earlier con-

[1] In the opinion of the writer there was evidence in *United States* v. *Schwimmer,* 279 U. S. 644, from which the district court could and presumably did infer that applicant's behavior evidenced a disposition, present and future, actively to resist all laws of the United States and lawful commands of its officers for the furthering of any military enterprise of the United States, and actively to aid and encourage such resistance in others, and this the district court presumably concluded evidenced a want of attachment of the applicant to the principles of the Constitution which the naturalization law requires to be exhibited by the behavior of the applicant, preceding the application for citizenship.

struction of the naturalization laws. For that reason alone I think that the judgment should be affirmed.

The construction of the naturalization statutes, adopted by this Court in the three cases mentioned, immediately became the target of an active, publicized legislative attack in Congress which persisted for a period of eleven years, until the adoption of the Nationality Act in 1940. Two days after the *Schwimmer* case was decided, a bill was introduced in the House, H. R. 3547, 71st Cong., 1st Sess., to give the Naturalization Act a construction contrary to that which had been given to it by this Court and which, if adopted, would have made the applicants rejected by this Court in the *Schwimmer, Macintosh* and *Bland* cases eligible for citizenship. This effort to establish by Congressional action that the construction which this Court had placed on the Naturalization Act was not one which Congress had adopted or intended, was renewed without success after the decision in the *Macintosh* and *Bland* cases, and was continued for a period of about ten years.[2] All of these measures were of substantially the same pattern as H. R. 297, 72d Cong., 1st Sess., introduced December 8, 1931, at the first session of Congress, after the decision in the *Macintosh* case. It provided that no person otherwise qualified "shall be debarred from citizenship by reason of his or her religious views or philosophical opinions with respect to the lawfulness of war as a means of settling international disputes, but every alien admitted to citizenship shall be subject to the same obligations as the native-born citizen." H. R. 3547, 71st Cong., 1st Sess.,

[2] H. R. 3547, 71st Cong., 1st Sess., 71 Cong. Rec. 2184; H. R. 297, 72d Cong., 1st Sess., 75 Cong. Rec. 95; H. R. 298, 72d Cong., 1st Sess., 75 Cong. Rec. 95; S. 3275, 72d Cong., 1st Sess., 75 Cong. Rec. 2600; H. R. 1528, 73d Cong., 1st Sess., 77 Cong. Rec. 90; H. R. 5170, 74th Cong., 1st Sess., 79 Cong. Rec. 1356; H. R. 8259, 75th Cong., 1st Sess., 81 Cong. Rec. 9193; S. 165, 76th Cong., 1st Sess., 84 Cong. Rec. 67.

introduced immediately after the decision in the *Schwimmer* case, had contained a like provision, but with the omission of the last clause beginning "but every alien." Hearings were had before the House Committee on Immigration and Naturalization on both bills at which their proponents had stated clearly their purpose to set aside the interpretation placed on the oath of allegiance by the *Schwimmer* and *Macintosh* cases.[3] There was opposition on each occasion.[4] Bills identical with H. R. 297 were introduced in three later Congresses.[5] None of these bills were reported out of Committee. The other proposals, all of which failed of passage (see footnote 2, *ante*), had the same purpose and differed only in phraseology.

Thus, for six successive Congresses, over a period of more than a decade, there were continuously pending before Congress in one form or another proposals to overturn the rulings in the three Supreme Court decisions in question. Congress declined to adopt these proposals after full hearings and after speeches on the floor advocating the change. 72 Cong. Rec. 6966–7; 75 Cong. Rec. 15354–7. In the meantime the decisions of this Court had been followed in *Clarke's Case,* 301 Pa. 321, 152 A. 92; *Beale* v. *United States,* 71 F. 2d 737; *In re Warkentin,* 93 F. 2d 42. In *Beale* v. *United States, supra,* the court pointed out that the proposed amendments affecting the provisions of the statutes relating to admission to citizenship had failed, saying: "We must conclude, therefore, that these statutory requirements as construed

[3] Hearings on H. R. 3547, pp. 12, 22, 29–57, 73–109, 169–180; Hearings on H. R. 297, pp. 4–7, 10, 12, 15–19, 41–48, 53–56, 66–81, 147, 148.

[4] Hearings on H. R. 3547, pp. 57–65, 73, 146–169, 181–212; Hearings on H. R. 297, pp. 85–140.

[5] H. R. 1528, 73d Cong., 1st Sess.; H. R. 5170, 74th Cong., 1st Sess.; H. R. 8259, 75th Cong., 1st Sess.

by the Supreme Court have congressional sanction and approval."

Any doubts that such were the purpose and will of Congress would seem to have been dissipated by the reenactment by Congress in 1940 of Paragraphs "Third" and "Fourth" of § 4 of the Naturalization Act of 1906, and by the incorporation in the Act of 1940 of the very form of oath which had been administratively prescribed for the applicants in the *Schwimmer, Macintosh* and *Bland* cases. See Rule 8 (c), Naturalization Regulations of July 1, 1929.[6]

The Nationality Act of 1940 was a comprehensive, slowly matured and carefully considered revision of the naturalization laws. The preparation of this measure was not only delegated to a Congressional Committee, but was considered by a committee of Cabinet members, one of whom was the Attorney General. Both were aware of our decisions in the *Schwimmer* and related cases and that no other question pertinent to the naturalization laws had been as persistently and continuously before Congress in the ten years following the decision in the *Schwimmer* case. The modifications in the provisions of Paragraphs "Third" and "Fourth" of § 4 of the 1906 Act show conclusively the careful attention which was given to them.

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[6] Section 307 (a) of the Nationality Act, 8 U. S. C. § 707 (a), provides that no person shall be naturalized unless for a period of five years preceding the filing of his petition for naturalization he "has been and still is a person . . . attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States." Section 335 (a) of the Nationality Act, 8 U. S. C. § 735 (a), provides that before an applicant for naturalization shall be admitted to citizenship, he shall take an oath in open court that inter alia he will "support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; . . . and . . . bear true faith and allegiance to the same . . ."

In the face of this legislative history the "failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one. This is the more so where, as here, the application of the statute . . . has brought forth sharply conflicting views both on the Court and in Congress, and where after the matter has been fully brought to the attention of the public and the Congress, the latter has not seen fit to change the statute." *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 488–9. And see to like effect *United States* v. *Ryan,* 284 U. S. 167–175; *United States* v. *Elgin, J. & E. R. Co.,* 298 U. S. 492, 500; *Missouri* v. *Ross,* 299 U. S. 72, 75; cf. *Helvering* v. *Winmill,* 305 U. S. 79, 82, 83. It is the responsibility of Congress, in reenacting a statute, to make known its purpose in a controversial matter of interpretation of its former language, at least when the matter has, for over a decade, been persistently brought to its attention. In the light of this legislative history, it is abundantly clear that Congress has performed that duty. In any case it is not lightly to be implied that Congress has failed to perform it and has delegated to this Court the responsibility of giving new content to language deliberately readopted after this Court has construed it. For us to make such an assumption is to discourage, if not to deny, legislative responsibility. By thus adopting and confirming this Court's construction of what Congress had enacted in the Naturalization Act of 1906 Congress gave that construction the same legal significance as though it had written the very words into the Act of 1940.

The only remaining question is whether Congress repealed this construction by enactment of the 1942 amend-

ments of the Nationality Act. That Act extended special privileges to applicants for naturalization who were aliens and who have served in the armed forces of the United States in time of war, by dispensing with or modifying existing requirements, relating to declarations of intention, period of residence, education, and fees. It left unchanged the requirements that the applicant's behavior show his attachment to the principles of the Constitution and that he take the oath of allegiance. In adopting the 1942 amendments Congress did not have before it any question of the oath of allegiance with which it had been concerned when it adopted the 1940 Act. In 1942 it was concerned with the grant of special favors to those seeking naturalization who had worn the uniform and rendered military service in time of war and who could satisfy such naturalization requirements as had not been dispensed with by the amendments. In the case of those entitled to avail themselves of these privileges, Congress left it to the naturalization authorities, as in other cases, to determine whether, by their applications and their conduct in the military service, they satisfy the requirements for naturalization which have not been waived.

It is pointed out that one of the 1942 amendments, 8 U. S. C., Supp. IV, § 1004, provided that the provisions of the amendment should not apply to "any conscientious objector who performed no military duty whatever or refused to wear the uniform." It is said that the implication of this provision is that conscientious objectors who rendered noncombatant service and wore the uniform were, under the 1942 amendments, to be admitted to citizenship. From this it is argued that since the 1942 amendments apply to those who have been in noncombatant, as well as combatant, military service, the amendment must be taken to include some who have rendered

noncombatant service who are also conscientious objectors and who would be admitted to citizenship under the 1942 amendments, even though they made the same reservations as to the oath of allegiance as did the applicants in the *Schwimmer, Macintosh* and *Bland* cases. And it is said that although the 1942 amendments are not applicable to petitioner, who has not been in military service, the oath cannot mean one thing as to him and another as to those who have been in the noncombatant service.

To these suggestions there are two answers. One is that if the 1942 amendment be construed as including noncombatants who are also conscientious objectors, who are unwilling to take the oath without the reservations made by the applicants in the *Schwimmer, Macintosh* and *Bland* cases, the only effect would be to exempt noncombatant conscientious objectors from the requirements of the oath, which had clearly been made applicable to all objectors, including petitioner, by the Nationality Act of 1940, and from which petitioner was not exempted by the 1942 amendments. If such is the construction of the 1942 Act, there is no constitutional or statutory obstacle to Congress' taking such action. Congress if it saw fit could have admitted to citizenship those who had rendered noncombatant service, with a modified oath or without any oath at all. Petitioner has not been so exempted.

Since petitioner was never in the military or naval forces of the United States, we need not decide whether the 1942 amendments authorized any different oath for those who had been in noncombatant service than for others. The amendments have been construed as requiring the same oath, without reservations, from conscientious objectors, as from others. *In re Nielsen,* 60 F. Supp. 240. Not all of those who rendered noncombatant service were conscientious objectors. Few were. There were others in the noncombatant service who had announced their con-

scientious objections to combatant service, who may have waived or abandoned their objections. Such was the experience in the First World War. See "Statement Concerning the Treatment of Conscientious Objectors in the Army," prepared and published by direction of the Secretary of War, June 18, 1919. All such could have taken the oath without the reservations made by the applicants in the *Schwimmer, Macintosh* and *Bland* cases and would have been entitled to the benefits of the 1942 amendments, provided they had performed military duty and had not refused to wear the uniform. The fact that Congress recognized by indirection, in 8 U. S. C., Supp. IV, § 1004, that those who had appeared in the role of conscientious objectors, might become citizens by taking the oath of allegiance and establishing their attachment to the principles of the Constitution, does not show that Congress dispensed with the requirements of the oath as construed by this Court and plainly confirmed by Congress in the Nationality Act of 1940. There is no necessary inconsistency in this respect between the 1940 Act and the 1942 amendments. Without it repeal by implication is not favored. *United States* v. *Borden Co.*, 308 U. S. 188, 198–9, 203–6; *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 457; *United States Alkali Assn.* v. *United States*, 325 U. S. 196, 209. The amendments and their legislative history give no hint of any purpose of Congress to relax, at least for persons who had rendered no military service, the requirements of the oath of allegiance and proof of attachment to the Constitution as this Court had interpreted them and as the Nationality Act of 1940 plainly required them to be interpreted. It is not the function of this Court to disregard the will of Congress in the exercise of its constitutional power.

MR. JUSTICE REED and MR. JUSTICE FRANKFURTER join in this opinion.

QUEENSIDE HILLS REALTY CO., INC. *v.* SAXL, COMMISSIONER OF HOUSING AND BUILDINGS OF THE CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 769. Argued March 28, 1946.—Decided April 22, 1946.

In 1940 appellant constructed a lodging house in New York, complying with all applicable laws then in force. In 1944 New York amended its Multiple Dwelling Law so as to provide that lodging houses of "non-fireproof construction existing prior to the enactment" of the amendment should comply with certain new requirements, including the installation of an automatic wet pipe sprinkler system. Appellant asserted that its building did not constitute a fire hazard or a danger to its occupants; that it had a market value of $25,000; that the cost of complying with the 1944 law would be $7,500; and that the benefits to be obtained by the changes were negligible. *Held:*

1. The law does not violate the due process clause of the Fourteenth Amendment, since it is within the police power of the State and the owner of property does not acquire immunity against the exercise of the police power by constructing it in full compliance with existing laws. P. 82.

2. In the absence of a showing that there are in existence other lodging houses of the same category which will escape its requirements, the law can not be held to violate the equal protection clause of the Fourteenth Amendment because of its failure to apply to lodging houses which might be erected subsequently; since lack of equal protection is found in the actual existence of an invidious discrimination and not in the mere possibility that there will be like or similar cases which will be treated more leniently. Pp. 83–85.

3. The wisdom of the legislation and the need for it are questions for the legislature. P. 82.

294 N. Y. 917, 63 N. E. 2d 116, affirmed.

Appellant sued in the New York courts for a declaratory judgment holding certain provisions of the New York Multiple Dwelling Law (L. 1929, c. 713) as amended in 1944 (L. 1944, c. 553) unconstitutional and restraining their enforcement. The Supreme Court dismissed the

suit. The Appellate Division affirmed. 269 App. Div. 691, 54 N. Y. S. 2d 394. The Court of Appeals affirmed, 294 N. Y. 917, 63 N. E. 2d 116, certifying by its remittitur that questions involving the Fourteenth Amendment were presented and necessarily passed upon. 295 N. Y. 567, 64 N. E. 2d 278. *Affirmed*, p. 85.

George G. Lake argued the cause and filed a brief for appellant.

Edward G. Griffin argued the cause for appellee. With him on the brief were *John J. Bennett* and *Joseph F. Mulqueen, Jr.*

Mr. Justice Douglas delivered the opinion of the Court.

In 1940 appellant constructed a four-story building on the Bowery in New York City and since that time has operated it as a lodging house. It was constructed so as to comply with all the laws applicable to such lodging houses and in force at that time. New York amended its Multiple Dwelling Law [1] in 1944,[2] providing, *inter alia*, that lodging houses "of non-fireproof construction existing prior to the enactment of this subdivision" [3] should comply with certain new requirements.[4] Among these was the installation of an automatic wet pipe sprinkler system. Appellant received notice to comply with the new requirements and thereupon instituted this suit in the New York courts for a declaratory judgment holding these provisions of the 1944 law unconstitutional and restraining their enforcement.

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[1] L. 1929, ch. 713; Cons. L. ch. 61A.

[2] L. 1944, ch. 553.

[3] *Id.*, § 4.

[4] This followed a disastrous fire in an old lodging house in New York City in which there was a considerable loss of life.

The bill alleged that the building was safe for occupancy as a lodging house and did not constitute a fire hazard or a danger to the occupants; that it complied with all building laws and regulations at the time of its construction; that part of it was fireproof and that the rest was so constructed as not to be dangerous to occupants; that the regulations existing prior to 1944 were adequate and sufficient to prevent loss of life in lodging houses of this particular type. It was further alleged that this lodging house has a market value of about $25,000, that the cost of complying with the 1944 law would be about $7,500; and that the benefits to be obtained by the changes were negligible. By reason of those circumstances the 1944 law was alleged to violate the due process clause of the Fourteenth Amendment. It was also alleged to violate the equal protection clause of the Fourteenth Amendment since it was applicable to lodging houses "existing" prior to the 1944 law but not to identical structures erected thereafter. Appellee answered, denying the material allegations of the bill, and moved to dismiss. The Supreme Court granted the motion. The Appellate Division affirmed without opinion. 269 App. Div. 691, 54 N. Y. S. 2d 394. On appeal to the Court of Appeals the judgment was likewise affirmed without opinion. 294 N. Y. 917, 63 N. E. 2d 116. The case is here on appeal, the Court of Appeals having certified by its remittitur that questions involving the Fourteenth Amendment were presented and necessarily passed upon. 295 N. Y. 567, 64 N. E. 2d 278.

Little need be said on the due process question. We are not concerned with the wisdom of this legislation or the need for it. *Olsen* v. *Nebraska,* 313 U. S. 236, 246. Protection of the safety of persons is one of the traditional uses of the police power of the States. Experts may differ as to the most appropriate way of dealing with fire hazards in lodging houses. Appellant, indeed, says that its building,

far from being a fire-trap, is largely fireproof; and to the extent that any fire hazards exist, they are adequately safeguarded by a fire alarm system, constant watchman service, and other safety arrangements. But the legislature may choose not to take the chance that human life will be lost in lodging house fires and adopt the most conservative course which science and engineering offer. It is for the legislature to decide what regulations are needed to reduce fire hazards to the minimum. Many types of social legislation diminish the value of the property which is regulated. The extreme cases are those where in the interest of the public safety or welfare the owner is prohibited from using his property. *Reinman* v. *Little Rock,* 237 U. S. 171; *Hadacheck* v. *Sebastian,* 239 U. S. 394; *Pierce Oil Corp.* v. *Hope,* 248 U. S. 498. We are dealing here with a less drastic measure. But in no case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with the existing laws. *Hadacheck* v. *Sebastian, supra,* p. 410. And see *Chicago, B. & Q. R. Co.* v. *Nebraska,* 170 U. S. 57; *Hutchinson* v. *Valdosta,* 227 U. S. 303. The police power is one of the least limitable of governmental powers, and in its operation often cuts down property rights. *Block* v. *Hirsh,* 256 U. S. 135, 155. And see *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531. Appellant may have a lodging house far less hazardous than the other existing structures regulated by the 1944 law. Yet a statute may be sustained though some of the objects affected by it may be wholly innocent. *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 204. The question of validity turns on the power of the legislature to deal with the prescribed class. That power plainly exists here.

Appellant's claim of lack of equal protection is based on the following argument: The 1944 law applies only to

existing lodging houses; if a new lodging house were erected or if an existing building were converted into a lodging house, the 1944 law would be inapplicable. An exact duplicate of appellant's building, if constructed today, would not be under the 1944 law and hence could be lawfully operated without the installation of a wet pipe sprinkler system. That is said to be a denial of equal protection of the laws.

The difficulty is that appellant has not shown that there are in existence lodging houses of that category which will escape the law. The argument is based on an anticipation that there may come into existence a like or identical class of lodging houses which will be treated less harshly. But so long as that class is not in existence, no showing of lack of equal protection can possibly be made. For under those circumstances the burden which is on one who challenges the constitutionality of a law could not be satisfied. *Metropolitan Casualty Insurance Co.* v. *Brownell,* 294 U. S. 580, 584. The legislature is entitled to hit the evil that exists. *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144; *Bryant* v. *Zimmerman,* 278 U. S. 63; *Bain Peanut Co.* v. *Pinson,* 282 U. S. 499. It need not take account of new and hypothetical inequalities that may come into existence as time passes or as conditions change. So far as we know, the 1944 law may have been designed as a stop-gap measure to take care of a pressing need until more comprehensive legislation could be prepared. It is common knowledge that due to war conditions there has been little construction in this field in recent years. By the time new lodging houses appear they, too, may be placed under the 1944 law; or different legislation may be adopted to take care both of the old and the new on the basis of parity. Or stricter standards for new lodging houses may be adopted. In any such case the asserted discrimination would have turned out to be fanciful, not real. The point is that lack

of equal protection is found in the actual existence of an invidious discrimination (*Truax* v. *Raich,* 239 U. S. 33; *Skinner* v. *Oklahoma,* 316 U. S. 535), not in the mere possibility that there will be like or similar cases which will be treated more leniently.

Affirmed.

MR. JUSTICE RUTLEDGE concurs in the result.

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

SEAS SHIPPING CO., INC. *v.* SIERACKI.

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

No. 365. Argued January 3, 1946.—Decided April 22, 1946.

1. A shipowner's obligation of seaworthiness, traditionally owed by shipowners to seamen, extends to a stevedore who was injured while aboard and loading the ship, although employed by an independent stevedoring contractor engaged by the owner to load the ship. Pp. 89–100.

   (a) The obligation is essentially a species of liability without fault and is neither limited by conceptions of negligence nor contractual in character. Pp. 90–94.

   (b) It is not confined to seamen who perform the ship's service under immediate hire of the owner, but extends to those who render it with his consent or by his arrangement. Pp. 95–97.

   (c) For purposes of the liability, a stevedore is a seaman, because he is doing a seaman's work and incurring a seaman's hazards, and he is entitled to a seaman's traditional protection. P. 99.

2. By giving longshoremen the rights of compensation afforded by the Longshoremen's and Harbor Workers' Compensation Act and making them exclusive as against the employer, Congress has not withdrawn from longshoremen the protections gained under the Merchant Marine Act of 1920 or other protections relating to personal injury available to them under general maritime law. P. 100.

(a) The Longshoremen's and Harbor Workers' Compensation Act did not purport to make the stevedore's remedy for compensation against his employer exclusive of remedies against others and it expressly reserved to the stevedore a right of election to proceed against third parties responsible for his injury. P. 101.

(b) It did not nullify any right of a stevedore against the owner of the ship, except possibly when he is hired by the owner. P. 102.

3. A right peculiar to the law of admiralty may be enforced either by a suit in admiralty or by one on the law side of the court. P. 88.
4. The liability of a shipowner for failure to maintain a seaworthy vessel rests upon an entirely different basis from the liability of contractors and subcontractors who built the ship. Therefore, the shipowner would not be jointly liable with the builders but would be liable severally. P. 89.
5. When one of several defendants in a suit brings the cause here on certiorari and the others are not named as respondents or served in accordance with Rule 38 (3), this Court is precluded from making any determination concerning the rights or liabilities of the other defendants. P. 89.

149 F. 2d 98, affirmed.

A stevedore employed by an independent stevedoring company sued a shipowner, the contractor who built the ship and a subcontractor for injuries sustained while working aboard the ship as a result of a latent defect in a part of the ship. The District Court gave judgment against the contractor and subcontractor but in favor of the shipowner. 57 F. Supp. 724. The Circuit Court of Appeals reversed as to the shipowner. 149 F. 2d 98. This Court granted certiorari. 326 U. S. 700. *Affirmed*, p. 103.

Thomas E. Byrne, Jr. argued the cause for petitioner. With him on the brief were *Rowland C. Evans, Jr.* and *John B. Shaw.*

Abraham E. Freedman argued the cause for respondent. With him on the brief was *Charles Lakatos.*

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

The principal question is whether the obligation of seaworthiness, traditionally owed by an owner of a ship to seamen, extends to a stevedore injured while working aboard the ship.

Sieracki was employed by an independent stevedoring company which was under contract to petitioner to load its ship, the S. S. Robin Sherwood. On December 23, 1942, he was on the vessel loading cargo. The winch he operated was controlled by a ten-ton boom at number five hatch. One part of a freight car had been lowered into the hold. The second part weighed about eight tons. While it was being put down the shackle supporting the boom broke at its crown, causing the boom and tackle to fall and injure respondent.

He sued petitioner and two other companies. These were the Bethlehem Steel Company, to which the Maritime Commission had awarded the contract for constructing the ship, and Bethlehem Sparrow's Point, Inc., which had built part of the ship under agreement with the steel company. The District Court found that the shackle had broken as the result of a defect which had occurred in its forging. The Bethlehem companies had purchased this equipment from another concern. Nevertheless the court held they were negligent in not having tested it adequately before installing it. But the court considered petitioner to be under no such obligation to test [1] and therefore not negligent. Accordingly, it gave judgment against the two Bethlehem companies but in favor of petitioner. 57 F. Supp. 724.

The Circuit Court of Appeals reversed as to petitioner. 149 F. 2d 98. Accepting the District Court's conclusion

[1] Visual inspection would not have disclosed the defect.

that it was not negligent, the Court of Appeals was of the opinion that respondent should recover for the ship's lack of seaworthiness.[2] The opinion emphasized that the decision was novel, noting "statements and assumptions each way."[3] Because of the novelty and importance of the question we granted certiorari.[4] 326 U. S. 700.

The finding that the ship was unseaworthy is not disputed. Petitioner says, first, that the doctrine of unseaworthiness is peculiar to admiralty and cannot be applied in a suit brought on the law side of the court. It also urges that in any event the liability may not be extended properly to the benefit of stevedores and longshoremen. And finally petitioner argues that, if the doctrine is properly so applicable, its liability is only secondary to that of the Bethlehem companies, which both courts found to be negligent; and therefore petitioner, the nonnegligent defendant, should not be held "jointly" liable with the negligent ones.

At the outset we may dismiss the first contention. It is now well settled that a right peculiar to the law of admiralty may be enforced either by a suit in admiralty or by one on the law side of the court. *Carlisle Packing Co.* v.

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[2] The District Court found "that the accident occurred by reason of unseaworthiness of the vessel." 57 F. Supp. 724, 726.

[3] The references were to *W. J. McCahan Co.* v. *Stoffel*, 41 F. 2d 651, 654 (C. C. A. 3); *Cassil* v. *United States Emergency Fleet Corp.*, 289 F. 774 (C. C. A. 9), suggesting liability; and, to the contrary, *Panama Mail S. S. Co.* v. *Davis*, 79 F. 2d 430 (C. C. A. 3); *Bryant* v. *Vestland*, 52 F. 2d 1078 (C. C. A. 5); *Luckenbach S. S. Co.* v. *Buzynski*, 19 F. 2d 871 (C. C. A. 5), rev'd on another ground, 277 U. S. 226; *The Howell*, 273 F. 513 (C. C. A. 2); *The Student*, 243 F. 807 (C. C. A. 4); *Jeffries* v. *DeHart*, 102 F. 765 (C. C. A. 3); *The Mercier*, 5 F. Supp. 511, affirmed, 72 F. 2d 1008 (C. C. A. 9).

[4] See in addition to the authorities cited by the Circuit Court of Appeals, 149 F. 2d at 102; Decision (1945) 45 Col. L. Rev. 957; (1945) 59 Harv. L. Rev. 127; (1946) 19 Temp. L. Q. 336, 339.

Sandanger, 259 U. S. 255, 259; *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239, 243–244; *Thornes* v. *Socony-Vacuum Oil Co.,* 37 F. Supp. 616.[5]

Equally unavailable is the contention concerning the secondary character of petitioner's liability. That liability, if it exists, not only sounds in tort,[6] but rests upon an entirely different basis from that upon which recovery has been had against the Bethlehem companies. Such a liability therefore would be not joint but several and the judgment of the Court of Appeals obviously went on this view. Moreover the contention necessarily affects the Bethlehem companies, at any rate in relation to possible claim of indemnity by petitioner. They have not been named as respondents here or served in accordance with Rule 38 (3). Consequently we are precluded from making any determination concerning their rights or liabilities, with relation either to petitioner or to respondent.

The nub of real controversy lies in the question whether the shipowner's obligation of seaworthiness extends to longshoremen injured while doing the ship's work aboard but employed by an independent stevedoring contractor whom the owner has hired to load or unload the ship.

[5] Nothing in 28 U. S. C. § 41 (3) is to the contrary. The section provides that federal district courts shall have jurisdiction "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it . . . ." This does not mean that where suit is brought at law the court is restricted to the enforcement of common-law rights. *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372, 384; *Panama R. Co.* v. *Johnson,* 264 U. S. 375, 387–388; *Panama R. Co.* v. *Vasquez,* 271 U. S. 557, 560–561. "When a cause of action in admiralty is asserted in a court of law its substance is unchanged." *Panama Agencies Co.* v. *Franco,* 111 F. 2d 263, 266.

[6] Cf. text *infra; Cortes* v. *Baltimore Insular Line,* 287 U. S. 367; *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52.

There could be no question of petitioner's liability for respondent's injuries, incurred as they were here, if he had been in petitioner's employ rather than hired by the stevedoring company. That an owner is liable to indemnify a seaman for an injury caused by the unseaworthiness of the vessel or its appurtenant appliances and equipment has been settled law in this country ever since *The Osceola*, 189 U. S. 158. *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, 99, and authorities cited. And the liability applies as well when the ship is moored at a dock as when it is at sea. See, *e. g.*, *The Edith Godden*, 23 F. 43; *Wm. Johnson & Co.* v. *Johansen*, 86 F. 886; *The Waco*, 3 F. 2d 476.

Petitioner insists, however, that the obligation flows from, and is circumscribed by the existence of, the contract between the owner of the vessel and the seaman. Accordingly, since there was no such contract here, it says respondent cannot recover. Respondent is equally insistent that the owner cannot slough off liability to those who do the vessel's work by bringing an intermediary contracting employer between himself and those workers. In respondent's view the liability is an incident of the maritime service rendered, not merely of the immediate contractual relation of employment, and has its roots in the risks that service places upon maritime workers and in the policy of the law to secure them indemnity against such hazards.

Obviously the norm of the liability has been historically and still is the case of the seaman under contract with the vessel's owner. This is because the work of maritime service has been done largely by such persons. But it does not follow necessarily from this fact that the liability either arose exclusively from the existence of a contractual relation or is confined to situations in which one exists.

The origins are perhaps unascertainable.[7] But that fact in itself may be some evidence that contract alone is neither the sole source of the liability nor its ultimate boundary. For to assume this would be at once to project ideas of contract backward into centuries governed more largely than our own by notions of status,[8] and to exclude from the protection all who do the work of the sea without benefit of contract with the owner. It may be doubted, for example, that he has ever been able to escape liability to impressed seamen, in whose cases to speak of "contract" would only rationalize a responsibility imposed regardless of consensual relationship. And it would hardly seem consistent with the obligation's benevolent purposes [9] that

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[7] It has been suggested that "the seaman's right of indemnity for injuries caused by defective appliances or unseaworthiness seems to have been a development from his privilege to abandon a vessel improperly fitted out." *The Arizona* v. *Anelich*, 298 U. S. 110, 121, note 2; *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, 99; cf. *The Osceola*, 189 U. S. 158.

It does not follow that the right of abandonment would not exist if the seaman were hired by another at the instance of the vessel's owner, and no decision to which we have been referred so holds.

[8] See Maine, Ancient Law (1861). For a modern criticism, see Pound, Interpretations of Legal History (1930) 53 *et seq.*

[9] An excellent summary is given by Parker, J., in *The State of Maryland*, 85 F. 2d 944, 945:

> "Seamen are the wards of admiralty, and the policy of the maritime law has ever been to see that they are accorded proper protection by the vessels on which they serve. In early days, this protection was sufficiently accorded by the enforcement of the right of 'maintenance and cure.' Vessels and their appliances were of comparatively simple construction, and seamen were in quite as good position ordinarily to judge of the seaworthiness of a vessel as were her owners . . . .
>
> "With the advent of steam navigation, however, it was realized, at least in this country, that 'maintenance and cure' did not afford to injured seamen adequate compensation in all cases for injuries

the owner might nullify it by the device of having all who man the ship hired by others willing to furnish men for such service at sea or ashore.

It is true that the liability for unseaworthiness is often said to be an incident of the seaman's contract. But in all instances which have come to our attention this has been in situations where such a contract existed.[10] Necessarily

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sustained. Vessels were no longer the simple sailing ships, of whose seaworthiness the sailor was an adequate judge, but were full of complicated and dangerous machinery, the operation of which required the use of many and varied appliances and a high degree of technical knowledge. The seaworthiness of the vessel could be ascertained only upon an examination of this machinery and appliances by skilled experts. It was accordingly held that the duty of the vessel and her owners to the seaman, in this new age of navigation, extended beyond mere 'maintenance and cure,' which had been sufficient in the simple age of sailing ships; that the owners owed to the seamen the duty of furnishing a seaworthy vessel and safe and proper appliances in good order and condition; and that for failure to discharge such duty there was liability on the part of the vessel and her owners to a seaman suffering injury as a result thereof. The Osceola, 189 U. S. 158, 175 . . . . In the Edith Godden (D. C.) 23 F. 43, 46, which dealt with the case of a seaman injured by a defective derrick, Judge Addison Brown pointed out that in dealing with injuries sustained by the use of modern appliances 'it is more reasonable and equitable to apply the analogies of the municipal law in regard to the obligation of owners and masters, rather than to extend the limited rule of responsibility under the ancient maritime law to these new, modern conditions, for which those limitations were never designed.' "

See, in addition to the cited opinion of Judge Brown, his opinion in *The City of Alexandria,* 17 F. 390. See also *Storgard* v. *France & Canada S. S. Corp.,* 263 F. 545, 547–548; *The H. A. Scandrett,* 87 F. 2d 708, 711.

[10] In all of the cases cited or found, except perhaps the stevedore cases cited in note 3, where the cause of action has been based upon unseaworthiness, there was a contract. The "implied warranty" on the part of a shipowner that a ship is seaworthy has been read not only into contracts made with seamen, *Hamilton* v. *United States,* 268 F.

in such a setting the statement could have no reference to any issue over liability in the absence of such a contractual relation. Its function rather has been to refute other suggested restrictions which might be held to apply on the facts. Most often perhaps these have been limitations arising from the erroneous idea that the liability is founded in negligence and therefore may be defeated by the common-law defenses of contributory negligence, assumption of risk and the fellow-servant rule. *Mahnich* v. *Southern S. S. Co., supra;* cf. *Carlisle Packing Co.* v. *Sandanger,* 259 U. S. 255.

Because rationalizing the liability as one attached by law to the relation of shipowner and seaman, where this results from contract, may have been thought useful to negative the importation of those common-law tort limitations does not mean, however, that the liability is itself contractual or that it may not extend to situations where the ship's work is done by others not in such an immediate relation of employment to the owner. That the liability may not be either so founded or so limited would seem indicated by the stress the cases uniformly place upon its relation, both in character and in scope, to the hazards of marine service which unseaworthiness places on the men who perform it. These, together with their helplessness to ward off such perils and the harshness of forcing them to shoulder alone the resulting personal disability and loss, have been thought to justify and to require putting their burden, in so far as it is measurable in money, upon the

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15, 21, but also into contracts for the carriage of goods by sea, *Bradley Fertilizer Co.* v. *The Edwin I. Morrison,* 153 U. S. 199, 210–211, although this liability has been modified by the Harter Act, 27 Stat. 445, 46 U. S. C. §§ 189–195; and in rare instances perhaps also into contracts with passengers, cf. *Muise* v. *Gorton-Pew Vessels Co.,* 1938 A. M. C. 714, 718; *Rainey* v. *New York & P. S. S. Co.,* 216 F. 449, 453; Robinson, Admiralty (1939) 306, note 109.

owner regardless of his fault.[11] Those risks are avoidable by the owner to the extent that they may result from negligence. And beyond this he is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost.

These and other considerations arising from the hazards which maritime service places upon men who perform it, rather than any consensual basis of responsibility, have been the paramount influences dictating the shipowner's liability for unseaworthiness as well as its absolute character. It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. *Mahnich* v. *Southern S. S. Co., supra; Atlantic Transport*

[11] Contributory negligence has never been a defense in suits brought by seamen to recover for injuries due to a ship's unseaworthiness but has been applied merely in mitigation of damages. *Socony-Vacuum Oil Co.* v. *Smith,* 305 U. S. 424, 429; *The Arizona* v. *Anelich,* 298 U. S. 110, 122, and cases cited. And in *The Max Morris,* 137 U. S. 1, the Court held that in a suit for personal injuries brought in admiralty by a stevedore the admiralty rule of divided damages was applicable. It was said in *The Arizona* v. *Anelich,* at 122–123, with respect to the defense of assumption of risk: "The seaman assumes the risk normally incident to his perilous calling . . ., but it has often been pointed out that the nature of his calling, the rigid discipline to which he is subject, and the practical difficulties of his avoiding exposure to risks of unseaworthiness and defective appliances, make such a defense . . . peculiarly inapplicable to suits by seamen to recover for the negligent failure to provide a seaworthy ship and safe appliances." As to the fellow-servant rule, see *Mahnich* v. *Southern S. S. Co.,* 321 U. S. 96, 100–103; *The Frank and Willie,* 45 F. 494, 495–496.

In this connection is pertinent also the frequently stated rule that the obligation of a shipowner to provide a seaworthy ship is nondelegable. See, e. g., Lord and Sprague, Cases on the Law of Admiralty (1926) 237, note 4; *The Rolph,* 299 F. 52, 55; *Globe S. S. Co.* v. *Moss,* 245 F. 54, 55.

Co. v. *Imbrovek*, 234 U. S. 52; *Carlisle Packing Co.* v. *Sandanger, supra.* It is a form of absolute duty owing to all within the range of its humanitarian policy.

On principle we agree with the Court of Appeals that this policy is not confined to seamen who perform the ship's service under immediate hire to the owner, but extends to those who render it with his consent or by his arrangement. All the considerations which gave birth to the liability and have shaped its absolute character dictate that the owner should not be free to nullify it by parcelling out his operations to intermediary employers whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection. The risks themselves arise from and are incident in fact to the service, not merely to the contract pursuant to which it is done. The brunt of loss cast upon the worker and his dependents is the same, and is as inevitable, whether his pay comes directly from the shipowner or only indirectly through another with whom he arranges to have it done. The latter ordinarily has neither right nor opportunity to discover or remove the cause of the peril and it is doubtful, therefore, that he owes to his employees, with respect to these hazards, the employer's ordinary duty to furnish a safe place to work, unless perhaps in cases where the perils are obvious or his own action creates them.[12] If not, no

[12] In *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, the stevedoring company was held liable to its employee for negligence in failing to furnish a safe place to work. This consisted in its failure to secure properly a beam which supported hatch covers removed by it in the loading process. The libelant joined the shipowner with the stevedoring contractor, both being represented by the same proctors and advocates. The stevedoring company acquitted the shipowner and the libel was dismissed as to it. The case, in view of these circumstances, is not authority for the view that the stevedoring company is liable to the stevedore, under the employer's obligation to furnish a safe

such obligation exists unless it rests upon the owner of the ship. Moreover, his ability to distribute the loss over the industry is not lessened by the fact that the men who do the work are employed and furnished by another. Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew. *Florez* v. *The Scotia*, 35 F. 916; *The Gilbert Knapp*, 37 F. 209, 210; *The Seguranca*, 58 F. 908, 909. That the owner seeks to have it done with the advantages of more modern divisions of labor does not minimize the worker's hazard and should not nullify his protection.

Every consideration, therefore, giving rise to the liability and shaping its character bespeaks inclusion of men intermediately employed to do this work, save only that which is relevant to consent as a basis for responsibility. We do not think this is the ultimate basis of the liability where the seaman hired by the vessel does the work. It is only the source of the relation which furnishes the occasion for the liability, attached by law to performance of the service, to come into play. Not the owner's consent to liability, but his consent to performance of the service defines its boundary. That this is given by contract with the worker's employer rather than with the worker himself does not defeat the responsibility.

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working place, for the hazards secured against by the shipowner's obligation of seaworthiness. It holds only that the stevedoring company is liable for its own negligence.

It has frequently been said that a shipowner owes to stevedores the duty of providing a safe place to work, see, e. g., *The Joseph B. Thomas*, 86 F. 658, 660; *The No. 34*, 25 F. 2d 602, 604, but cf. *Willis* v. *Lykes Bros. S. S. Co.*, 23 F. 2d 488, 489, although the duty has at times been qualified by statements that it does not extend to latent defects that "a reasonable inspection by the shipowner or his agents would not show." *Wholey* v. *British & Foreign S. S. Co.*, 158 F. 379, 380, affirmed, 171 F. 399.

Accordingly we think the Court of Appeals correctly held that the liability arises as an incident, not merely of the seaman's contract, but of performing the ship's service with the owner's consent. For this view, in addition to the stated considerations of principle, the court rightly found support in the trend and policy of this Court's decisions, especially in *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50; *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52; and *Uravic* v. *Jarka Co.,* 282 U. S. 234.

The *Haverty* case is of special importance. The Court of Appeals said, with reference to its bearing and that of the *Imbrovek* decision: "And so an injury to a stevedore comes within the classification of a marine tort. Atlantic Transport Co. v. Imbrovek, 234 U. S. 52. It seems, therefore, that when a man is performing a function essential to maritime service on board a ship the fortuitous circumstances of his employment by the shipowner or a stevedoring contractor should not determine the measure of his rights. This is the very basis on which the Jones Act [13] was held applicable to give redress to an injured stevedore in International Stevedoring Co. v. Haverty . . . ." 149 F. 2d 98, 101.

The conclusions are sound, notwithstanding the cases are distinguishable in their specific rulings. From that fact it does not follow that either those rulings or the grounds upon which they went are irrelevant or without force for our problem. It is true that negligence was the basis of recovery in both cases and that in each the stevedoring contractor was held responsible. But it was of the gist of the jurisdictional question presented by the libel

[13] Merchant Marine Act of 1920, 41 Stat. 1007, 46 U. S. C. § 688, extending to "seamen" the benefits of the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.*

in *Imbrovek* [14] that stevedores injured while working aboard the ship, though not employed by its owner, are within the traditional protections afforded to seamen by admiralty and that "the fortuitous circumstance" of their employment by one other than the owner to do the ship's work not only did not remove them from those protections, but brought their employers within the protection of the liability to supply them.[15]

The same underlying considerations were controlling in the *Haverty* decision, although the liability asserted arose under an Act of Congress and the Court cast its ruling in terms of legislative intent. The only fulcrum for its action was the statute's undefined use of the term "seamen" in conferring the right of recovery under the Federal Employers' Liability Act for the employer's negligence. 41 Stat. 988, 1007. Recognizing that for most purposes "stevedores are not 'seamen,' " [16] and relying upon *Imbro-*

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[14] It was argued that the wrong, although taking place aboard ship in navigable waters, was not of maritime character and hence not within the admiralty jurisdiction of the District Court.

[15] In answer to the contention that the service was not maritime and hence the independently employed stevedore's claim was not within the admiralty jurisdiction, the Court said: "Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners'." 234 U. S. 52, 61–62.

[16] The Court of Appeals in this case likewise carefully limited its ruling in recognition of the fact that stevedores are not entitled to all the protections a seaman may claim.

It is in relation to liability for personal injury or death arising in the course of his employment aboard the ship that the policy of our law has been most favorable to the stevedore's claims. Whether or not that policy has been influenced by the vicissitudes experienced in

vek, the Court again stressed that "the work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew," and that the statute's policy was to afford compensation for injuries "as properly part of the cost of the business," that is, of the maritime service rendered, rather than by the capricious circumstance of employment "by a stevedore rather than by the ship." And the *Uravic* decision rejected an equally capricious discrimination based upon the nationality of the vessel's flag.

Running through all of these cases, therefore, to sustain the stevedore's recovery is a common core of policy which has been controlling, although the specific issue has varied from a question of admiralty jurisdiction to one of coverage under statutory liability within the admiralty field. It is that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner.[17] For these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards. Moreover, to make the policy effective, his employer is brought within the liability which is peculiar to the employment relation to the extent that and because he also undertakes the service of the ship.

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finding protection for him as a result of the *Jensen* decision, 244 U. S. 205; *Davis* v. *Department of Labor,* 317 U. S. 249, 252–253, the reasons underlying the policy are perhaps more nearly identical in this application, as between seamen and longshoremen, than those supporting other rights of the seaman, such as that to maintenance and cure.

[17] In this case we are not concerned with the question whether the same policy extends to injuries incurred ashore by a stevedore engaged in the same work, a matter which is relevant however in *Swanson* v. *Marra Brothers, Inc., ante,* p. 1. Cf. *O'Donnell* v. *Great Lakes Co.,* 318 U. S. 36.

It would be anomalous if such a policy, effective to control such issues, were less effective when the question is simply whether the stevedore is entitled to the traditional securities afforded by the law of the sea to men who do the ship's work. Nor does it follow from the fact that the stevedore gains protections against his employer appropriate to the employment relation as such, that he loses or never acquires against the shipowner the protections, not peculiar to that relation, which the law imposes as incidental to the performance of that service. Among these is the obligation of seaworthiness. It is peculiarly and exclusively the obligation of the owner. It is one he cannot delegate.[18] By the same token it is one he cannot contract away as to any workman within the scope of its policy. As we have said, he is at liberty to conduct his business by securing the advantages of specialization in labor and skill brought about by modern divisions of labor. He is not at liberty by doing this to discard his traditional responsibilities. That the law permits him to substitute others for responsibilities peculiar to the employment relation does not mean that he can thus escape the duty it imposes of more general scope. To allow this would be, in substantial effect, to convert the ancient liability for maritime tort into a purely contractual responsibility. This we are not free to do.

It remains to consider one other argument, namely, that the *Haverty* decision has been overruled, in effect, by the enactment of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U. S. C. § 901 ff., and therefore the effect of that decision as furnishing any support for including longshoremen within the owner's obligation of seaworthiness has been

[18] See note 11.

nullified. The argument is that by giving longshoremen the rights of compensation afforded by that Act against the employer and making them exclusive, Congress has withdrawn from them not only the protections gained by virtue of the Merchant Marine Act of 1920 under the *Haverty* decision, but also all other protections relating to personal injury which otherwise might be available to them under the general maritime law. In other words, it is claimed that the remedies afforded by the Longshoremen's legislation are exclusive of all other remedies for injuries incurred aboard ship, whether against the employer or others.

This view cannot be accepted. Apart from the fact that the *Uravic* decision was rendered by a unanimous Court some three years after the Longshoremen's and Harbor Workers' Act was adopted, with a like result in *Jamison* v. *Encarnacion,* 281 U. S. 635,[19] the compelling answer is that Congress by that Act not only did not purport to make the stevedore's remedy for compensation against his employer exclusive of remedies against others. It expressly reserved to the stevedore a right of election to proceed against third persons responsible for his injury [20] and, in case of his election to receive compensation, it provided for assignment of his rights against third persons to his employer, binding the latter to remit to him any

[19] Both cases were determined on facts which arose prior to enactment of the statute.

[20] Section 33 (a) of the Act provides: "If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person." 44 Stat. 1440, 33 U. S. C. § 933 (a).

excess of the recovery over the compensation, expenses of recovery, etc.[21]

We may take it therefore that Congress intended the remedy of compensation to be exclusive as against the employer. See *Swanson* v. *Marra Brothers, Inc., ante,* p. 1; 33 U. S. C. § 905. But we cannot assume, in face of the Act's explicit provisions, that it intended this remedy to nullify or affect others against third persons. Exactly the opposite is true. The legislation therefore did not nullify any right of the longshoreman against the owner of the ship, except possibly in the instance, presumably rare, where he may be hired by the owner. The statute had no purpose or effect to alter the stevedore's rights as against any but his employer alone. Beyond that consequence, moreover, we think it had none to alter either the basic policy or the rationalization of the *Haverty* decision. Because the recovery under the Merchant Marine Act of 1920 was limited to the employer, the necessary effect of the Longshoremen's and Harbor Workers' Act, likewise so limited, was to substitute its remedy for that provided under the preexisting legislation and the *Haverty* decision's construction of it. There was none to nullify the basic and generally applicable policy of that decision or to affect the validity of its foundations in other applications.

It may be added that, beyond the applicability of those considerations to sustain the stevedore's right of recovery

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[21] See 33 U. S. C. §§ 933 (b) to (g) inclusive. As to the right of election and the right to receive compensation or the amount of the recovery against third persons, whichever is greater, see *Chapman* v. *Hoage,* 296 U. S. 526, 529; *Marlin* v. *Cardillo,* 95 F. 2d 112; *Grasso* v. *Lorentzen,* 149 F. 2d 127; *The Pacific Pine,* 31 F. 2d 152; *Cupo* v. *Isthmian S. S. Co.,* 56 F. Supp. 45.

The statute did not cover members of a crew of a vessel, thereby saving to them their preexisting rights under the Merchant Marine Act of 1920. 33 U. S. C. § 902 (3). See *South Chicago Coal & Dock Co.* v. *Bassett,* 309 U. S. 251, 256–257.

for breach of the owner's obligation of seaworthiness, are others to support the statutory policy of giving his employer recovery over against the owner when the latter's breach of duty casts upon the employer the burden of paying compensation. These may furnish additional reason for our conclusion. With them however we are not immediately concerned.

The judgment is

Affirmed.

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

MR. CHIEF JUSTICE STONE, dissenting.

MR. JUSTICE FRANKFURTER, MR. JUSTICE BURTON and I think the judgment should be reversed.

Respondent, the employee of a stevedoring company, which had contracted with petitioner to load its vessel lying in navigable waters, was injured while so employed, in consequence of the failure of a shackle, a part of the ship's tackle, due to its hidden defects. The courts below have found that two other defendants were liable for negligence in furnishing the defective shackle. The courts were unable to find that the injury was attributable to any negligent act or omission of the vessel or its owner. But the Court of Appeals below and this Court have sustained a recovery against petitioner on the novel ground that the owner is an insurer against injury caused by the unseaworthiness of the vessel or its appliances to a maritime worker on board, although not a member of the crew or the ship's company, and not employed by the vessel.

The Court has thus created a new right in maritime workers, not members of the crew of a vessel, which has not hitherto been recognized by the maritime law or by any statute. For this I can find no warrant in history or precedent, nor any support in policy or in practical needs.

The liability of a vessel or its owner to members of the crew, as an insurer of seaworthiness of the vessel and its tackle, was not recognized by the maritime law of England until established by statute. Merchant Shipping Act, 39 & 40 Vict. c. 80, § 5; 57 & 58 Vict. c. 60, § 458. In this country the right of the seaman to demand, in addition to maintenance and cure, indemnity for injuries resulting from unseaworthiness, was first recognized by this Court in *The Osceola,* 189 U. S. 158. In later cases it has been established that due diligence of the owner does not relieve him from this obligation. See *The Arizona* v. *Anelich,* 298 U. S. 110, 121; *Socony-Vacuum Co.* v. *Smith,* 305 U. S. 424, 429, 432; *Mahnich* v. *Southern S. S. Co.,* 321 U. S. 96, 100, and cases cited; *The Neptuno,* 30 F. 925; *The Frank & Willie,* 45 F. 494; *The Julia Fowler,* 49 F. 277; cf. *The Edwin I. Morrison,* 153 U. S. 199, 210.

The liability of the vessel or owner for maintenance and cure, regardless of their negligence, was established long before our modern conception of contract. But it, like the liability to indemnify the seaman for injuries resulting from unseaworthiness, has been universally recognized as an obligation growing out of the status of the seaman and his peculiar relationship to the vessel, and as a feature of the maritime law compensating or offsetting the special hazards and disadvantages to which they who go down to sea in ships are subjected. They are exposed to the perils of the sea and all the risks of unseaworthiness, with little opportunity to avoid those dangers or to discover and protect themselves from them or to prove who is responsible for the unseaworthiness causing the injury.

For these reasons the seaman has been given a special status in the maritime law as the ward of the admiralty, entitled to special protection of the law not extended to land employees. *Robertson* v. *Baldwin,* 165 U. S. 275, 282–3; *The Arizona* v. *Anelich, supra,* 122, 123; *Calmar*

S. S. Corp. v. *Taylor*, 303 U. S. 525; *Socony-Vacuum Co.* v. *Smith, supra*, 430; *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724. See also Judge Addison Brown in *The City of Alexandria*, 17 F. 390, 394, *et seq.* Justice Story said in *Reed* v. *Canfield*, Fed. Cas. No. 11,641, 1 Sumn. 195, 199: "Seamen are in some sort co-adventurers upon the voyage; and lose their wages upon casualties, which do not affect artisans at home. They share the fate of the ship in cases of shipwreck and capture. They are liable to different rules of discipline and sufferings from landsmen. The policy of the maritime law, for great, and wise, and benevolent purposes, has built up peculiar rights, privileges, duties, and liabilities in the sea-service, which do not belong to home pursuits."

It is for these reasons that throughout the long history of the maritime law the right to maintenance and cure, and later the right to indemnity for injuries attributable to unseaworthiness, have been confined to seamen. Longshoremen and harbor workers are in a class very different from seamen, and one not calling for the creation of extraordinary obligations of the vessel or its owner in their favor, more than other classes of essentially land workers. Unlike members of the crew of a vessel they do not go to sea; they are not subject to the rigid discipline of the sea; they are not prevented by law or ship's discipline from leaving the vessel on which they may be employed; they have the same recourse as land workers to avoid the hazards to which they are exposed, to ascertain the cause of their injury and to prove it in court.

Congress has recognized this difference in their status from that of seamen. Although it has given extensive consideration to it in enacting the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 ff., in 1927, and again, upon its revision in 1934 and 1938, in no instance did Congress extend to longshoremen and

harbor workers any of the special rights or privileges conferred on seamen by the maritime law. In fact Congress, by the Longshoremen's Act, cut off from longshoremen and harbor workers the right extended to them by judicial construction of the Jones Act, 46 U. S. C. § 688, *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50; *Uravic* v. *Jarka Co.*, 282 U. S. 234, to enjoy the same right of recovery from the vessel or owner as seamen for negligent injuries sustained while working on navigable waters. *Swanson* v. *Marra Brothers, ante*, p. 1. While the Act gave to longshoremen and stevedores a right to compensation against their employer, it neither conferred upon nor withheld from them any rights of recovery for such injuries against third persons. It can hardly be said that the failure of Congress thus to enlarge the rights of longshoremen, so as to make them comparable to those of seamen, is a recognition of existing rights against third persons arising from the warranty of seaworthiness which no court has ever recognized* and which grows out of a status which longshoremen have never occupied.

There are no considerations of policy or practical need which should lead us, by judicial fiat, to do that which Congress, after a full study of the subject, has failed to do. Wherever the injury occurs on navigable waters, Congress has given to longshoremen and harbor workers substantial rights to compensation against their employer for in-

*The two cases relied upon by the Circuit Court of Appeals do not lend support to its decision. In *Cassil* v. *United States Emergency Fleet Corp.*, 289 F. 774, recovery was sought on the ground that the vessel was negligent, and the court merely said that there could be no claim against the vessel unless it was unseaworthy. The court seems to have assumed that a recovery for unseaworthiness could be had only if negligence was shown. See cases cited in *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, 100. In *W. J. McCahan Co.* v. *Stoffel*, 41 F. 2d 651, a longshoreman was allowed recovery on the ground of negligence of one of the ship's employees.

juries inflicted without his fault. *South Chicago Co.* v. *Bassett,* 309 U. S. 251. It has left them free to pursue their remedy for injuries resulting from negligence of third parties, including in this case the vessel and the furnishers of the defective shackle. Where the injury occurs on land they are free to pursue the remedy afforded by local law. *State Industrial Commission* v. *Nordenholt Corp.,* 259 U. S. 263; *Smith & Son* v. *Taylor,* 276 U. S. 179; *Swanson* v. *Marra Brothers, ante,* p. 1. There would seem to be no occasion for us to be more generous than Congress has been by presenting to them paid-up accident insurance policies at the expense of a vessel by which they have not been employed, and which has not failed in any duty of due care toward them. Apparently under the decision now rendered the maritime worker employed by a vessel on navigable waters, but not a member of the crew, would enjoy rights of recovery not accorded to members of the crew. For he would be entitled to indemnity upon the warranty of seaworthiness as are members of the crew and also to the benefits of the Longshoremen's and Harbor Workers' Act from which members of the crew are excluded. See *South Chicago Co.* v. *Bassett, supra,* 255–6.

Nor is the rule now announced to be justified as a modern and preferred mode of distributing losses inflicted without fault. Congress, in adopting the Longshoremen's Act, has chosen the mode of distribution in the case of longshoremen and harbor workers. By 33 U. S. C. § 901 *et seq.* it has given to them compensation for their injuries, irrespective of fault. Section 933 provides that if a stevedore entitled to compensation elects to recover damages against a third person, the employer must pay as compensation a sum equal to the excess of the amount which the commission determines is payable on account of the injury over the amount recovered against the third person.

The whole philosophy of liability without fault is that losses which are incidental to socially desirable conduct should be placed on those best able to bear them. Congress has made a determination that the employer is best able to bear the loss which, in this instance, could not be avoided by the exercise of due care. This is an implied determination which should preclude us from saying that the ship owner is in a more favorable position to absorb the loss or to pass it on to society at large, than the employer.

D. A. SCHULTE, INC. *v.* GANGI ET AL.

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

No. 517. Argued March 1, 1946.—Decided April 29, 1946.

1. An employer can not be relieved from liability for liquidated damages under § 16 (b) of the Fair Labor Standards Act by a compromise or settlement of a bona fide dispute as to the coverage of the Act. P. 114.
2. The purpose of the Fair Labor Standards Act—to secure a subsistence wage for low-income workers—requires that neither wages nor the damages for withholding them be reducible by compromise of controversies over coverage. Pp. 116–118, 121.
3. Maintenance employees of a building the occupants of which receive, work on and return in intrastate commerce goods belonging to non-occupants who subsequently in the regular course of their business ship substantial proportions of the occupants' products to other States, *held* covered by the Fair Labor Standards Act. P. 120.
4. The burden of proof that rests upon employees to establish that they are engaged in the production of goods for commerce, within the coverage of the Fair Labor Standards Act, must be met by evidence in the record. P. 120.
5. In determining whether employees are engaged in the "production of goods for commerce," within the meaning of the Fair Labor Standards Act, it is sufficient that, from the circumstances of production,

a trier of fact may reasonably infer that the employer has reasonable grounds to anticipate that his products will move in interstate commerce. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, distinguished. Pp. 119, 121.

6. Mere separation of the economic processes of production for commerce between different industrial units, even without any degree of common ownership, does not destroy the continuity of production for commerce. P. 121.

150 F. 2d 694, affirmed.

Respondent, suing on behalf of himself and other employees similarly situated, brought suit against his employer to recover liquidated damages under § 16 (b) of the Fair Labor Standards Act. The District Court held that the liability of the employer had been validly released. 53 F. Supp. 844. The Circuit Court of Appeals reversed. 150 F. 2d 694. This Court granted certiorari. 326 U. S. 712. *Affirmed*, p. 121.

Edwin A. Falk argued the cause for petitioner. With him on the brief was *Abraham Friedman.*

Isidore Entes argued the cause and filed a brief for respondent.

Solicitor General McGrath, William S. Tyson, Bessie Margolin and *Joseph M. Stone* filed a brief for the Administrator of the Wage and Hour Division, United States Department of Labor, as *amicus curiae,* urging affirmance.

MR. JUSTICE REED delivered the opinion of the Court.

The issues brought to this Court by this proceeding arise from a controversy concerning overtime pay and liquidated damages under the Fair Labor Standards Act of 1938. Under § 7 (a), the employer is required to pay for

excess hours of work not less than one and one-half times the regular rate.[1] An employer who violates this subsection is liable to his injured employees in the amount due and unpaid and in an additional equal amount as liquidated damages.[2]

The primary issue presented by the petition for certiorari is whether the Fair Labor Standards Act precludes a bona fide settlement of a bona fide dispute over the coverage of the Act on a claim for overtime compensation and liquidated damages where the employees receive the overtime compensation in full. As the conclusion of the Circuit Court of Appeals on this issue in this case[3] conflicts with that of the Fourth Circuit in *Guess* v.

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[1] 52 Stat. 1063:

"SEC. 7. (a) No employer shall . . . employ any of his employees who is engaged in commerce or in the production of goods for commerce—[longer than the maximum workweek]

. . . . . .

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."

[2] 52 Stat. 1069:

"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."

[3] *Gangi* v. *D. A. Schulte*, 150 F. 2d 694. See also *Fleming* v. *Warshawsky & Co.*, 123 F. 2d 622, 626.

Montague, 140 F. 2d 500, 504–505, and the Fifth Circuit in *Atlantic Co.* v. *Broughton,* 146 F. 2d 480, we granted certiorari in order to determine the issue which was not passed upon in *Brooklyn Bank* v. *O'Neil,* 324 U. S. 697, 702–704, 708, note 21. 326 U. S. 712.[4]

Respondents were employed by petitioner as building service and maintenance employees in its twenty-three story loft building in the garment manufacturing district of New York City during the period October 24, 1938, to February 5, 1942. Each put in varying hours of overtime for which no payment had been made prior to our decision in *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, on June 1, 1942, by which service and maintenance employees in buildings tenanted by manufacturers producing for interstate commerce were held to be covered by the Wage-Hour Act. Shortly thereafter respondents made claims for overtime pay and liquidated damages which were refused by petitioner on the ground, admittedly true, that its tenants did not ship the products they produced directly in interstate commerce but delivered them to distributors or producers in the same state who thereafter used the products of petitioner's tenants for interstate commerce or the production of goods for that commerce. Under threat of suit, petitioner paid the overtime compensation and obtained a release under seal signed by the

[4] In view of the number of settlements for violations, the issue is of importance. See Annual Report, Wage and Hour and Public Contracts Divisions, U. S. Department of Labor, fiscal year ending June 30, 1945, p. 2:

> "In the six years and nine months that the Fair Labor Standards Act had been in force through the end of the fiscal year, about $85,000,000 in restitution of illegally withheld wages had been agreed to or ordered paid to almost two and a half million workers in more than 110,000 establishments, with more than two-fifths of the cases involving failure to pay the minimum wage of 40 cents an hour or less."

several respondents. It is set out below.[5] Petitioner computed the amount of overtime and respondents raise no question as to its accuracy. Respondents then brought this suit in the District Court to recover liquidated damages due them under § 16 (b) of the Act. It was stipulated that the liquidated damages, due if recoverable, were certain stated amounts which corresponded to the overtime compensation already paid. Petitioner denied that it was covered by the Act and pleaded affirmatively, as a defense, the releases which it asserted were obtained in settlement of a bona fide dispute as to coverage.

The District Court held that there was a good accord and satisfaction and release of all claims for liquidated damages because there was a bona fide settlement of a bona fide dispute. It specifically refused to pass upon the defense that the Act did not cover the respondents except to indicate that it presented a difficult issue. 53 F. Supp. 844. This judgment was entered prior to our decision in the *O'Neil* case. The Circuit Court of Appeals reversed. That court thought the *O'Neil* case substantially determined that a bona fide compromise of a dispute as to coverage was invalid. Its conclusion as to the invalidity of such compromises was in accord with its prior comments that the liability of unpaid overtime compensation and liquidated damages is single and "is not discharged in toto by paying one-half of it." *Rigopoulos* v. *Kervan,* 140 F. 2d 506, 507; *Fleming* v. *Post,* 146 F. 2d 441, 443.

Petitioner urges that the theory of a single liability of the employer to the employee under § 16 (b) is unsound

[5] "The undersigned, an employee of D. A. Schulte, Inc., in premises 575 Eighth Avenue, New York City, does hereby acknowledge receipt of the sum of $..... as payment in full of all sums, if any, which may be due to the undersigned by said D. A. Schulte, Inc. by reason of the Federal Wage & Hour Act, and the undersigned does hereby release said D. A. Schulte, Inc. of and from any other or further obligations in connection therewith."

and that this Court should not find a lack of power in employers and employees to settle amicably controversies over coverage and amounts due for violations of the unpaid minimum wage or unpaid overtime compensation under §§ 6 and 7 of the Act. Petitioner reasons on its first contention that there were two claims—one for overtime compensation and the other for an equal amount as liquidated damages—and that the payment for the first in full was sufficient consideration for the release of the second. On its second contention, petitioner advances the argument that since the congressional intent to forbid compromises of such claims is not clear, such a sharp departure from the traditional policy of encouraging the adjustment instead of the litigation of disputes cannot be inferred from the purposes of the Act. Petitioner points out that a seaman may release his claims under statutes enacted for his protection in a bona fide settlement [6] and that settlement of accrued claims is permitted under the Federal Employers' Liability Act.[7] Petitioner adds that in doubtful cases it may be advantageous to the employee to compromise, that to force litigation may disrupt employer-employee relationships, and that numerous compromise settlements have been made for less than full liability.[8]

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[6] *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239.

[7] *Mellon* v. *Goodyear*, 277 U. S. 335.

[8] Attention is called by petitioner to the failure in this case of the Administrator of the Wage and Hour Division, United States Department of Labor, as amicus curiae, to take the position that compromise payments in cases of disputed coverage are invalid. The Administrator is charged with responsibility for the administration of the Act. Petitioner cites from the Administrator's brief (p. 20) in the *O'Neil* case to show the government position the following excerpt: "The factors which we have mentioned suggest, to us, the difficulty and perhaps the inadvisability from the standpoint of the policy of the

We do not find it necessary to determine whether the liability for unpaid wages and liquidated damages that § 16 (b) creates is unitary or divisible.[9] Whether the liability is single or dual, we think the remedy of liquidated damages cannot be bargained away by bona fide settlements of disputes over coverage. Nor do we need to consider here the possibility of compromises in other situa-

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Act of framing a sweeping generalization that all releases of liquidated damages are either valid or invalid." That brief called attention also (pp. 19–20) to government practice upon violations of the Act by contractors with cost-plus contracts with the War and Navy Departments:

> "If it is decided by the contracting agency, the Administrator, or on appeal by the Assistant Attorney General, that the employee should prevail, the United States Attorney handling the case is directed to negotiate a tentative settlement with the employee's counsel for submission to the contracting agency for acceptance or rejection. The wages due are of course always paid, but the claim for liquidated damages is the subject of bargaining, and almost invariably the employee's counsel is willing to accept considerably less than the total amount of liquidated damages. After payment of the amount agreed on, a judgment is entered dismissing the suit with prejudice, thereby preventing the employee from seeking to recover more on the same claim."

Settlements of controversies under the Act by stipulated judgments in this Court are also referred to by petitioner. *North Shore Corp.* v. *Barnett*, 323 U. S. 679.

Petitioner draws the inference that bona fide stipulated judgments on alleged Wage-Hour violations for less than the amounts actually due stand in no better position than bona fide settlements. Even though stipulated judgments may be obtained, where settlements are proposed in controversies between employers and employees over violations of the Act, by the simple device of filing suits and entering agreed judgments, we think the requirement of pleading the issues and submitting the judgment to judicial scrutiny may differentiate stipulated judgments from compromises by the parties. At any rate, the suggestion of petitioner is argumentative only as no judgment was entered in this case.

[9] See *Dize* v. *Maddrix*, 324 U. S. 697, 701–2, 713.

tions which may arise, such as a dispute over the number of hours worked or the regular rate of employment.[10]

The reasons which lead us to conclude that compromises of real disputes over coverage which do not require the payment in full of unpaid wages and liquidated damages do not differ greatly from those which led us to condemn the waivers of liquidated damages in the *O'Neil* case. We said there, 324 U. S. at 708:

> "The same policy which forbids waiver of the statutory minimum as necessary to the free flow of commerce requires that reparations to restore damage done by such failure to pay on time must be made to accomplish Congressional purposes. Moreover, the same policy which forbids employee waiver of the minimum statutory rate because of inequality of bargaining power, prohibits these same employees from bargaining with their employer in determining whether so little damage was suffered that waiver of liquidated damage is called for."

In a bona fide adjustment on coverage, there are the same threats to the public purposes of the Wage-Hour Act that exist when the liquidated damages are waived. The damages are at the same time compensatory and an aid to enforcement. It is quite true that the liquidated damage provision acts harshly upon employers whose violations are not deliberate but arise from uncertainties or mistakes as to coverage. Since the possibility of violations inheres in every instance of employment that is covered by the Act, Congress evidently felt it should not provide for variable compensation to fit the degree of blame in each infraction.[11] Instead Congress adopted a mandatory re-

[10] See *Strand* v. *Garden Valley Telephone Co.*, 51 F. Supp. 898, 904–5.

[11] *Brooklyn Savings Bank* v. *O'Neil, supra,* 713; *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 397; *Adkins* v. *Children's Hospital,* 261 U. S. 525, 563.

quirement that the employer pay a sum in liquidated damages equal to the unpaid wages so as to compensate the injured employee for the retention of his pay.[12]

It is realized that this conclusion puts the employer and his employees to an "all or nothing gamble," as Judge Chase phrased the result in his dissent below. Theoretically this means each party gets his just deserts, no more, no less. The alternative is to find in the Act an intention of Congress to leave the adjustments to bargaining at the worst between employers and individual employees or at best between employers and the employees' chosen representatives, bargaining agent or some other. We think the purpose of the Act, which we repeat from the *O'Neil* case was to secure for the lowest paid segment of the Nation's workers a subsistence wage, leads to the conclusion that neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage.[13] Such a compromise thwarts the public policy of minimum wages, promptly paid, embodied in the Wage-Hour Act, by reducing the sum selected by Congress as proper compensation for withholding wages.[14]

The only other material question presented by this certiorari [15] is whether the Wage-Hour Act covers service and

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[12] *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 583–84; *Birbalas* v. *Cuneo Printing Industries,* 140 F. 2d 826, 828–29.

[13] Discussions of compromise of liability under the Wage-Hour Act will be found in 45 Col. L. Rev. 798; 14 George Washington L. Rev. 385 and 57 Harv. L. Rev. 257.

[14] *Brooklyn Savings Bank* v. *O'Neil, supra,* 704–5, note 14.

[15] The precise language of the question presented is as follows:

"Whether building maintenance employees are within the protection of the Act if the facts relied on to establish coverage of the employees show only that some of the tenants in the building receive, work on and return in intrastate commerce goods belonging to local owners who are not tenants of the building and that subsequently some of the said goods are sold and shipped by such non-tenant owners in interstate commerce, there being no proof

maintenance employees of a building that is tenanted by occupants who receive, work on and return in intrastate commerce goods belonging to non-occupants who subsequently in the regular course of their business ship substantial proportions of the occupants' products to other states.[16] It is agreed by petitioner and respondents that if certain tenants are included as producers for interstate commerce the occupants of the building who are engaged in production for interstate commerce are sufficiently numerous and productive to bring the maintenance em-

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either that at the time of production such tenants had any knowledge of the ultimate destination of the goods worked on by them or that at the time of production the non-tenant owners had any prior orders or agreements to sell and ship any part of the completed goods in interstate commerce."

[16] No problem involving the soundness of the Wage-Hour standards to guide its enforcement of the Act is involved. We express no opinion on that question. As a working hypothesis the Wage-Hour Administration assumes that when as much as twenty per cent of a building is occupied by firms substantially engaged in production for commerce, then it is likely that maintenance employees will be covered. Release PR–19 (rev.), Nov. 19, 1943, Wage-Hour Division, U. S. Department of Labor. The Circuit Court of Appeals applied this rule with the result that it decided none of the respondents was covered by the Act prior to January 1, 1940. 150 F. 2d 694, 696–97. It decided that all the respondents were covered by the Act beginning January 1, 1940, because more than twenty per cent of the tenants then were engaged in the production of goods for commerce. No review of the first ruling is sought by respondents. Petitioner did not question the soundness of the twenty per cent standard in its petition for certiorari or brief.

As no question is made in petition for certiorari or brief as to the propriety of the action or the power of the Circuit Court of Appeals in determining the kind of activity, state or interstate, that the petitioner's tenants carried on, rather than returning the case to the District Court for a finding of fact, we pass the question without inquiry and without intimation of our understanding of the proper procedure. Compare the majority and dissenting opinions in 150 F. 2d 694.

ployees of the building within the coverage of the Act. *Gangi* v. *D. A. Schulte,* 150 F. 2d 694, note 5. That is, petitioner's building then would be in the same classification, so far as the coverage of its maintenance employees by the Wage-Hour Act is concerned, as were the buildings in *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, and *Borden Co.* v. *Borella,* 325 U. S. 679. We then would have no problem as to the business of the tenants, that is, whether they were producers for interstate commerce, such as was involved in *10 East 40th Street Co.* v. *Callus,* 325 U. S. 578. While the Wage-Hour Act covers employees engaged in the production of goods for commerce, a maintenance employee working for a building corporation which furnishes loft space to tenants can hardly be so engaged unless an adequate proportion of the tenants of that building are so engaged. *Kirschbaum Co.* v. *Walling,* 316 U. S. at 524; *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564, 572.

Our inquiry, therefore, is narrowed to a determination of whether or not these certain tenants of petitioner, twelve in number, are producing goods for interstate commerce. These tenants manufactured articles for non-tenant New York City business organizations, which organizations subsequently sold the articles in interstate commerce. The Circuit Court of Appeals held as to them, 150 F. 2d 697: [17]

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[17] Petitioner says as to this finding: "The sole basis in the record for this finding is that the manufacturers for whom the said twelve tenant-contractors worked eventually disposed of some of their goods in interstate commerce. No evidence was offered and no attempt was made to prove that at the time when any of the additional twelve tenants worked on goods belonging to the manufacturers, such manufacturers had an order or an agreement or contract for the shipment of the goods, when completed, in interstate commerce. There was no testimony by any of the twelve tenants that they knew or had reason

> "And the testimony clearly shows that at the time of production these tenants had at the very least reasonable grounds to anticipate that their products would move in other states. This is all that had to be shown to constitute them interstate producers. Warren-Bradshaw Drilling Co. v. Hall, 317 U. S. 88, 92; United States v. Darby, 312 U. S. 100, 118. . . ."

Petitioner asserts that for four of the twelve there was no evidence that any of them knew at the time of production or later that their products were to be shipped interstate and that the proper characterization of these four tenants, as producers or non-producers for interstate commerce, is decisive of the liability of petitioner. Without detailing the factual situation which makes the position of these four tenants decisive of liability, we assume petitioner's conclusion that its liability depends upon the proper characterization of the four tenants in respect to their position as producers for interstate commerce. We assume that the other eight are in the same category of tenants.

Petitioner relies upon *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 569, as indicating that evidence of a pre-existing understanding by a manufacturer of the interstate destination of his products is essential. But that case was concerned with whether a wholesaler's employees who handled stock were in commerce, not whether they were engaged in the production of goods for commerce.[18] On that basis distinctions were made, as to employees handling goods locally, between a wholesaler's stock pur-

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to believe that the goods worked on by them would be shipped in interstate commerce. In fact, there was no evidence, in the case of four of the twelve tenants, that any of them knew, either at the time of production or at any time thereafter, or even upon the trial, that the goods worked on by them were eventually shipped in interstate commerce."

[18] Compare *McLeod* v. *Threlkeld*, 319 U. S. 491.

chased on prior order extra-state for delivery intrastate and other stock purchased extra-state and warehoused for subsequent sale and local handling. We find nothing in the case that lends any support to the suggestion that a manufacturer's intrastate delivery to a wholesaler or distributor or other manufacturer for further processing for ultimate interstate distribution interrupts production for interstate commerce.

The burden of proof that rests upon employees to establish that they are engaged in the production of goods for commerce must be met by evidence in the record. *Warren-Bradshaw Drilling Co.* v. *Hall,* 317 U. S. 88, 90. The record shows this building is at 571–583 Eighth Avenue, Borough of Manhattan, City of New York. The testimony of many witnesses shows that the tenants were predominantly, if not entirely, engaged in work for the garment trades. We will take judicial notice, as a matter of common knowledge, that New York City produces more garments for interstate shipment than any other city in the Nation. Eleven of the twelve tenants were contractors who furnished labor on goods sent in to them so as to produce clothing articles eventually distributed in interstate commerce. The twelfth was a manufacturer with offices, salesroom and shipping rooms elsewhere in New York. There was no specific evidence that the four contractors, upon whose status petitioner bases his argument, ever knew that their goods were intended to be or eventually were shipped interstate. There is clear evidence that each business organization for which these four tenants did produce these clothing articles shipped a major proportion of the articles so produced by these tenants in interstate commerce in the regular course of their business. The production of these articles by the tenants for non-tenants was the regular business of the tenants. The shortest occupancy of space by any of the four was five years and eleven months.

From these facts, we think the conclusion of the Circuit Court of Appeals that these tenants had reasonable grounds to anticipate that material quantities of their production would move interstate is well supported. It is not essential that individual products should be traced. It is sufficient that, from the circumstances of production, a trier of fact may reasonably infer that a producer has grounds to anticipate that his products will move interstate.[19] Certainly if these tenants had not only manufactured but had also shipped their products interstate, no one would doubt that they were producers for commerce. Mere separation of the economic processes of production for commerce between different industrial units, even without any degree of common ownership, does not destroy the continuity of production for commerce. Producers may be held to know the usual routes for distribution of their products. All this is made plain by the citations of the Court of Appeals to the *Darby* and *Bradshaw* cases.

Affirmed.

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

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

Substantially for the reasons given by Judge Rifkind, 53 F. Supp. 844, I would restore his judgment in the District Court and reverse that of the Circuit Court of Appeals. For purposes of judicial enforcement, the "policy" of a statute should be drawn out of its terms, as nourished by their proper environment, and not, like nitrogen, out

[19] Compare *Dize* v. *Maddrix*, 144 F. 2d 584; *Culver* v. *Bell & Loffland*, 146 F. 2d 29; *St. John* v. *Brown*, 38 F. Supp. 385, 388; *Fleming* v. *Enterprise Box Co.*, 37 F. Supp. 331, aff'd 125 F. 2d 897; *Bracey* v. *Luray*, 138 F. 2d 8.

of the air. Before a hitherto familiar and socially desirable practice is outlawed, where overreaching or exploitation is not inherent in the situation, the outlawry should come from Congress. To that end, some responsibility at least for a broad hint to the courts, if not for explicitness, should be left with Congress.

When on other occasions Congress has desired to forbid arrangements made in good faith, it has known how to express its will. When it has not said so in words, it has said so in effect by the very thing it has required, as, for instance, when it made tariffs filed with the Interstate Commerce Commission the fixed measure of transportation charges and forbade discrimination. 24 Stat. 379, 380, as amended; 49 U. S. C. § 6 (7). Of course that precludes discrimination by contract. *E. g., Pittsburgh, C., C. & St. L. R. Co.* v. *Fink,* 250 U. S. 577. The Fair Labor Standards Act affords no comparable basis for the Court's decision in this case. Nothing is discernible in anything that Congress has said or done to imply the prohibition of a settlement made by parties in good faith, not for the minimum wages but a settlement affecting the penalizing double liability where any liability was fairly in controversy when the settlement was made. The severity of the penalties imposed and the legitimate differences regarding the scope of the Act, inherent in its terms, *cf. Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 520, 523, only serve to underline the impolicy of attributing to Congress a purpose reflected neither in any specific provision of the statute nor in the scheme of the legislation. Strict enforcement of the policy which puts beyond the pale of private arrangement minimum standards of wages and hours fixed by law does not call for disregard of another policy, that of encouraging amicable settlement of honest differences between men dealing at arm's length with one another.

Syllabus.

SMITH, TRUSTEE, ET AL. *v.* HOBOKEN RAILROAD, WAREHOUSE AND STEAMSHIP CONNECTING CO. ET AL.

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

No. 384. Argued December 11, 1945.—Decided April 29, 1946.

1. The provision of § 70 (b) of the Bankruptcy Act that "an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same shall be enforceable" is applicable to railroad reorganizations under § 77 of the Bankruptcy Act. Pp. 126–128.
2. The provision of § 70 (b) of the Bankruptcy Act, authorizing enforcement against a bankruptcy trustee of an express covenant of forfeiture, embraces a covenant applicable to any "transfer" of the premises "in any proceeding, whether at law or in equity or otherwise," to which the lessee is a party, and "whereby any of the rights, duties and obligations" of the lessee are "transferred, encumbered, abrogated or in any manner altered" without the lessor's consent. P. 128.
3. Whether, in a proceeding for reorganization of an interstate railroad under § 77 of the Bankruptcy Act, enforcement against the trustee of a covenant of forfeiture in a lease of railroad tracks and facilities would be "consistent with the provisions" of § 77, within the meaning of § 77 (l), presents problems primarily for consideration and decision by the Interstate Commerce Commission; and the reorganization court should not have declared a forfeiture of the lease until the questions had been passed upon by the Commission. Pp. 128–129.

   (a) Whether the public interest requires that the line be operated by the lessee rather than the lessor presents a question for the Commission under § 1 (18) of the Interstate Commerce Act. P. 130.

   (b) It is the function of the Commission under § 77 of the Bankruptcy Act to prepare the plan of reorganization of the debtor company; and, if the reorganization court decrees a forfeiture in advance of consideration of the problem by the Commission, it would interfere with the functions entrusted to the Commission under § 77. Pp. 130, 132.

150 F. 2d 921, reversed.

In proceedings for the reorganization of a railroad under § 77 of the Bankruptcy Act, the reorganization court granted respondent's motion to terminate a lease in which the debtor company was lessee. 56 F. Supp. 187. The Circuit Court of Appeals affirmed. 150 F. 2d 921. This Court granted certiorari. 326 U. S. 707. *Reversed*, p. 133.

James D. Carpenter argued the cause and filed a brief for Smith, Trustee, petitioner.

Parker McCollester argued the cause for the Hoboken Manufacturers Railroad Company et al., petitioners. With him on the brief was *Edward A. Markley.*

Edward J. O'Mara argued the cause for respondents. With him on the brief was *John J. Hickey.*

Solicitor General McGrath, Assistant Attorney General Berge, Edward Dumbauld, Daniel W. Knowlton and *Edward M. Reidy* filed a brief for the United States and the Interstate Commerce Commission, as *amici curiae.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Hoboken Manufacturers Railroad Co. (the debtor) operates a terminal switching railroad along the waterfront at Hoboken, New Jersey. It is a common carrier subject to the provisions of the Interstate Commerce Act. 24 Stat. 379, 41 Stat. 474, 49 Stat. 543, 54 Stat. 899, 49 U. S. C. § 1. The major part of its right-of-way and line of railroad is held by it under a 99-year lease from respondent dated June 19, 1906.[1] In 1943 the debtor filed a peti-

[1] The debtor has two additional pieces of land under 99-year leases, dated June 19, 1906, from the parent company of the respondent. By a tie-in indenture the debtor agreed that these leases should terminate

tion for reorganization under § 77 of the Bankruptcy Act (49 Stat. 1969, 53 Stat. 1406, 11 U. S. C. § 205) in the District Court for the District of New Jersey. The petition was approved and petitioner Smith was appointed trustee. Shortly thereafter respondent notified the trustee that it would petition the reorganization court for termination of the lease. A hearing was held and decision reserved. While the matter was under advisement the trustee on order of the court adopted the lease. Thereafter the reorganization court granted respondent's motion to terminate the lease, holding that the appointment of the trustee was a breach of the terms of the lease entitling the lessor to reenter.[2] 56 F. Supp. 187. The Circuit Court of Appeals affirmed. 150 F. 2d 921. 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 Interstate Commerce Act and the Bankruptcy Act.

The provision of the lease upon which the forfeiture was decreed reads as follows:

> "The Lessee shall not and will not sell, assign or transfer this lease or underlet the demised premises, or any part thereof, or the rights and privileges, or any of them, hereby granted, without the previous consent of the Lessor expressed by endorsement on this lease made in pursuance of authority granted by resolution of the board of directors of the Lessor . . . This covenant shall also apply to any unauthorized sale or transfer thereof or underletting of the demised premises, or any part thereof, or of the said rights and

on the expiration or earlier termination of the main lease mentioned in the opinion. What we say in the opinion also governs these tie-in leases.

[2] Notice was also given by respondent's parent company for termination of the tie-in leases mentioned in note 1, *supra*. The order of the District Court also terminated these leases.

> privileges, or any of them, whether made by the Lessee or in any proceeding, whether at law or in equity or otherwise, to which the Lessee may be a party, whereby any of the rights, duties and obligations of the Lessee shall or may be transferred, encumbered, abrogated or in any manner altered, without the consent of the Lessor first had and obtained in the manner hereinbefore provided."

By a further provision of the lease, violation of that covenant entitled the lessor to terminate the lease and to reenter on specified notice.

Sec. 77 (l), 11 U. S. C. § 205 (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."

Sec. 70 (b) of the Bankruptcy Act, 11 U. S. C. § 110 (b) provides in part:

> "A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same shall be enforceable."

We have recently held that those provisions of § 70 (b) of the Bankruptcy Act are applicable to reorganizations under Ch. X. 52 Stat. 885, 11 U. S. C. § 526. *Finn* v. *Meighan,* 325 U. S. 300. It is argued here, as it was there, that § 70 (b) should not be applied in reorganization pro-

ceedings since reorganization plans might be seriously impaired if forfeiture clauses in leases were allowed to be enforced. It is contended that forfeiture of railroad leases runs counter to the design and purpose of § 77, which is aimed at keeping railroad properties intact so that reorganization plans may be worked out and disintegration of transportation systems prevented. It is argued that the policy of § 77 which prevents pledgees and mortgagees from foreclosing their liens (*Continental Illinois National Bank* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648; *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. Co.*, 318 U. S. 523) is equally applicable to prevent lessors from causing forfeiture of leases. It is pointed out that § 77 (a) gives the reorganization court exclusive jurisdiction of the debtor and its property wherever located. It is noted that lessors are creditors as defined by § 77 (b) and that a plan of reorganization can modify or alter the rights of creditors either through the issuance of securities or otherwise. § 77 (b) (1). It is also pointed out that a plan of reorganization may cure or waive defaults and may deal with all or any part of the property of the debtor, § 77 (b) (5), and may provide for the rejection or adoption of leases. § 77 (b). From these provisions and the policy they reflect, it is argued that § 77 should not be construed as incorporating within it § 70 (b).

As we have noted, § 77 (l) provides that, so far as "consistent with the provisions" of § 77, the "duties of the debtor" and the "rights and liabilities of creditors" shall be the same as if a voluntary adjudication had been made. We cannot say that the forfeiture provisions of § 70 (b) on their face are inconsistent with § 77. They embrace leases of all kinds and sorts. They include leases of railroad tracks and facilities but they are not restricted to them. But if § 70 (b) is applicable to some leases under § 77, it

would seem to be applicable to all. And termination of leases would, in many cases at least, be as consistent with reorganizations of railroads under § 77 as it would with reorganizations of other enterprises under Ch. X. Sec. 70 (b) is applicable to reorganizations under Ch. X as we held in *Finn* v. *Meighan, supra.* As we pointed out in that case, an express covenant of forfeiture has long been held to be enforceable against the bankruptcy trustee. That represents the bankruptcy rule. And we find no provision in § 77 which suggests that Congress intended to make that rule inapplicable in case of railroad reorganizations.

It is argued, however, that the covenant in the present lease is not of the kind which is enforceable under § 70 (b). In other words, it is said not to be "an express covenant that an assignment by operation of law or the bankruptcy" of the lessee shall "terminate" or give the lessor "an election to terminate" the lease.

These forfeiture clauses are to be liberally construed in favor of the bankruptcy lessee. *Finn* v. *Meighan, supra.* Yet the covenant in question, so construed, seems to us to fall within § 70 (b). It applies to any "transfer" of the premises "in any proceeding, whether at law or in equity or otherwise," to which the lessee is a party, "whereby any of the rights, duties and obligations" of the lessee are "transferred, encumbered, abrogated or in any manner altered" without the lessor's consent. When the trustee adopted the lease, the lessee's interest was transferred to him. *Palmer* v. *Palmer,* 104 F. 2d 161. That transfer, being in a § 77 proceeding, was made in a "proceeding, whether at law or in equity or otherwise." The lessee was a party to the proceeding. And by the adoption the trustee acquired such rights and obligations under the lease as the lessee had.

But the question remains whether enforcement of the forfeiture clause would be "consistent with the provisions"

of § 77 within the meaning of § 77 (l). That question does not seem to have been considered by the lower courts. Our view is that it presents problems primarily for consideration and decision by the Interstate Commerce Commission and that the reorganization court should not have declared a forfeiture of the lease until the questions had been passed upon by the Commission. There are two aspects of that problem. The first relates to abandonment of operations by the trustee.

The District Court terminated the lease and authorized the lessor to reenter upon the premises and to oust the debtor and the trustee. This order followed an order of the Interstate Commerce Commission dismissing an application made by respondent to resume operations of the properties. The application was dismissed because the Commission was of the view that no certificate from it was needed. It ruled that the lessor's "obligations and duties to the public have never ceased but have merely been performed by the lessee for its benefit, and when the latter for any reason no longer can perform such obligations, the duties must be performed by the lessor on its own behalf." 257 I. C. C. 739, 744. And the Commission added, "If and when the lease is terminated and the property reverts to the applicant, it will have no alternative but to resume operation thereof." *Id.*, p. 744.

But that case only held that the lessor needed no certificate of public convenience and necessity under § 1 (18) to operate the road, as, if, and when the lessee or its trustee ceased operations. It did not present the question whether operations by the lessee or its trustee might be abandoned. No application for abandonment of operations by the lessee or its trustee was before the Commission. Authority of a lessor to resume operations if the lessee or its trustee abandons is one thing; authority of the lessee or its trustee to abandon is quite different.

Sec. 1 (18) of the Interstate Commerce Act provides in part:

> ". . . no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."

In *Thompson* v. *Texas Mexican R. Co., post,* p. 134, we held that a company having trackage rights over the lines of another must receive authorization to abandon the operations. That case is, of course, different from the present one because it entailed complete abandonment of operations by one company over another's lines. Here the question is whether the lessee or the lessor shall perform the service. But § 1 (18) provides that "no carrier by railroad" shall abandon "the operation" of all or any portion of a line without a certificate from the Commission. Discontinuance of operations by the trustee is abandonment of operations by a carrier within the meaning of § 1 (18). And a certificate is required under § 1 (18) whether the lessee or the lessor is abandoning operations. See *Lehigh Valley R. Co. Proposed Abandonment of Operation,* 202 I. C. C. 659; *Norfolk Southern R. Co. Receivers' Abandonment,* 221 I. C. C. 258. Whether the public interest requires that the line be operated by the lessee rather than the lessor presents a question for the Commission under § 1 (18) of the Interstate Commerce Act. The lessor is not at the mercy of the lessee in this situation. For the lessor, as well as the lessee, has the standing necessary to invoke § 1 (18) on the question of abandonment. *Thompson* v. *Texas Mexican R. Co., supra.*

The second aspect of the problem is related to the first. It is the function of the Commission under § 77 to prepare the plan of reorganization of the debtor company.

§ 77 (d). As we stated in *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 468:

> "These reorganizations require something more than contests between adversary interests to produce plans which are fair and in the public interest. When the public interest, as distinguished from private, bulks large in the problem, the solution is largely a function of the legislative and administrative agencies of government with their facilities and experience in investigating all aspects of the problem and appraising the general interest. Congress outlined the course reorganization is to follow. It established standards for administration and placed in the hands of the Commission the primary responsibility for the development of a suitable plan. When examined to learn the purpose of its enactment, § 77 manifests the intention of Congress to place reorganization under the leadership of the Commission, subject to a degree of participation by the court."

The Commission in preparation of the plan is guided not only by the requirements that the plan be fair and equitable and feasible. It is also charged with the duty of preparing a plan that "will be compatible with the public interest." § 77 (d). Whether a leased line should continue to be operated by the lessee or should revert to the system of the lessor may present large questions bearing on the development by the Commission of an adequate transportation system. Interstate Commerce Act § 1. Moreover, it appears in the present case that forfeiture of the lease will deprive the debtor of all of its railroad properties.[3] Whether a particular carrier should go out of

[3] The District Court ordered the trustee to turn over to the respondent all of the property held or used for railroad purposes except bank accounts, cash, accounts receivable and the like. Among the property were small lengths of line which the debtor claimed to own in fee but which the respondent asserted should revert to it. The order of the District Court provided that the trustee might file a claim for that property or its value and reasonable compensation for its use.

business presents problems of primary importance to its security holders and perhaps to the public interest as well. If forfeiture of the lease is now declared, no plan of reorganization may be possible. The problem of preparing a plan of reorganization will often present to the Commission decisions concerning the adoption or rejection of leases. The adoption of a lease by the trustee does not preclude rejection of it in the plan of reorganization. § 77 (b). The scheme of the Act is, indeed, to settle in the plan of reorganization the various claims to the property. The Commission may decide that it is in the public interest as well as in the interest of the private claimants that a lease be adopted. If it is adopted, then any defaults under it can be cured.[4] § 77 (b) (5). Or it may conclude, as it did in *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. Co., supra,* pp. 546–555, that a lease should be rejected unless the lessor consented to a revision of its terms. Or it may conclude that forfeiture of a lease according to the provisions of § 70 (b) would be compatible with the public interest. As we stated in *Palmer* v. *Massachusetts,* 308 U. S. 79, 87, "The judicial process in bankruptcy proceedings under § 77 is, as it were, brigaded with the administrative process of the Commission." And see *Warren* v. *Palmer,* 310 U. S. 132. The point is that if the reorganization court decrees a forfeiture in advance of consideration of the problem by the Commission, it interferes with the functions entrusted to the Commission under § 77. Forfeiture of a lease in accordance with the provisions of § 70 (b) may be wholly consistent with the preparation of a plan of reorganization under § 77. But, as we have said, the nature of the

[4] Sec. 77 (b) (5) provides in part, "A plan of reorganization within the meaning of this section . . . shall provide adequate means for . . . the curing or waiver of defaults . . ."

plan of reorganization to be submitted is entrusted primarily to the Commission. If forfeiture of leases can be decreed without prior reference of the matter to the Commission, it may be seriously embarrassed in preparing the plan which it deems necessary or desirable for the reorganization of the debtor.[5] The federal policy embodied in § 77 can prevent enforcement of the engagements of the debtor pursuant to their terms. *Continental Illinois National Bank* v. *Chicago, R. I. & P. R. Co., supra.* Cf. *Otis & Co.* v. *Securities & Exchange Commission,* 323 U. S. 624.

We hold that the District Court erred in declaring the lease forfeited and that the judgment should be reversed and the cause remanded. The District Court should stay its hand pending a decision by the Interstate Commerce Commission on the questions.

Reversed.

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

[5] *Finn* v. *Meighan, supra,* involved the forfeiture of a lease in reorganization proceedings under Ch. X. But the problem there was not complicated by any provisions of Ch. X giving to an administrative agency the functions entrusted to the Interstate Commerce Commission under § 77. As we stated in *Palmer* v. *Massachusetts,* 308 U. S. 79, 87, ". . . the whole scheme of § 77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates."

THOMPSON, TRUSTEE, ET AL. *v.* TEXAS MEXICAN RAILWAY CO.

CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS.

No. 42. Argued October 9, 1945.—Decided April 29, 1946.

1. By contract between two interstate railroads, both of which were subject to the authority of the Interstate Commerce Commission, one obtained trackage rights over the lines of the other, at a specified rental. The contract was terminable by either party upon twelve months' notice. The grantee railroad subsequently petitioned for reorganization under § 77 of the Bankruptcy Act, a trustee was appointed, and stay orders pursuant to § 77 (j) were entered. Thereafter the grantor gave notice that it was exercising its right to terminate the contract. After the date when by its terms the contract would thus have been terminated, the trustee continued to operate trains over the lines of the grantor, and refused to pay more than the rental specified in the contract. Thereupon the grantor brought suit in a state court to enjoin the grantee and its trustee from using the tracks of the grantor without the grantor's consent, and to recover $500 a day damages for such use or alternatively the reasonable value of the use. The state court denied an injunction; adjudged that the contract had been terminated; and awarded damages. *Held* that maintenance of the suit in the state court was not precluded by the stay orders issued by the bankruptcy court nor by § 77 of the Bankruptcy Act, but that the state court should have stayed its hand and remitted the parties to the Interstate Commerce Commission for determination of the administrative phases of the questions involved. Pp. 138, 151.

(a) So far as the suit involved a money claim against the estate for acts of the trustee in operating trains over the grantor's tracks, it was maintainable in the state court under § 66 of the Judicial Code, which authorizes suits against the trustee, without leave of the bankruptcy court, "in respect of any act or transaction of his in carrying on the business." P. 138.

(b) Maintenance of the suit in the state court is not inconsistent with the provisions of § 77 granting the reorganization court exclusive jurisdiction over the debtor and its property. P. 139.

(c) The exclusive jurisdiction of the bankruptcy court is determined by the "main purpose" of the suit, which in this case evidently was an attempt on the part of the grantor to obtain a more favorable rental. P. 139.

(d) The principle that the exclusive jurisdiction of the bankruptcy court extends to the adjudication of questions affecting title is inapplicable here, since the trackage agreement created only a personal obligation and did not purport to grant any estate in the property of the grantor. P. 140.

(e) The general rule in bankruptcy that the trustee takes the contracts of the debtor subject to their terms and conditions is applicable to proceedings under § 77 by virtue of the provisions of § 77 (l). P. 141.

(f) The qualification in § 77 (l) that the rule of bankruptcy be "consistent with the provisions" of § 77 made premature an adjudication by the court that the contract was terminated, prior to a determination by the Interstate Commerce Commission that that step was consistent with the reorganization requirements of the debtor. P. 141.

2. Prior to rendition of judgment on the merits the decision of the Interstate Commerce Commission was necessary on certain phases of the controversy:

(1) Whether termination of the trackage agreement would interfere with the plan of reorganization to be formulated by the Commission under § 77 of the Bankruptcy Act. P. 142.

(2) Whether the Commission should issue a certificate under § 1 (18) of the Interstate Commerce Act that "the present or future public convenience and necessity" would permit abandonment of operations under the trackage agreement. P. 144.

(3) What would be a reasonable rental to be allowed, under § 5 (2) (a) of the Transportation Act of 1940, if the Commission decided that the trackage arrangement should be continued. P. 149.

3. Until determination by the Interstate Commerce Commission of the administrative phases of the questions involved is had, it can not be known with certainty what issues for judicial decision will emerge; and, until that time, judicial action is premature. P. 151.

181 S. W. 2d 895, reversed.

The respondent railroad company brought suit in a state court against the petitioner railroad company (which was a debtor in a reorganization proceeding under § 77 of the

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Bankruptcy Act) and its trustee, and was awarded damages. The Court of Civil Appeals affirmed. 181 S. W. 2d 895. The Supreme Court of Texas refused an application for a writ of error. This Court granted certiorari. 324 U. S. 838. *Reversed*, p. 151.

Robert H. Kelley argued the cause and filed a brief for petitioners.

John P. Bullington argued the cause for respondent. With him on the brief were *M. G. Eckhardt* and *B. D. Tarlton.*

Solicitor General McGrath, Daniel W. Knowlton and *Edward M. Reidy* filed a brief for the Interstate Commerce Commission, as *amicus curiae.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Brownsville (The St. Louis, Brownsville and Mexico Railway Co.) and Tex-Mex (The Texas Mexican Railway Co.) are interstate carriers by railroad and subject to the provisions of the Interstate Commerce Act. 24 Stat. 379, 41 Stat. 474, 49 Stat. 543, 54 Stat. 899, 49 U. S. C. § 1. On November 1, 1904, they entered into a written contract whereby, for payment of specified rentals, Tex-Mex granted Brownsville the right to operate its trains over the tracks of Tex-Mex between Robstown and Corpus Christi, Texas, and to make use of terminal facilities of Tex-Mex at Corpus Christi. The contract provided that it was to continue for a term of 50 years from its date unless sooner terminated by the parties. And it contained the following provision, "It is further agreed that this contract may be terminated without giving any reason therefor, by either party, upon giving twelve months notice of such intent to terminate the lease."

In 1933 Brownsville filed its petition for reorganization under § 77 of the Bankruptcy Act.[1] The petition was approved and petitioner Thompson was appointed as trustee in the proceeding. Shortly thereafter the bankruptcy court entered stay orders to which we will later refer. In October 1940 Tex-Mex notified petitioners that it was exercising its right to terminate and cancel the trackage contract, effective twelve months after November 1, 1940. The trustee, however, continued to operate over the Tex-Mex and to use the Tex-Mex facilities after November 1, 1941. Tex-Mex informed him that a charge of $500 per day would be made for the use of these facilities—an amount in excess of the rental under the contract. The trustee refused to pay any rental other than that specified in the contract.

Thereupon this suit was instituted by Tex-Mex in the Texas courts to enjoin Brownsville and its trustee from using the tracks or other facilities without the consent of Tex-Mex and to recover $500 a day damages for such use or alternatively the reasonable value of the use of the property. The trial court overruled pleas to its jurisdiction and tried the case on the merits. It denied an injunction. It held that the 1904 contract had been terminated and awarded Tex-Mex damages in the amount of $184,929.85. The Court of Civil Appeals affirmed.[2] 181 S. W. 2d 895. The Supreme Court of Texas refused an application for a writ of error. The case is here on a petition for a writ of certiorari which we granted because of the importance of the problems in the administration of the Interstate Commerce Act and of the Bankruptcy Act.

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[1] This petition was filed in the reorganization proceedings of the Missouri Pacific R. Co. which owned about 94 per cent of the voting stock of the New Orleans, Texas and Mexico Ry. Co., which in turn owned all of the voting stock of Brownsville.

[2] No complaint was made on appeal of the denial of an injunction.

First. It is contended here, as it was in the state court, that the maintenance of the present suit is precluded by the stay orders issued by the bankruptcy court and by § 77 of the Bankruptcy Act.

Sec. 66 of the Judicial Code, 28 U. S. C. § 125, authorizes suits against the trustee, without leave of the bankruptcy court, "in respect of any act or transaction of his in carrying on the business." [3] In *McNulta* v. *Lochridge,* 141 U. S. 327, 332, this statute was said to grant an "unlimited" right "to sue for the acts and transactions" of the estate. Operation of the trains is plainly a part of the trustee's functions. Claims which arise from their operation—whether grade-crossing claims as in *McNulta* v. *Lochridge, supra,* or claims for the use of the tracks of another as in the present case—are claims based on acts of the trustee in conducting the business. Hence this suit, so far as it involves only a money claim against the estate for acts of the trustee in operating trains over respondent's tracks, could be maintained in the state courts against the trustee.[4] And the stay orders entered were wholly consistent with this course.[5]

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[3] "Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

[4] Judgment for damages was granted only against petitioner trustee; judgment for costs was granted against the trustee and Brownsville jointly and severally.

[5] The stay orders authorized the trustee to defend any suits which might be brought.

In view of our disposition of the case it is unnecessary to decide at this time whether or not the suit may also be maintained against Brownsville. The stay order, entered for the benefit of the debtor,

It is argued, however, that this suit cannot be maintained consistently with the provisions of § 77 which grant the reorganization court exclusive jurisdiction over the debtor and its property.[6] The theory is that the suit interferes with the administration of the estate, adjudicates the trustee's interest in property in his possession, and indeed seeks to disrupt the operating schedule of trains. It is clear that the issuance of an injunction against operation of the trains over respondent's tracks would have been an interference with the exclusive jurisdiction of the reorganization court. The fact that no injunction was granted is not a decisive answer. In *Ex parte Baldwin,* 291 U. S. 610, 618, the Court held that the exclusive jurisdiction of the bankruptcy court is determined by the "main purpose" of the suit. In that case suit had been brought in the state courts to have a railroad right of way declared forfeited and in addition to recover damages. The claim for damages was held to be "merely an incident" to the suit for a forfeiture and did not save the suit from the defense that it was of the type which sought to interfere with the exclusive jurisdiction of the bankruptcy court. We do not construe the present

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followed the provisions of § 77 (j) of the Bankruptcy Act, 49 Stat. 911, 922, 11 U. S. C. § 205 (j) and provided: "That commencement or continuation of suits against any of the debtor companies is hereby stayed and enjoined until after final decree entered in these proceedings, provided, however, that suits or claims for damages caused by the operation of trains, buses, or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction, and any order heretofore staying the prosecution of any such causes of action or appeal is hereby vacated."

[6] Sec. 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 . . ."

bill as having as its main object the stoppage of the movement of petitioner's trains over respondent's tracks. The main purpose of the suit seems to be an attempt on the part of respondent to obtain a more favorable rental.

The fact, however, that respondent's suit does not have as its main purpose the ouster of petitioners from possession is not a complete answer to the plea to the state court's jurisdiction. As *Ex parte Baldwin, supra,* p. 616, held, the exclusive jurisdiction of the bankruptcy court is not limited to protecting the possession of the trustee; it "extends also to the adjudication of questions respecting the title." See *White* v. *Schloerb,* 178 U. S. 542; *Whitney* v. *Wenman,* 198 U. S. 539. Petitioners argue that the present case comes within that principle. It is pointed out that this suit seeks the cancellation of the trackage agreement. It is argued that the rights granted Brownsville under that agreement are property rights; and that a suit to cancel the agreement and collect amounts other than the specified rentals is a suit which interferes with and adjudicates title to the property. If we were dealing here with a lease, a suit to effect its forfeiture could not be maintained in another court without consent of the reorganization court. But the trackage agreement created only a personal obligation and did not purport to grant Brownsville any estate in the property of Tex-Mex. See *Des Moines & Ft. Dodge R. Co.* v. *Wabash, St. L. & P. R. Co.,* 135 U. S. 576, 583; *Union Pacific R. Co.* v. *Chicago, M. & St. P. R. Co.,* 163 U. S. 564, 582–583. It was an executory contract subject to termination on a specified notice. The exclusive jurisdiction of the reorganization court was a barrier to any action by any other court which would disturb the possession of the trustee or interfere in any way with his operation of the business. But, apart from the qualification to which we will later refer, litigation restricted to the amount due under a contract, express or implied, for the

use by the trustee of another's property no more interferes with the administration of the estate than suits to determine his liability under contracts calling for the delivery of coal or other supplies. In each the claim is reduced to judgment and may then be presented to the bankruptcy court for proof and allowance. Cancellation of a contract pursuant to its terms alters, of course, rights and duties of the trustee. But the bankruptcy rule is that he takes the contracts of the debtor subject to their terms and conditions. Contracts adopted by him are assumed *cum onere*.[7] The general rule is (1) that if the other party had a right to terminate the arrangement, that right survives adoption of the contract by the trustee; and (2) that the incidence of termination, except as it interferes with the exclusive jurisdiction of the bankruptcy court, may be litigated in any court where the trustee may be sued. That rule of bankruptcy is applicable to proceedings under § 77 by reason of § 77 (l) which 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."

But, as we shall see, the qualification in § 77 (l) that the rule of bankruptcy be "consistent with the provisions" of § 77 made premature an adjudication by the court that the contract was terminated, prior to a determination by the Interstate Commerce Commission that that step was consistent with the reorganization requirements of the debtor.

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[7] See *Greif Bros. Cooperage Co.* v. *Mullinix*, 264 F. 391, 397; 4 Collier on Bankruptcy (14th ed.) § 70.43.

Second. Prior to the rendition of judgment on the merits, the decision of the Interstate Commerce Commission was necessary on two phases of the controversy—one under § 77 of the Bankruptcy Act, the other under provisions of the Interstate Commerce Act.

(1) As we have said, the right to terminate a contract pursuant to its terms survives the bankruptcy of the other contracting party. And that general bankruptcy rule is applicable in § 77 proceedings by reason of § 77 (l), which, as we have said, incorporates into § 77 the rules governing the duties of debtors and the rights and liabilities of creditors so far as they are "consistent with the provisions" of § 77. We have considered the meaning of that qualification in *Smith* v. *Hoboken Railroad, W. & S. C. Co., ante,* p. 123. We there held that a covenant of forfeiture in a lease of railroad tracks and facilities should not be enforced by the bankruptcy court prior to a determination by the Commission that such step would be consistent with the reorganization requirements of the debtor. The Commission has the primary responsibility for formulating plans of reorganization under § 77. See § 77 (d). Forfeiture of leases by the court in advance of a determination by the Commission of the nature of the plan of reorganization which is necessary or desirable for the debtor may seriously interfere with the performance by the Commission of the functions entrusted to it.

We think that the same considerations are applicable to a determination that the trackage agreement in this case should be terminated pending formulation of a reorganization plan. By § 77 (b) the plan of reorganization may adopt or reject executory contracts of the debtor as well as unexpired leases. And the adoption of either an executory contract or of a lease by the trustee does not preclude a rejection of it in the plan. Moreover, trackage agreements, like leases of railroad tracks and facilities, are means by

which railroad systems have been assembled. The retention or the sloughing off of trackage agreements may assume importance in the fashioning of a plan of reorganization by the Commission. The problem is kin to that involved in *Continental Illinois National Bank* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648. In that case the Court sustained the power of the reorganization court to enjoin under § 77 creditors, who held collateral notes of the debtor railroad secured by its bonds and bonds of its subsidiaries, from selling the collateral under a power of sale in the notes, where the sale would so hinder, obstruct or delay the plan of reorganization as would likely defeat it. The Court stated (p. 676) that a proceeding under § 77 is a "special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render its provisions futile." The Court concluded, in view of the complexity of the problems involved in the reorganization, "that without the maintenance of the *status quo* for a reasonable length of time no satisfactory plan could be worked out." p. 679.

That decision prevented in the interests of a reorganization the enforcement of the provisions of the contracts of the debtor according to their terms. We think like reasons make it important that the *status quo* of this trackage agreement be maintained pending decision by the Commission as to the proper treatment of it in the reorganization plan. The Commission may decide that it should be adopted. Or the Commission may conclude that the trackage agreement should be rejected or that its termination pursuant to its terms should be allowed. These matters involve not only the interests of the two parties to the trackage agreement but phases of the public interest

as well. A court which enforced the termination clause of the agreement pursuant to its terms would be narrowing the choice of the Commission and perhaps embarrassing it in the performance of the functions with which it has been entrusted. For these and like reasons which we have discussed in *Smith* v. *Hoboken Railroad, W. & S. C. Co.*, *ante*, p. 123, we think the court erred in holding that the trackage agreement had been or should be terminated.

(2) The Commission has further functions to perform apart from determining under § 77 whether it would be consistent with the reorganization requirements of the debtor to terminate the trackage agreement.

By § 1 (18) of the Interstate Commerce Act it is provided that "no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment." Carriers being reorganized under § 77 of the Bankruptcy Act are not exempt from that provision. § 77 (o), 11 U. S. C. § 205 (o); *Warren* v. *Palmer*, 310 U. S. 132, 137–138. Whatever may be the powers of the Commission under the Interstate Commerce Act, rather than § 77, over the terms of the trackage agreement (*Abandonment of Chicago, R. I. & P. R. Co.*, 131 I. C. C. 421; *Kansas City Southern R. Co.* v. *Kansas City Terminal R. Co.*, 211 I. C. C. 291), it is clear that the Commission has jurisdiction over the operations. Sec. 1 (18) embraces operations under trackage contracts, as well as other types of operations. See *Chicago & Alton R. Co.* v. *Toledo, P. & W. R. Co.*, 146 I. C. C. 171, 179–181. And the fact that the trackage contract was entered into in 1904 prior to the passage of the Act is immaterial; the provisions of the Act, including § 1 (18), are applicable to contracts made before as well as after its enactment.

See *Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467, 482. Though the contract were terminated pursuant to its terms, a certificate would still be required under § 1 (18). Brownsville or its trustee could, of course, make the application for abandonment of operations. But the fact that they might be content with the existing arrangement and fail or refuse to move does not mean that Tex-Mex would be burdened with a trackage arrangement in perpetuity. Tex-Mex might invoke the Commission's jurisdiction under § 1 (18) and make application for abandonment of operations by Brownsville or its trustee. There is no requirement in § 1 (18) that the application be made by the carrier whose operations are sought to be abandoned. It has been recognized that persons other than carriers "who have a proper interest in the subject matter" may take the initiative.[8] See *Atchison, T. & S. F. R. Co.* v. *Railroad Commission,* 283 U. S. 380, 393–394. An application by a city and county for abandonment of a part of the Colorado & Southern line was indeed entertained. *Colorado & Southern R. Co. Abandonment,* 166 I. C. C. 470. Tex-Mex has even a more immediate interest in the operations over this line. Its property is involved; and the amount being paid for the use of its property is deemed by it insufficient. The Commission is as much concerned with its financial condition as it is with that of Brownsville. Tex-Mex therefore has the standing necessary to invoke § 1 (18).

Tex-Mex, however, points out that in 1941 it made application to the Commission "for authority to cancel track-

[8] Cf. *Texas & Pacific R. Co.* v. *Gulf, C. & S. F. R. Co.,* 270 U. S. 266, 273, which holds that a party in interest who is opposed to construction of an extension may not "initiate before the Commission any proceeding concerning the project," his remedy being to appear in opposition if application is made or to seek an injunction under § 1 (20) if no application is made. And see *Powell* v. *United States,* 300 U. S. 276.

age agreements" with Brownsville and that the Secretary of the Commission returned the application saying "The Commission is without authority to consider an application of the nature submitted by you. Its jurisdiction under Section 1 (18) of the Interstate Commerce Act would extend only to abandonment of operation by the St. Louis, Brownsville & Mexico Railway Company." We need not consider whether the application was in proper form for one authorizing and requiring abandonment of operations by Brownsville. In any event, the Secretary of the Commission was without authority to bind the Commission in the matter. Cf. *Minneapolis & St. Louis R. Co.* v. *Peoria & P. U. R. Co.*, 270 U. S. 580, 585.

(3) The jurisdiction of the Commission is not restricted, however, to determining whether or no operations of Brownsville over the tracks of Tex-Mex should be abandoned. Prior to the Transportation Act of 1940 the Commission had some jurisdiction over trackage agreements of the character involved in this case. *Transit Commission* v. *United States*, 289 U. S. 121. But by that Act the Commission received new, explicit powers over trackage rights. Sec. 5 (2) (a) (ii) provides: "It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) . . . for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto." Trackage rights acquired without the consent and approval of the Commission are unlawful. § 5 (4).

The authority of the Commission under § 5 (2) (a) extends to fixing terms and conditions, including rentals, for any trackage agreements entered into subsequent to the effective date of the Transportation Act of 1940. If, therefore, the two carriers had voluntarily terminated the 1904 trackage contract and had entered into a new one without the approval of the Commission, they would have

violated the Act. There would be no difference in result merely because the trackage contract expired by its terms or was terminated by operation of an escape clause. Until abandonment is authorized, operations must continue. While they continue, trackage rights are being enjoyed. In absence of administrative control, the law would under those circumstances imply a contract for the use of another's property and award reasonable compensation. Thus trackage rights would be acquired on such terms as the court and jury determined. But § 5 (2) (a) vests in the Commission, not the courts, the power to determine the terms and conditions under which trackage rights may be acquired. The jurisdiction of the Commission is exclusive. *Transit Commission* v. *United States, supra.* In that case the Commission had approved a trackage agreement between two carriers and the Court held that the Commission's jurisdiction being exclusive, approval by a state commission was not necessary. The court below thought that case was not controlling here, in view of the fact that the Interstate Commerce Commission had not acted. But in a long line of cases beginning with *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, it has been held that where the reasonableness or legality of the practices of the parties was subject to the administrative authority of the Interstate Commerce Commission, the court should stay its hand until the Commission had passed on the matter. See *General American Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U. S. 422, and cases cited. That course is singularly appropriate here. It is the function of the Commission to determine the terms and conditions under which trackage rights are acquired. If the parties were allowed to by-pass the Commission and litigate the question in the courts, the power to fix the rental under trackage agreements would be shifted from the Commission to the courts and juries. Moreover, one jury would determine the amount of compensation due

for the period here in question and another jury the amount due for a subsequent period. But a major concern of Congress in dealing with this problem was that neither inadequate rentals nor extortionate nor unreasonable exactions would be made for trackage rights. *Transit Commission* v. *United States, supra,* p. 128. Those questions intimately relate to the financial strength of carriers. And it is one of the Commission's high functions to protect the public interest against unfair or oppressive financial practices which in the past led to such great havoc and disaster. That policy would be undermined if the carriers could repair to courts for determination of the conditions under which trackage rights could be secured. Then jury verdicts or settlements would take the place of the expert and informed judgment of the Commission.

It is suggested, however, that the Commission is empowered to fix the rental only for the future and that it has no power to make an award with retroactive effect. But on this phase of the case we are not dealing with the problem of reparations. In any case where application is made for trackage rights the terms and conditions fixed by the Commission are applicable when the certificate of public convenience and necessity takes effect. If operations do not start until that time, no problem is presented. But frequently there will be applications for renewal of trackage agreements which have expired. Operations may not be discontinued until a certificate of abandonment is obtained. If new trackage rights are granted, they run from the expiration of the old and their terms and conditions are applicable to the full term.[9] Once the Com-

[9] The terms and conditions approved by the Commission in *Long Island R. Co. Trackage,* 180 I. C. C. 439, affirmed *Transit Commission* v. *United States,* 289 U. S. 121, were given retroactive effect in that sense.

mission has acted, the court may then proceed to enter judgment in conformity with the terms and conditions specified by the Commission. See *El Dorado Oil Works v. United States,* 328 U. S. 12.

It is argued, however, that the trackage rights envisioned by § 5 (2) (a) of the Act are consensual arrangements between the parties; and that the Commission is not granted authority to force a trackage agreement on a carrier. We do not decide what may be the full reach of the power of the Commission under § 5 (2) (a). We are dealing here with an existing operation, not with a case where one carrier seeks to initiate a new one by acquiring the right to run its trains over the tracks of another. The Commission has the power under § 1 (18) to refuse to allow abandonment of the operations. If it so refuses, trackage rights continue to be enjoyed by Brownsville. The question of what would be the amount of a fair rental to be paid by Brownsville would be highly relevant to a decision by the Commission on the issue of abandonment. We conclude that at least in that situation the Commission has the power under § 5 (2) to fix a reasonable rental for the use of the facility by Brownsville regardless of the consent of Tex-Mex.[10] Denial of that power to the Com-

[10] The argument is that the Commission has that authority only under § 3 (5) which gives the Commission authority to require the use of terminal facilities including main-line tracks for a reasonable distance outside of the terminal.

Sec. 3 (5) provides: "If the commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compen-

mission is not required by the language of § 5 (2) (a). And this construction of § 5 (2) (a) is in harmony with the power of the Commission under § 1 (18) to refuse to authorize the abandonment of operations. If operations must continue, it is more consistent with this scheme of regulation for the Commission rather than courts or juries to determine the amount of the rental. Any legal, including constitutional, rights of Tex-Mex are protected by the review which Congress has granted the orders of the Commission.

Third. If the Commission granted trackage rights, Tex-Mex could then recover judgment, as we have said, for the amount of the rental fixed by the Commission. If, on the other hand, the Commission authorizes the operations to be abandoned, it "may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require." § 1 (20). The Commission could permit abandonment unless Brownsville paid such reasonable compensation for the use of Tex-Mex's property as the Commission should fix.

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sation as the carriers affected may agree upon, or, in the event of a failure to agree, as the commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be."

In that case, too, the court would have an administrative finding as a guide to the judgment it would enter. In case abandonment were authorized without more, respondent would then be free to move in this proceeding for judgment and to apply to the bankruptcy court for compliance with the Commission's order. In all those situations suits to recover the amounts due for use of the tracks of Tex-Mex could be maintained in the state court [11] under the principles announced in *Central New England R. Co.* v. *Boston & Albany R. Co.*, 279 U. S. 415, 420. If, however, the Commission decided that the trackage agreement should be dealt with in the plan, the state court would not have power to proceed further. For respondent's rights would be protected by the provisions of the plan which may be reviewed only by the reorganization court. § 77 (e).

Thus, however the case may be viewed, the court below should have stayed its hand and remitted the parties to the Commission for a determination of the administrative phases of the questions involved. Until that determination is had, it cannot be known with certainty what issues for judicial decision will emerge. Until that time, judicial action is premature. The judgment will be reversed and the cause remanded so that the case may be held pending the conclusion of appropriate administrative proceedings.

Reversed.

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

[11] If the order of the Commission were challenged, its review could of course be had only in the manner provided by statute. See *El Dorado Oil Works* v. *United States*, 328 U. S. 12.

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE *v.* FEDERAL POWER COMMISSION. STATE OF IOWA, INTERVENOR.

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

No. 603. Argued March 8, 1946.—Decided April 29, 1946.

Petitioner applied to the Federal Power Commission for a license for a power project in Iowa involving the construction of a dam on a navigable stream and the diversion of water from two navigable streams into another. Section 9 (b) of the Federal Power Act requires an applicant to submit satisfactory evidence of compliance with requirements of state laws "with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act." Petitioner showed no attempt to comply with Iowa Code, 1939, ch. 363, which forbids the construction of dams and the diversion of water for industrial purposes without a permit from the State Executive Council and authorizes the issuance of such a permit upon a finding, *inter alia*, that "any water taken from the stream . . . is returned thereto at the nearest practicable place." The State intervened and urged that the application be denied because petitioner did not submit evidence of its compliance with the requirements of the Iowa Code for a permit from the State Executive Council. The Commission found that a federal license for the project was required under the Federal Power Act and that the project called for a practical and reasonably adequate water power development, with certain recreational advantages, all at a cost not appearing to be unreasonable; but it dismissed the application without prejudice, on the ground of petitioner's failure to present satisfactory evidence, pursuant to § 9 (b), of compliance with requirements of laws of Iowa requiring a state permit. *Held:*

1. Compliance with requirements for a state permit under Iowa Code, 1939, ch. 363, is not a condition precedent to, or an administrative procedure that must be exhausted before, securing a federal license. Pp. 163, 170, 182.

(a) To require petitioner to secure a state permit as a condition precedent to securing a federal license would vest in the State Executive Council a veto power over the federal project which easily could destroy the effectiveness of the Federal Act and subordinate to state control the "comprehensive" planning which the Federal Power Act entrusts to the judgment of the Commission or other representatives of the Federal Government. P. 164.

(b) The action of the Commission in requiring petitioner to present satisfactory evidence of compliance with the requirements for a state permit, while not requiring it actually to secure a state permit, avoided vesting a veto power in the State Executive Council; but it did not meet the substance of petitioner's objection, because it subjected to state control the very requirements of the project which Congress has placed in the discretion of the Commission. P. 165.

(c) The Act leaves to the States their traditional jurisdiction over property rights to the beds and banks of streams and the use of water, subject to the superior right of the Federal Government to regulate interstate and foreign commerce, administer public lands and reservations of the United States and exercise authority under treaties. Pp. 171–176.

(d) The intention of Congress was to secure a comprehensive development of national resources and not merely to prevent obstructions to navigation. Pp. 180–181.

(e) The Act establishes a dual system of control by separating those subjects which remain under the jurisdiction of the States from those which the Constitution delegates to the United States and over which Congress vests the Commission with authority to act. P. 167.

(f) Where the Federal Government supersedes the State Government, there is no suggestion that both agencies shall have final authority. P. 168.

(g) A contrary policy is indicated in §§ 4 (e), 10 (a), (b) and (c) and 23 (b), which sections place responsibility squarely upon federal officials and usually upon the Federal Power Commission. P. 168.

(h) The express provision of § 27 requiring that the Act be not construed as affecting the laws of the States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein, indicates that § 9 (b) should not be given a like effect in the absence of a similar provision. Pp. 175–178.

(i) Section 27, protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature and has primary, if not exclusive, reference to such proprietary rights. Pp. 175, 176.

(j) Section 9 is devoted to securing adequate information for the Commission as to pending applications for licenses and does not itself require compliance with any state laws. Pp. 168, 177, 178.

(k) The detailed provisions of the Act providing a comprehensive plan for the development and regulation of the water resources of the Nation leave no room or need for conflicting state controls. P. 181.

(l) It is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional Government must pass upon issues affecting the use of navigable waters—on behalf of the people of Iowa as well as on behalf of all others. P. 182.

2. The action of the Commission was erroneous in dismissing the application on the ground of petitioner's failure to present satisfactory evidence, pursuant to § 9 (b), of compliance with requirements of laws of Iowa requiring a state permit. Pp. 161–167.

(a) The project is clearly within the jurisdiction of the Commission under the Federal Power Act. P. 163.

(b) Believing the Iowa law to be inapplicable or to have been superseded by the Federal Power Act, the Commission would have been justified in following its own interpretation of the Federal Power Act and proceeding with the merits of the application thereunder, without requiring petitioner to submit evidence of compliance with such laws of Iowa. Pp. 160–162.

(c) The Commission's action in dismissing the application without prejudice did not avoid passing on the issue as to the need for evidence of petitioner's compliance with the state law, but constituted a ruling that such evidence was essential. Pp. 161–162.

(d) A state permit not being required, there was no justification for requiring petitioner, as a condition of securing a federal permit, to present evidence of its compliance with the requirements of the state law for that state permit. P. 166.

(e) There is ample opportunity and authority for the Commission to require by regulation the presentation of evidence satisfactory to it of petitioner's compliance with any of the requirements for a state permit that the Commission considers appropriate to effect the purposes of a federal license. P. 167.

3. Upon the remand of this application to the Commission, it will not act as a substitute for the local authorities having jurisdiction over such questions as the sufficiency of applicant's legal title to riparian rights or the validity of its local franchises relating to proposed intrastate public utility service. P. 178.

(a) The references in § 9 (b) to beds and banks of streams, to proprietary rights to divert or use water, or to legal rights to engage locally in the business of developing, transmitting and distributing power neither add anything to nor detract anything from the force of local laws, if any, on those subjects. P. 178.

(b) In so far as those laws have not been superseded by the Federal Power Act, they remain as applicable and effective as they were before its passage. P. 178.

151 F. 2d 20, reversed.

Petitioner applied to the Federal Power Commission for a license to construct, operate, and maintain a power project on navigable waters in Iowa. The State intervened and urged that the application be denied because petitioner had not presented satisfactory evidence of its compliance with the requirements of Iowa Code, 1939, ch. 363, as to the issuance of a permit by the State Executive Council. The Commission dismissed the application "without prejudice to renewal within one year upon satisfying the requirements of Section 9 (b) of the Federal Power Act." 52 P. U. R. (N. S.) 82. The Court of Appeals for the District of Columbia affirmed. 151 F. 2d 20. This Court granted certiorari. 326 U. S. 715. *Reversed,* p. 183.

David W. Robinson, Jr. argued the cause for petitioner. With him on the brief were *George B. Porter, Andrew G. Haley* and *John Connolly, Jr.*

Howard E. Wahrenbrock argued the cause for the Federal Power Commission, respondent. With him on the brief were *Solicitor General McGrath* and *Louis W. McKernan.*

Neill Garrett argued the cause for the State of Iowa, intervenor. With him on the brief were *John M. Rankin*, Attorney General of Iowa, *Horace L. Lohnes* and *C. Walter Harris*.

MR. JUSTICE BURTON delivered the opinion of the Court.

This case illustrates the integration of federal and state jurisdictions in licensing water power projects under the Federal Power Act.[1] The petitioner is the First Iowa Hydro-Electric Cooperative, a cooperative association organized under the laws of Iowa with power to generate, distribute and sell electric energy. On January 29, 1940, pursuant to § 23 (b) of the Federal Power Act,[2] it

[1] 41 Stat. 1063, as amended, 49 Stat. 838, 16 U. S. C. §§ 791a–825r.

[2] "SEC. 23. . . . (b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands . . . of the United States . . . except under and in accordance with the terms of . . . a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands . . . are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws." 49 Stat. 846, 16 U. S. C. § 817.

filed with the Federal Power Commission a declaration of intention to construct and operate a dam, reservoir and hydro-electric power plant on the Cedar River, near Moscow, Iowa.[3]

On April 2, 1941, it also filed with the Commission an application for a license, under the Federal Power Act, to construct an enlarged project essentially like the one it now wishes to build. The cost of the enlarged project is estimated at $14,600,000. It calls for an 8,300 foot earthen dam on the Cedar River near Moscow, an 11,000 acre reservoir at that point and an eight-mile diversion canal to a power plant to be built near Muscatine on the Mississippi. The canal will create two other reservoirs totaling 2,000 acres. It is alleged that the three reservoirs incidentally will provide needed recreational facilities. The power plant will have four turbo-generating units with a total capacity of 50,000 kw., operating with an average head of 101 feet of water provided by the fall from the canal to the Mississippi. Water will be pumped from the Mississippi up to the head bays of the power intake dam at the plant to meet possible shortages in supply. The tailrace will extend for a mile along the shore of the Mississippi to a point below Dam 16 on that River. Transmission lines will connect the project with a source of steam standby electric current at Davenport, Iowa, 24 miles up the Mississippi. The plant is expected to produce 200,000,000 kwh. of marketable power per year, of which 151,000,000 kwh. will be firm energy in an average year. Interchange of energy is proposed with the Moline-Rock Island Manufacturing Company near Davenport and the project is suggested as an alternative to the addi-

[3] This described a project including an 8,500 foot earthen dam, and a power plant of three 5,000 kw. hydraulic turbine generators operating under a maximum head of 35 feet, with an estimated output of 47,000,000 kwh. per year. The water was to be returned to the Cedar River immediately below the dam.

tion of a 50,000 kw. unit to the plant of that company. The power will be available especially to non-profit rural electrification cooperative associations and to cities and towns in 35 or more nearby counties.

The Cedar River rises in Minnesota and flows 270 miles southeasterly through Iowa to Moscow, which is 10 miles west of the Mississippi. From there it flows southwesterly 29 miles to Columbus Junction where it joins the Iowa River and returns southeasterly 28 miles to the Mississippi. The proposed diversion will take all but about 25 c. f. s. of water from the Cedar River at Moscow. This will correspondingly reduce the flow in the Iowa River while the diverted water will enter the Mississippi at Muscatine, about 20 miles above its present point of entry at the mouth of the Iowa River. There are no cities or towns on the Cedar River between Moscow and Columbus Junction and the record indicates that the petitioner has options upon 98% of the riparian rights on the Cedar River in that area. At petitioner's request, this application was treated as a supplement to its then pending declaration of intention to construct the smaller project.

On June 3, 1941, the Commission made the following findings:

> "(1) That the Cedar and Iowa Rivers are navigable waters of the United States;
>
> (2) That the diversion of water from the Cedar River by means of the diversion canal as set forth above would have a direct and substantial effect upon the flow and stage of the Iowa River and hence would affect the navigable capacity of that river;
>
> (3) That the alternate withholding of water in the reservoir and canal during periods of shut-down of the power plant and the release of water at substantial rates of flow during periods of operation of the power plant, as set forth above, would cause extreme fluctuations in the flow of the Mississippi River at

Muscatine, Iowa, and would substantially affect the navigable capacity of that river;

(4) That the interests of interstate commerce would be affected by construction of the project as described in the declaration of intention as supplemented;

(5) That the two small islands . . . [in the Cedar River] are public lands of the United States and will be partly or wholly flooded by the reservoir of the proposed project and will be occupied by the project;

(6) That a license for the construction proposed above is required under the provisions of the Federal Power Act." 2 Fed. Power Comm. Rep., 958.[4]

On August 11, 1941, the petitioner, pursuant to that finding, filed with the Commission an application for a license to construct the project above described. On November 4, 1941, the Commission granted the State of Iowa's petition to intervene and, since then, the State has opposed actively the granting of the federal license.

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[4] On February 7, 1940, the Commission had sent notice to the Governor of Iowa of the filing of the original declaration of intention and invited him to present information and comments relative thereto. The State, however, took no part in the proceedings. The record also indicates that twice in the three years before the present proceeding, the Executive Council of the State of Iowa rejected applications of the petitioner requesting state permits to construct a dam near Moscow comparable to that proposed in all of these proceedings, but not including a diversion of water from the Cedar to the Mississippi River. The last application of the petitioner to the Council for such a permit was filed August 12, 1940, and rejected June 25, 1941. No application has been made by the petitioner to the Executive Council for a state permit for construction of the project including the canal diverting most of the flow of the Cedar River to the Mississippi and providing for a plant and tailrace on the bank of the Mississippi. In its petition to intervene in the present proceeding for a federal license, the State alleged that such a diversion would violate § 7771 (in Chapter 363) of the Code of Iowa, 1939. That allegation touches the principal question in this case.

On January 29, 1944, after extended hearings, the Commission rendered an opinion including the following statements:

> "As first presented, the plans of the applicant for developing the water resources of the Cedar River were neither desirable nor adequate, but many important changes in design have been made. [The opinion here quoted in a footnote § 10 (a) of the Federal Power Act.][5] The applicant has also agreed to certain modifications proposed by the Chief of Engineers of the War Department. The present plans call for a practical and reasonably adequate development to utilize the head and water available, create a large storage reservoir, and make available for recreational purposes a considerable area now unsuitable for such use, all at a cost which does not appear to be unreasonable.
>
> "Further changes in design may be desirable, but they are minor in character and can be effected if the applicant is able to meet the other requirements of the act." *Re First Iowa Hydro-Electric Cooperative,* 52 PUR (NS) 82, 84.

We believe that the Commission would have been justified in proceeding further at that time with its consideration of the petitioner's application upon all the material facts. Such consideration would have included evidence submitted by the petitioner pursuant to § 9 (b)

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[5] "SEC. 10. All licenses issued under this Part shall be on the following conditions:

"(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval." 49 Stat. 842, 16 U. S. C. § 803 (a).

of the Federal Power Act [6] as to the petitioner's compliance with the requirements of the laws of Iowa with respect to the petitioner's property rights to make its proposed use of the affected river beds and banks and to divert and use river water for the proposed power purposes, as well as the petitioner's right, within the State of Iowa, to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of the license. The Commission, however, was confronted at that point with a claim by the State of Iowa that the petitioner must not only meet the requirements for a federal license for the project under the Federal Power Act, but should also present satisfactory evidence of its compliance with the requirements of Chapter 363 of the Code of Iowa, 1939, hereinafter discussed, for a permit from the State Executive Council of Iowa for the same project.

While it now appears, from its brief and the argument in this Court, that it is the opinion of the Federal Power Commission that the requirements of Chapter 363 of the Code of Iowa as to this project have been superseded by those of the Federal Power Act, yet, at the time of the original hearing, the Commission felt that the courts were the appropriate place for the decision on Iowa's contention as to the applicability and effectiveness of Chapter 363

[6] "SEC. 9. That each applicant for a license hereunder shall submit to the commission—

. . . . . .

"(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act." 41 Stat. 1068, 16 U. S. C. § 802 (b).

of its Code in relation to this project. The Commission decided, therefore, to proceed no further until that question had been decided by the courts, and dismissed the petitioner's application, without prejudice, in accordance with the following explanation stated in its opinion:

> "The appropriate place for a determination of the validity of such state laws is in the courts and, if we dismiss the application for license on the basis of failure to comply with the requirements of § 9 (b), applicant may seek review of our action and its contentions under § 313 (b) of the Federal Power Act." 52 PUR (NS) 82, 85.

The Commission also expressly found that—

> "The applicant has not presented satisfactory evidence, pursuant to § 9 (b) of the Federal Power Act, of compliance with the requirements of applicable laws of the state of Iowa requiring a permit from the State Executive Council to effect the purposes of a license under the Federal Power Act, and the pending application, as supplemented, should be dismissed without prejudice; . . ." *Id.* at 85.

This action, after all, did not save the Commission from passing on the issue, for the order of dismissal was a ruling upon it, adverse both to the petitioner's contentions and to its own views on the law. The Commission would have been justified in following its own interpretation of the Federal Power Act and proceeding with the merits of the application without requiring the petitioner to submit evidence of its compliance with the terms of Chapter 363, or of any other laws of the State of Iowa, which the Commission held to be inapplicable or to have been superseded by the Federal Power Act.

On the applicant's petition for review of the dismissal, it was affirmed by the United States Court of Appeals for the District of Columbia. 151 F. 2d 20. We then granted certiorari under § 240 (a) of the Judicial Code, 28 U. S. C. § 347, and § 313 (b) of the Federal Power Act,

49 Stat. 860, 16 U. S. C. § 825*l*, because of the importance of the case in applying the Federal Power Act.

The findings made by the Commission on June 3, 1941, in response to the petitioner's declaration of intention are not in question. For the purposes of this application it is settled that the project will affect the navigability of the Cedar, Iowa and Mississippi Rivers, each of which has been determined to be a part of the navigable waters of the United States; will affect the interests of interstate commerce; will flood certain public lands of the United States; and will require for its construction a license from the Commission.[7] The project is clearly within the jurisdiction of the Commission under the Federal Power Act. The question at issue is the need, if any, for the presentation of satisfactory evidence of the petitioner's compli-

[7] "SEC. 4. The Commission is hereby authorized and empowered—

. . . . . .

"(e) To issue licenses . . . to any corporation organized under the laws of the United States or any State thereof, . . . for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands . . . of the United States . . .: *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: . . ." 49 Stat. 840, 16 U. S. C. § 797 (e). See also, § 23 (b), note 2, *supra.*

ance with the terms of Chapter 363 of the Code of Iowa. This question is put in issue by the petition for review of the order of the Commission which dismissed the application solely on the ground of the failure of the petitioner to present such evidence. The laws of Iowa which that State contends are applicable and require a permit from its Executive Council to effect the purposes of the federal license are all in §§ 7767–7796.1 of the Code of Iowa, 1939, constituting Chapter 363, entitled "Mill Dams and Races." Section 7767 of that chapter is alleged to require the issuance of a permit by the Executive Council of the State and is the one on which the Commission's order must depend. It provides:

> "7767 Prohibition—permit. No dam shall be constructed, maintained, or operated in this state in any navigable or meandered stream for any purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation, or municipality constructing, maintaining, or operating the same." [8]

To require the petitioner to secure the actual grant to it of a state permit under § 7767 as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the Federal Act. It would subordinate to the control of the State the "comprehensive" planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government.[9]

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[8] Sections 7771, 7776, 7792 and 7796 of Chapter 363 have a less direct relation to the issue but would be superseded by the Federal Power Act if § 7767 is superseded by it.

[9] See § 10 (a), note 5, *supra;* § 23 (b), note 2, *supra;* and § 4 (e), note 7, *supra.*

The Commission's order of dismissal avoids this extreme result because, instead of charging the petitioner with failure to present satisfactory evidence of the actual grant to it of a state permit, the order charges the petitioner with failure to present satisfactory evidence merely of its "compliance with the requirements of applicable laws of the state of Iowa requiring a permit from the State Executive Council." While this avoids subjecting the petitioner to an arbitrary and capricious refusal of the permit it does not meet the substance of the objection to the order. For example, § 7776 of the State Code requires that "the method of construction, operation, maintenance, and equipment of any and all dams in such waters shall be subject to the approval of the Executive Council." This would subject to state control the very requirements of the project that Congress has placed in the discretion of the Federal Power Commission.[10] A still greater difficulty is illustrated by § 7771. This states the requirements for a state permit as follows:

"7771 When permit granted. If it shall appear to the council that the construction, operation, or

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[10] See § 10 (a), note 5, *supra;* and also:

"SEC. 10. All licenses issued under this Part shall be on the following conditions: . . .

"(b) That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder . . . without the prior *approval of the Commission;* and any emergency alteration or addition so made shall thereafter be subject to such modification and change *as the Commission may direct.*

"(c) That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as *the Commission may from time to time prescribe* for the protection of life, health, and property. . . ." 49 Stat. 842, 16 U. S. C. § 803 (b) and (c). (Italics supplied.)

maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and *any water taken from the stream in connection with the project is returned thereto at the nearest practicable place* without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit, upon such terms and conditions as it may prescribe." (Italics supplied.)

This strikes at the heart of the present project. The feature of the project which especially commended it to the Federal Power Commission was its diversion of substantially all of the waters of the Cedar River near Moscow, to the Mississippi River near Muscatine. Such a diversion long has been recognized as an engineering possibility and as constituting the largest power development foreseeable on either the Cedar or Iowa Rivers.[11] It is this diversion that makes possible the increase in the head of water for power development from a maximum of 35 feet to an average of 101 feet, the increase in the capacity of the plant from 15,000 kw. to 50,000 kw. and its output from 47,000,000 kwh. to 200,000,000 kwh. per year. It is this diversion that led the Federal Power Commission, on January 29, 1944, to make its favorable appraisal of the enlarged project in contrast to its unfavorable appraisal, and to the State's rejection, of the smaller project. It is this feature that brings this project squarely under the Federal Power Act and at the same time gives the project its greatest economic justification.

If a state permit is not required, there is no justification for requiring the petitioner, as a condition of securing its federal permit, to present evidence of the petitioner's com-

[11] Report from the Chief of Engineers on the Iowa River and its tributaries made in 1929 covering navigation, flood control, power development and irrigation. H. R. Doc. No. 134, 71st Cong., 2d Sess., 86, 87, 90.

pliance with the requirements of the State Code for a state permit. Compliance with state requirements that are in conflict with federal requirements may well block the federal license. For example, compliance with the state requirement, discussed above, that the water of the Cedar River all be returned to it at the nearest practicable place would reduce the project to the small one which is classified by the Federal Power Commission as "neither desirable nor adequate." Similarly, compliance with the engineering requirements of the State Executive Council, if additional to or different from the federal requirements, may well result in duplications of expenditures that would handicap the financial success of the project. Compliance with requirements for a permit that is not to be issued is a procedure so futile that it cannot be imputed to Congress in the absence of an express provision for it. On the other hand, there is ample opportunity for the Federal Power Commission, under the authority expressly given to it by Congress, to require by regulation the presentation of evidence satisfactory to it of the petitioner's compliance with any of the requirements for a state permit on the state waters of Iowa that the Commission considers appropriate to effect the purposes of a federal license on the navigable waters of the United States. This evidence can be required of the petitioner upon the remanding of this application to the Commission.

In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the States from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two cooperating agencies of government, each with final authority in its own jurisdiction. The duality does not require two

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agencies to share in the final decision of the same issue. Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority. In fact a contrary policy is indicated in §§ 4 (e), 10 (a), (b) and (c), and 23 (b).[12] In those sections the Act places the responsibility squarely upon federal officials and usually upon the Federal Power Commission. A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable. "Compliance with the requirements" of such a duplicated system of licensing would be nearly as bad. Conformity to both standards would be impossible in some cases and probably difficult in most of them.[13] The solution adopted by Congress, as to what evidence an applicant for a federal license should submit to the Federal Power Commission, appears in § 9 of its Act. It contains not only subsection (b)[14] but also subsections (a) and (c).[15] Section 9 (c) permits

[12] See notes 7, 5, 10 and 2, *supra*.

[13] In addition to those given in the text, another example of conflict between the project requirements of the Iowa statutes and those of the Federal Power Act appears in § 7792 of the Iowa Code. That section requires the beginning of construction of the project dam or raceway within one year and the completion of the plant within three years after the granting of the permit. This conflicts with § 13 of the Federal Power Act which makes this largely discretionary with the Federal Power Commission but generally contemplates that the construction be commenced within two years from the date of the license. So in § 7793 of the Iowa Code, the life of a permit conflicts with the term of a license under § 6 of the Federal Power Act.

[14] See note 6, *supra*.

[15] "SEC. 9. That each applicant for a license hereunder shall submit to the commission—

"(a) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made

the Commission to secure from the applicant "Such additional information as the commission may require." This enables it to secure, *in so far as it deems it material,* such parts or all of the information that the respective States may have prescribed in state statutes as a basis for state action. The entire administrative procedure required as to the present application for a license is described in § 9 and in the Rules of Practice and Regulations of the Commission.[16]

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in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

. . . . . .

"(c) Such additional information as the commission may require." 41 Stat. 1068, 16 U. S. C. § 802 (a) and (c).

[16] These rules and regulations are issued pursuant to §§ 303, 308 and 309, 49 Stat. 855, 858, 16 U. S. C. §§ 825b, 825g and 825h, interpreting §§ 4 and 9 of the Federal Power Act. Federal Power Commission Rules of Practice and Regulations, 1938, §§ 4.40–4.51, 18 C. F. R. §§ 4.40–4.51. They cover the field so fully as to leave no purpose to be served by filing comparable information required in some alternative form under state laws as a basis for a state permit. Exhibits D and E, required by § 4.41 of the regulations, are to satisfy § 9 (b) of the Federal Power Act and have to do especially with property rights in the use of water under the state laws and do not alter the legal situation presented by the Act itself. These exhibits are described as follows:

"*Exhibit D.*—Evidence that the applicant has complied with the requirements of the laws of the State or States within which the project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business, necessary to effect the purposes of the license applied for, including a certificate of convenience and necessity, if required. This evidence shall be accompanied by a statement of the steps that have been taken and the steps that remain to be taken to acquire franchise or other rights from States, counties, and municipalities before the project can be completed and put into operation.

"*Exhibit E.*—The nature, extent, and ownership of water rights which the applicant proposes to use in the development of the

The securing of an Iowa state permit is not in any sense a condition precedent or an administrative procedure that must be exhausted before securing a federal license. It is a procedure required by the State of Iowa in dealing with its local streams and also with the waters of the United States within that State in the absence of an assumption of jurisdiction by the United States over the navigability of its waters. Now that the Federal Government has taken jurisdiction of such waters under the Federal Power Act, it has not by statute or regulation added the state requirements to its federal requirements.

The State of Iowa, in its petition to intervene in the proceedings before the Commission, stated in relation to the proposed diversion of water from the Cedar River to the Mississippi: "said diversion would be in direct violation of the provisions of section 7771, Code of Iowa 1939." Also, in the State's motion to intervene in the proceedings before the Court of Appeals, it alleged that "By reason of said provisions of law [§§ 7767 and 7771, Code of Iowa, 1939] and the diversion of water involved in the proposed project of petitioner, the executive council of the state of Iowa could not lawfully grant a permit for the erection of the dam proposed." Furthermore, the Executive Council, which includes the Governor of the State, on July 5,

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project covered by application, together with satisfactory evidence that the applicant has proceeded as far as practicable in perfecting its rights to use sufficient water for proper operation of the project works. A certificate from the proper State agency setting forth the extent and validity of the applicant's water rights shall be appended if practicable. In case the approval or permission of one or more State agencies is required by State law as a condition precedent to the applicant's right to take or use water for the operation of the project works, duly certified evidence of such approval or permission, or a showing of cause why such evidence cannot be reasonably submitted shall also be filed. When a State certificate is involved, one certified copy and three uncertified copies shall be submitted." Federal Power Commission Rules of Practice and Regulations, effective June 1, 1938, pp. 21–22.

1944, adopted a resolution directing the Attorney General of Iowa to intervene in this case before that court and "thereby take steps to sustain the said order of the Federal Power Commission [dismissing the petitioner's application for a federal license]" because "it is vital to the interests of the State of Iowa that the said order of the Commission be sustained." This demonstrates that the State of Iowa not only is opposed to the granting of a state permit but is opposed also to the granting of a federal license for the project. This opposition is based at least in part on the ground that the state statute, as interpreted by the state officials, expresses a policy opposed to the diversion of water from one stream to another in Iowa under such circumstances as the present.

Accepting this as the meaning of § 7771 of the Iowa Code brings us to consideration of the effect of the Federal Power Act upon it and the related state statutes. We find that when that Act is read in the light of its long and colorful legislative history, it discloses both a vigorous determination of Congress to make progress with the development of the long idle water power resources of the Nation and a determination to avoid unconstitutional invasion of the jurisdiction of the States. The solution reached is to apply the principle of the division of constitutional powers between the State and Federal Governments. This has resulted in a dual system involving the close integration of these powers rather than a dual system of futile duplication of two authorities over the same subject matter.

The Act leaves to the States their traditional jurisdiction subject to the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce, administer the public lands and reservations of the United States and, in certain cases, exercise authority under the treaties of the United States. These sources of constitutional authority are all applied in

the Federal Power Act to the development of the navigable waters of the United States.[17]

The closeness of the relationship of the Federal Government to these projects and its obvious concern in maintaining control over their engineering, economic and financial soundness is emphasized by such provisions as those of § 14 authorizing the Federal Government, at the

[17] The Federal Government took its greatest step toward exercising its jurisdiction in this field by authorizing federal licenses, under the Federal Water Power Act of 1920 (41 Stat. 1063), for terms of 50 years for the development of water power in the navigable waters of the United States. That Act was limited in 1921 by the exclusion from it of water power projects in national parks or national monuments. 41 Stat. 1353. The Commission was reorganized so as to improve its administrative capacity in 1930. 46 Stat. 797. The Act was generally revised and perfected on August 26, 1935, 49 Stat. 803, when it received the name of the Federal Power Act. It was then made Part I of Title II of the Public Utility Act of 1935.

This last step was shortly after the decision of this Court in *United States* v. *West Virginia*, 295 U. S. 463, and it has served to clarify the law as it existed prior to that decision. Among other things, this last step amended § 23 so as expressly to require a federal license for every water power project in the navigable waters of the United States. It also made mandatory, instead of discretionary, the filing with the Federal Power Commission of a declaration of intention by anyone intending to construct a project in non-navigable waters over which Congress had jurisdiction under its authority to regulate commerce. It continued its recital of permission to construct such projects upon compliance with the state laws, rather than with the Federal Power Act, provided the projects were not in navigable waters of the United States, did not affect the interests of interstate or foreign commerce and did not affect the public lands or reservations of the United States. These amendments sharpened the line between the state and federal jurisdictions and helped to make it clear that the Federal Government was assuming responsibility through the Federal Power Commission for the granting of appropriate licenses for the development of water power resources in the navigable waters of the United States. See also the rapid development of federal projects shown in the Annual Reports of the Federal Power Commission 1921–1945.

expiration of a license, to take over the licensed project by payment of "the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken," plus an allowance for severance damages. The scope of the whole program has been further aided, in 1940, by the definition given to navigable waters of the United States in *United States* v. *Appalachian Power Co.*, 311 U. S. 377. "Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. *Gibbons* v. *Ogden*, 9 Wheat. 1, to *United States* v. *Appalachian Power Co.*, 311 U. S. 377." *Northwest Airlines* v. *Minnesota*, 322 U. S. 292, 303.

It was in the light of these developments that this petitioner, in April, 1941, made application for a federal license for this enlarged project. This project thus illustrates the kind of a development, in relation to interstate commerce and to the navigable waters of the United States, that is brought forth by the new recognition of its value when viewed from the comprehensive viewpoint of the Federal Power Commission. Until 1941, this enlarged project had remained dormant at least from the time when its value was recognized in the report to Congress filed by the War Department in 1929.[18]

Further light is thrown upon the meaning of the Federal Power Act by the statement, made by Representative William L. LaFollette of Washington, a member of the Special Committee on Water Power, which reported the bill which later became the Federal Water Power Act of 1920. In the debate which led to the insertion in § 9 (b)

[18] H. R. Doc. No. 134, 71st Cong., 2d Sess., reflecting the recommendations of the District Engineer, pp. 8–90; Division Engineer, p. 90; Mississippi River Commission, pp. 90–93; Board of Engineers for Rivers and Harbors, pp. 3–8; and the Chief of Engineers, pp. 1–3. See especially pp. 86, 87, 90.

of the reference to state laws as to the bed and banks of streams, he said:

> "The property rights are within the State. It can dispose of the beds, or parts of them, regardless of the riparian ownership of the banks, if it desires to, and that has been done in some States. If we put in this language, which is practically taken from that Supreme Court decision [*United States* v. *Cress*, 243 U. S. 316], as to the property rights of the States as to the bed and the banks and to the diversion of the water, then it is sure that we have not infringed any of the rights of the States in that respect, or any of their rules of property, and *we are trying in this bill above everything else to overcome a divided authority and pass a bill that will make it possible to get development.* We are earnestly trying not to infringe the rights of the States. If possible we want a bill that can not be defeated in the Supreme Court because of omissions, because of the lack of some provision that we should have put in the bill to safeguard the States." 56 Cong. Rec. 9810. (Italics supplied.)

As indicated by Representative LaFollette, Congress was concerned with overcoming the danger of divided authority so as to bring about the needed development of water power and also with the recognition of the constitutional rights of the States so as to sustain the validity of the Act. The resulting integration of the respective jurisdictions of the State and Federal Governments is illustrated by the careful preservation of the separate interests of the States throughout the Act, without setting up a divided authority over any one subject.[19]

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[19] Instances of such provisions are the following: § 4 (a) and (c), cooperation of the Commission with the executive departments and other agencies of the State and National Governments is required in the investigation of such subjects as the utilization of water resources, water-power industry, location, capacity, development costs and the relation to markets of power sites, and the fair value of power. § 4 (f), notice of application for a preliminary permit is to go to any State or municipality likely to be interested. § 7 (a), in

Sections 27 and 9 are especially significant in this regard. Section 27 expressly "saves" certain state laws relating to property rights as to the use of water, so that these are not superseded by the terms of the Federal Power Act. It provides:

> "SEC. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 41 Stat. 1077, 16 U. S. C. § 821.

Section 27 thus evidences the recognition by Congress of the need for an express "saving" clause in the Federal Power Act if the usual rules of supersedure are to be overcome. Sections 27 and 9 (b) were both included in the original Federal Water Power Act of 1920 in their present form. The directness and clarity of § 27 as a "saving" clause and its location near the end of the Act emphasizes the distinction between its purpose and that of § 9 (b) which is included in § 9, in the early part of the Act, which deals with the marshalling of information for the consideration of a new federal license. In view of the use by Congress of such an adequate "saving" clause in § 27, its failure to use similar language in § 9 (b) is persuasive that § 9 (b) should not be given the same effect as is given to § 27.

The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation,

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issuing permits and licenses preference is to be given to States and municipalities. § 10 (e), licenses to States and municipalities under certain circumstances shall be issued and enjoyed without charge. § 14, a right is reserved not only to the United States but to any State or municipality to take over any licensed project at any time by condemnation and payment of just compensation. §§ 19 and 20, regulation of service and rates is preserved to the States.

use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase "any vested right acquired therein" further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words "other uses." Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes. This was so held in an early decision by a District Court, relating to § 27 and upholding the constitutionality of the Act, where it was stated that "a proper construction of the act requires that the words 'other uses' shall be construed ejusdem generis with the words 'irrigation' and 'municipal.'" *Alabama Power Co.* v. *Gulf Power Co.*, 283 F. 606, 619.

This section therefore is thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the Federal Power Act. It strengthens the argument that, in those fields where rights are not thus "saved" to the States, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course.[20]

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[20] The legislative history of § 27 confirms these conclusions. The language is similar to that of § 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U. S. C. § 383, which provides, "nothing [in several listed sections] in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, . . ."

This restricted clause appeared in a modified and broader form in the Ferris Public Lands Bill of 1916, H. R. No. 408, 64th Cong., 1st Sess.:

"SEC. 13. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws

Section 9 (b)[21] does not resemble § 27. It must be read with § 9 (a) and (c).[22] The entire section is devoted to securing adequate information for the Commission as to pending applications for licenses. Where § 9 (a) calls for engineering and financial information, § 9 (b) calls for legal information. This makes § 9 (b) a natural place in which to describe the evidence which the Commission shall require in order to pass upon applications for federal licenses. This makes it a correspondingly unnatural place to establish by implication such a substantive policy as that contained in § 27 and which, in accordance with the contentions of the State of Iowa, would enable Chapter 363 of the Code of Iowa, 1939, to remain in effect although in conflict with the requirements of the Federal Power Act. There is nothing in the express language of § 9 (b) that requires such a conclusion.

It does not itself require compliance with any state laws. Its reference to state laws is by way of suggestion to the

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of any State relating to the control, appropriation, use, or distribution of water."

It also had appeared as § 14 of the Ferris Bill of 1914, H. R. No. 16673, 63d Cong., 2d Sess., as follows:

"SEC. 14. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder."

Discussion in Congress further emphasized the purely proprietary sense in which this language was used. 51 Cong. Rec. 13630–13631.

The clause reappeared in the Bill which became the Federal Water Power Act and was there enacted into the law in its present form. The use, in § 27 of the Federal Power Act, of language having a limited meaning in relation to proprietary rights under the reclamation law and in public land bills, carries that established meaning of the language into the Federal Power Act in the absence of anything in the Act calling for a different interpretation of the language.

[21] See note 6.

[22] See note 15.

Federal Power Commission of subjects as to which the Commission may wish some proof submitted to it of the applicant's progress. The evidence required is described merely as that which shall be "satisfactory" to the Commission. The need for compliance with applicable state laws, if any, arises not from this federal statute but from the effectiveness of the state statutes themselves.

When this application has been remanded to the Commission, that Commission will not act as a substitute for the local authorities having jurisdiction over such questions as the sufficiency of the legal title of the applicant to its riparian rights, or as to the validity of its local franchises, if any, relating to proposed intrastate public utility service. Section 9 (b) says that the Commission may wish to have "satisfactory evidence" of the progress made by the applicant toward meeting local requirements but it does not say that the Commission is to assume responsibility for the legal sufficiency of the steps taken. The references made in § 9 (b) to beds and banks of streams, to proprietary rights to divert or use water, or to legal rights to engage locally in the business of developing, transmitting and distributing power neither add anything to nor detract anything from the force of the local laws, if any, on those subjects. In so far as those laws have not been superseded by the Federal Power Act, they remain as applicable and effective as they were before its passage. The State of Iowa, however, has sought to sustain the applicability and validity of Chapter 363 of the Code of Iowa in this connection, on the ground that the Federal Power Act, by the implications of § 9 (b), has recognized this chapter of Iowa law as part of a system of dual control of power project permits, cumbersome and complicated though it be. If it had been the wish of Congress to make the applicant obtain consent of state as well as federal authorities to each project, the simple thing would

have been to so provide. In the course of the long debate on the legislation it was proposed at one time to provide for some such consent in § 9 (b).

For example, in the Shields Bill, S. No. 1419, 65th Cong., 2d Sess., in 1917, a proviso was proposed:

> "That before the permit shall be granted under this Act, the permittee must first obtain, in such manner as may be required by the laws of the States, *the consent of the State or States* in which the dam or other structure for the development of the water power is proposed to be constructed." (Italics supplied.)

This proviso was not enacted into law but it illustrates the concreteness with which the proposal was before Congress. In 1918, when Representative Mondell, of Wyoming, successfully defended the present language against amendment, he stated the purposes of § 9 (b) as follows:

> "There are two controlling reasons for the insertion of this paragraph. The first, from the standpoint of water-power legislation, is that *the water-power commission shall have the benefit of all of the information* which the States possess relative to the condition of water supply at the point of proposed diversion. That is a very important reason for a provision of this kind. . . . The second reason is so that the bill shall carry with it *notice to the commission that they must proceed in accordance with the State laws, which they must do in any event, whether the provision were in the bill or not.*" 56 Cong. Rec. 9813–9814. (Italics supplied.)

The purpose of this section as thus explained is consistent with the contention of the Commission in this case. It provides for presentation of information to the federal commission and protects the constitutional rights of the States. This explanation does not support the contention of the State of Iowa that § 9 (b) amounts to the subjection of the federal license to requirements of the state law on the same subject. The inappropriateness of such

an interpretation is apparent in the light of the circumstances which culminated in the passage of the Federal Water Power Act in 1920. The purposes of the Act were then so generally known as to have made such a restrictive interpretation impossible and a denial of it unnecessary. It was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted.

It was a major undertaking involving a major change of national policy.[23] That it was the intention of Congress

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[23] The nation-wide drive for the passage of this legislation dates back at least to the administration of Theodore Roosevelt and to the enthusiastic support of "the conservationists" led by Gifford Pinchot, as Chief of the Division of Forestry.

> "With all its faults the Federal Water Power Act of 1920, marked a great advance. It established firmly the principle of federal regulation of water power projects, limited licenses to not more than fifty years, and provided for Government recapture of the power at the end of the franchise.
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> "For the first time, the Act of 1920 established a national policy in the use and development of water power on public lands and navigable streams." Pinchot, The Long Struggle for Effective Federal Water Power Legislation (1945), 14 Geo. Wash. L. Rev. 9, 19. See also, Kerwin, Federal Water-Power Legislation, c. VI.

The present Act was distinctly an effort to provide federal control over and give federal encouragement to water power development. It grew out of a bill prepared by the Secretaries of War, Interior and Agriculture. It was recommended by a Special Committee on Water Power created in the House of Representatives at the suggestion of President Wilson. See Statement by Representative Sims, Chairman of the Committee on Water Power, 56 Cong. Rec. 9797–9798. The bill was to provide "a method by which the water powers of the

to secure a comprehensive development of national resources and not merely to prevent obstructions to navigation is apparent from the provisions of the Act, the statutory scheme of which has been several times reviewed and approved by the courts.[24]

The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls.[25] The contention of the State of

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country, wherever located, can be developed by public or private agencies under conditions which will give the necessary security to the capital invested and at the same time protect and preserve every legitimate public interest. . . . The problems are national, rather than local; they transcend State lines and cannot be handled adequately except by or in conjunction with national agencies." Statement by David F. Houston, Secretary of Agriculture, quoted in H. R. Rep. No. 61, 66th Cong., 1st Sess., p. 5.

[24] *New Jersey* v. *Sargent*, 269 U. S. 328; *United States* v. *Appalachian Power Co.*, 311 U. S. 377; *Clarion River Power Co.* v. *Smith*, 59 F. 2d 861, certiorari denied, 287 U. S. 639; *Alabama Power Co.* v. *McNinch*, 94 F. 2d 601; *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 74 App. D. C. 351, 123 F. 2d 155, certiorari denied, 315 U. S. 806; *Alabama Power Co.* v. *Federal Power Commission*, 75 U. S. App. D. C. 315, 128 F. 2d 280, certiorari denied, 317 U. S. 652; *Puget Sound Power & Light Co.* v. *Federal Power Commission*, 78 U. S. App. D. C. 143, 137 F. 2d 701; *Wisconsin Public Service Corp.* v. *Federal Power Commission*, 147 F. 2d 743, certiorari denied, 325 U. S. 880; *Georgia Power Co.* v. *Federal Power Commission*, 152 F. 2d 908.

[25] Sections 4 (e) and 10 (a), comprehensive plans required; §§ 4 (f) and 5, preliminary permits; § 4 (g), investigation of power resources; § 6, license term of 50 years; § 7 (a) development of water resources on a national basis; § 7 (b), developments by the United States itself; § 13, prompt construction required; § 14, recapture of projects and payment for them by the Government upon expiration of licenses, thus giving the Government a direct interest in and reason for control of every feature of each licensed project; § 21, federal powers of condemnation vested in licensee; and § 28, prohibition of amendment or repeal of licenses.

Iowa is comparable to that which was presented on behalf of 41 States and rejected by this Court in *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 404–405, 426–427, where this Court said:

> "The states possess control of the waters within their borders, 'subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers.' It is this subordinate local control that, even as to navigable rivers, creates between the respective governments a contrariety of interests relating to the regulation and protection of waters through licenses, the operation of structures and the acquisition of projects at the end of the license term. But there is no doubt that the United States possesses the power to control the erection of structures in navigable waters.
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> . . . . . .
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> "The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government. The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power. Even if there were no such relationship the plenary power of Congress over navigable waters would empower it to deny the privilege of constructing an obstruction in those waters. It may likewise grant the privilege on terms. It is no objection to the terms and to the exertion of the power that 'its exercise is attended by the same incidents which attend the exercise of the police power of the states.' The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment."

It is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional Government must pass upon these issues on behalf of the people of Iowa as well as on behalf of all others.

We accordingly reverse the judgment of the court below with directions to remand the case to the Federal Power Commission for further proceedings in conformity with this opinion.

Reversed.

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

MR. JUSTICE FRANKFURTER, dissenting.

This case does not present one of those large constitutional issues which, because they are so largely abstract, have throughout its history so often divided the Court. The controversy, as I understand it, is concerned with the proper administration of a law in which Congress has recognized the interests of the States as well as of the United States and has entrusted the proper adjustment of these nation-State relations to the interrelated functions of the Federal Power Commission and the courts.

We are all agreed that Congress has the constitutional power to promote a comprehensive development of the nation's water resources and that it has exercised its authority by the Federal Power Act. 41 Stat. 1063, 49 Stat. 838; 16 U. S. C. §§ 791 (a) *et seq.* See *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *New Jersey* v. *Sargent*, 269 U. S. 328; *United States* v. *Appalachian Power Co.*, 311 U. S. 377. And in view of Congress' power, of course this enactment overrides all State legislation in conflict with it. But the national policy for water power development formulated by the Federal Power Act explicitly recognizes regard for certain interests of the States as part of that national policy. This does not imply that general, uncritical notions about so-called "States' rights" are to be read into what Congress has written. It does mean that we must adhere to the express Congressional mandate that the public interest which

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underlies the Federal Power Act involves the protection of particular matters of intimate concern to the people of the States in which proposed projects requiring the sanction of the Federal Power Commission are to be located. By § 9 (b) of the Act, 41 Stat. 1063, 1068; 16 U. S. C. § 802 (b),[1] Congress explicitly required that before the Commission can issue a license for the construction of a hydro-electric development, such as the proposed project of the petitioner, the Commission must have "satisfactory evidence that the applicant has complied with the requirements of the laws of the State" in reference to the matters enumerated.

Whether the Commission has such "satisfactory evidence" necessarily depends upon what the requirements of State law are. In turn, what the requirements of State law are often depends upon the appropriate but unsettled construction of State law. And so, the Commission may well be confronted, as it was in this case, with the necessity of determining what the State law requires before it can determine whether the applicant has satisfied it, and, therefore, whether the condition for exercising the Commission's power has been fulfilled.

To safeguard the interests of the States thus protected by § 9 (b), Congress has directed that notice be given to the State when an application has been filed for a license, the granting of which may especially affect a State. § 4 (f), 49 Stat. 838, 841; 16 U. S. C. § 797 (f). If a State does not challenge the claim of an applicant, the evidence

[1] "SEC. 9. That each applicant for a license hereunder shall submit to the commission . . .

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act."

submitted by the applicant, if found to be satisfactory by the Commission, has met the demands of § 9 (b), and a State cannot thereafter challenge the Commission's determination. But a real problem in administration is presented to the Power Commission when a State does intervene and claims that the applicant has not complied with its lawful requirements. For, before the Commission can meet the duty placed on it by § 9 (b), it must ascertain the scope and meaning of the State law. Suppose the State law is not clear or is susceptible of different constructions and has received no construction by the only authoritative source for the interpretation of State laws, namely, the highest court of the State. Must the Federal Power Commission give an independent interpretation of the laws of the State? This is not to suggest an unreal or hypothetical situation. The Federal Power Commission submitted here a compilation of laws relating to State requirements relevant under § 9 (b) for not less than thirty States. Are the lawyers of the Commission to make themselves the originating interpreters of the laws of these States? Are they to construe, for instance, the laws of New Jersey and Oklahoma and Arizona and Illinois when the courts of those States have not spoken? And if they do and the State appeals from the decision, must the Court of Appeals for the District of Columbia become the interpreter of these various laws? Finally, in the event of a further appellate review is this Court to construe State legislation without guidance by the State courts? Time out of mind, and in a variety of situations, this Court has admonished against the avoidable assumption by this Court of the independent construction of State legislation. See, *e. g.*, *Gilchrist* v. *Interborough Co.*, 279 U. S. 159, 207–209; Brandeis, J., dissenting, in *Railroad Comm'n* v. *Los Angeles R. Co.*, 280 U. S. 145, 158, 164–66. It is pertinent to recall the classic statement of the reason for leaving to the controlling interpretation of local courts the mean-

ing of local law: "to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books." *Diaz* v. *Gonzalez*, 261 U. S. 102, 106. If it has been deemed unwise to throw upon this Court the burden of construing local legislation when the construction could by appropriate procedure be had from the States, it seems odd that we should reject this as a rule of administration adopted by the Power Commission.

That is all that the Commission has done in this case. It has said, in effect: "We do not know what the Iowa law demands of the applicant. Iowa has a right to make certain demands under § 9 (b) and until they are met we are not empowered to grant a license to the applicant. But we cannot tell whether they have been met, because the meaning of the Iowa statutes has not been determined, as it easily can be determined, by an appropriate action in the Iowa courts. Only after such an authoritative pronouncement can we know what our obligation under the statute may be." The Court of Appeals for the District of Columbia thought that such procedure made sense. It seems to have said: "The Commission doesn't know what the Iowa law requires, and neither do we. For we cannot tell what it requires until the Iowa Supreme Court tells us what it requires. And an adjudication of that issue can be readily secured if the applicant will proceed along the easy path provided by Iowa for obtaining such an adjudication." 151 F. 2d 20. See Iowa Laws, 1943, c. 278, § 306 and *Lloyd* v. *Ramsay*, 192 Iowa 103, 116–17, 183 N. W. 333. Even we cannot construe the requirements of Iowa law in the absence of a determination by the Iowa Supreme Court. And in much more conventional types of litigation we have evolved the procedure whereby federal litigation is stayed until the State law is authoritatively

determined by a State court. *E. g., Railroad Commission* v. *Pullman Co.,* 312 U. S. 496; *Spector Motor Co.* v. *McLaughlin,* 323 U. S. 101; *A. F. of L.* v. *Watson,* 327 U. S. 582.

What reason of policy is there for not approving this mode of adjusting interests that involve a regard for both federal and State enactments? The Federal Power Commission which devised this procedure has not been an unzealous guardian of the national interests. *E. g., Federal Power Comm'n* v. *Natural Gas Pipeline Co.,* 315 U. S. 575; *Federal Power Comm'n* v. *Hope Natural Gas Co.,* 320 U. S. 591.

It is no answer to suggest that the Attorney-General of Iowa at the bar of this Court expressed a view of the Iowa statute which would make obedience to it needless because of conflict with the provisions of the Federal Power Act. The Attorney-General is not the judicial organ of the State of Iowa. This Court does not always take the interpretation by the Attorney-General of the United States of a federal statute. It should not take the view of the Attorney-General of Iowa as authoritative on a statute not construed by the Supreme Court of Iowa when we are called upon to make the adjustment in federal-State relations which Congress has enjoined in § 9 (b). After all, advocates, including advocates for States, are like managers of pugilistic and election contestants in that they have a propensity for claiming everything. Before conflict can be found between federal and State legislation, construction must be given the State legislation. Avoidance of conflict is itself an important factor relevant to construction. And so, construction of State legislation relating to the matters dealt with in the Federal Power Act is subtle business and a subtlety peculiarly within the duty, skill, and understanding of State judges.

If it be said that the procedure for which the Federal Power Commission contends may take time, there is no

assurance that a contested case like this will not take just as much time hereafter. The Commission must pass independently on an unconstrued State statute; its construction may then come before the Court of Appeals for the District and eventually before this Court. Even then the possibility remains that this Court's decision will be followed by one in the State court ruling, as has not been unknown, that this Court's interpretation was in error. In any event, mere speed is not a test of justice. Deliberate speed is. Deliberate speed takes time. But it is time well spent.

With due respect, I have not been able to discover an adequate answer to the position of the Federal Power Commission, thus summarized in the Solicitor-General's brief:

> "Unless Section 9 (b) is to be given no effect whatever, some evidence of compliance with at least some state laws is a prerequisite to the issuance of a federal license, and the view of the court below, that there is no occasion, in this case, to anticipate conflicts between state and federal authority and the consequent invalidity of the state law, is not an unreasonable one. 'To predetermine, even in the limited field of water power, the rights of different sovereignties, pregnant with future controversies, is beyond the judicial function.' *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 423. Here petitioner, since the modification of its plans, has given the State Executive Council and the Iowa courts no opportunity to express their views on its proposed project with reference to matters which may be peculiarly of local concern; without such an expression, it is difficult to assess the propriety of what is only an anticipated exercise of the State's power."

Accordingly, I think that the judgment should be affirmed.

Counsel for Parties.

HOWITT ET AL. *v.* UNITED STATES.

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

No. 354. Argued January 4, 1946.—Decided May 6, 1946.

1. Ticket sellers and other employees of a railroad who use the power of their positions to discriminate among passengers by exacting sums in excess of established rates, appropriating the excess for themselves, are punishable under § 10 (1) of the Interstate Commerce Act, even though the railroad is not a party to their conduct. Pp. 190–193.
2. One of the primary purposes of the Interstate Commerce Act is to establish uniform treatment of users of transportation facilities. P. 192.
3. Section 10 shows the clearest possible purpose to bar railroad employees from overcharging for their own or for the railroad's illegitimate gain. P. 193.
4. The Act imposes the same duty on ticket sellers and clerks of common carriers as that imposed on railroad officers or other employees, to treat all the public alike as to terms and conditions of transportation. P. 193.

150 F. 2d 82, affirmed.

Petitioners were indicted for violations of the Interstate Commerce Act and demurred to the indictments. The District Court overruled the demurrers, 55 F. Supp. 372, and they were convicted. The Circuit Court of Appeals affirmed. 150 F. 2d 82. This Court granted certiorari. 326 U. S. 706. *Affirmed*, p. 193.

Bart. A. Riley submitted on brief for petitioners.

Walter J. Cummings, Jr. argued the cause for the United States. With him on the brief were *Solicitor General McGrath, Robert S. Erdahl* and *Beatrice Rosenberg.*

Willard H. McEwen filed a brief for the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, as *amicus curiae*.

MR. JUSTICE BLACK delivered the opinion of the Court.

The wartime transportation shortage during the winter of 1943 made it exceedingly difficult to obtain tickets for trains going north from Miami, Florida. Petitioners are three ticket sellers and one diagram clerk who were employed at that time by a railroad at Miami. Petitioners Howitt, Lee, and Dewhurst were charged with, and convicted for, conspiracy to violate the Interstate Commerce Act, 49 U. S. C. § 1 *et seq.*, in that they conspired to collect and receive unjust and unreasonable charges for passenger transportation, in violation of § 1 (5) (a); to receive and collect greater compensation for service from certain persons than that which would be collected from others, in violation of § 2; to prefer particular persons to the disadvantage of others, in violation of § 3 (1); and to collect and receive compensation in excess of that fixed by tariff schedules, in violation of § 6 (7). These violations are made a crime by § 10.[1] Petitioner

[1] Section 10 reads in part as follows:

"Any common carrier subject to the provisions of this part, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this part prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this part required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this part to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this part for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor . . ."

O'Rourke was charged with and convicted for committing substantive offenses of the same nature.[2] The Circuit Court of Appeals affirmed. 150 F. 2d 82. We granted certiorari because this case raises important questions concerning the scope of the Act.

The Government charged that there was a working agreement between petitioners and certain local hotel employees under which persons anxious to purchase railroad tickets would, in order to obtain them, pay amounts in excess of published rates either to petitioners directly, or to the hotel employees who in turn would divide the excess payments between themselves and petitioners.[3]

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[2] Ordinary violations of the Act are under § 10 punished only by imposition of a fine. But a proviso imposes a prison term if the violation consists of an unlawful discrimination. Petitioner O'Rourke contends that he was charged only with violating § 6 (7) rather than § 2, which is the unlawful discrimination section, and that he therefore could not be imprisoned under § 10. This contention is frivolous. The O'Rourke indictment clearly and explicitly also charges a violation of § 2.

[3] An amicus brief filed with us contains the suggestion that a rather extensive paragraph of the court's charge to the jury, to which exception was noted, contains language susceptible of the construction that acceptance of a "bona fide tip" might constitute a violation of the Interstate Commerce Act. We think that that language read in its context does not relate to bona fide tips but rather to excess charges which the prospective passenger was forced to pay and which were made to look like tips. Moreover, this paragraph of the charge also contains instructions that employees acting alone without participation by the railroad might be found guilty of violating the Act. The exception to the paragraph was a general one. In view of what petitioners argue here, what they argued on demurrer, and on the motion for directed verdict, it is likely that the exception was directed to these last-mentioned instructions and not to the language challenged by the amicus brief. Indeed, petitioners introduced no evidence to show that they were receiving bona fide tips, nor did they request any charge on the basis of this theory. If petitioners in excepting to the challenged paragraph of the charge had the "bona fide" tip ques-

The railroad played no part in these transactions. The Government produced a great deal of evidence to support these charges.[4] Petitioners offered no testimony or other kind of evidence to contradict that produced by the Government. Their only contention was raised on demurrer, motion for directed verdict and exception to the charge of the jury. This contention, urged on several different grounds, was that the indictment failed to charge, and the evidence failed to establish a crime, since the Interstate Commerce Act and § 10 in particular are primarily aimed at railroads and do not make discriminatory and illegal charges by railroad employees for passenger transportation criminally punishable, unless the railroad is itself a party to the conduct. This is still the basis of petitioners' arguments.

It is well established that one of the primary aims of the Interstate Commerce Act and the amendments to it was to establish uniform treatment of users of transportation facilities. See *Mitchell* v. *United States,* 313 U. S. 80, 94, 95. The Act again and again expressly condemns all kinds of discriminatory practices. Railroad employees can accomplish invidious transportation discrimination, whether or not their conduct is approved or participated in by their superiors. Not only do the Act's provisions against discrimination and special favors fail to exempt

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tion in mind they should have specifically pointed this out to the trial court. See *Allis* v. *United States,* 155 U. S. 117, 121–123. The issue raised by the amicus brief as to whether the Act covers bona fide tips is therefore not before us.

[4] The Circuit Court of Appeals said that this evidence "proved beyond question that the defendants repeatedly and systematically took advantage of the prevailing war-time congestion in transportation to exact from applicants for accommodations more money than the regular rate prescribed, and appropriated the difference to themselves."

employees such as petitioners; but § 10 standing alone shows the clearest possible purpose to bar all railroad employees from overcharging for their own or for the railroad's illegitimate gain. The Interstate Commerce Act imposes the same duty on ticket sellers and clerks of common carriers as that imposed on railroad officers or other employees: to treat all the public alike as to the terms and conditions of transportation. Railroad accommodations are thus not to depend upon who will or can pay more because of greater need or a longer purse. See *United States* v. *Estes,* 6 F. 2d 902, 905.

Affirmed.

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

FEDERAL TRADE COMMISSION *v.* A. P. W. PAPER CO., INC.

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

No. 320. Argued February 4, 1946.—Decided May 6, 1946.

Prior to 1905 respondent used "Red Cross" as a trade name and displayed the Red Cross symbol on its products. Section 4 of the American Red Cross Act of January 5, 1905, forbade "any person or corporation, other than the Red Cross of America, not now lawfully entitled to use the sign of the Red Cross, hereafter to use such sign . . . for the purposes of trade or as an advertisement to induce the sale of any article whatsoever." That section was amended in 1910 so as to forbid the use of the symbol or the words "Red Cross" for the purpose of trade or as an advertisement "to induce the sale of any article" or "for any business or charitable purpose" by any person other than the American National Red Cross or the sanitary and hospital authorities of the army and navy, except that "no person, corporation, or association that actu-

ally used . . . the said emblem . . . or words for any lawful purpose prior to" January 5, 1905 "shall be deemed forbidden by this Act to continue the use thereof . . ." The Geneva Convention of 1929, ratified by the United States in 1932, bound the contracting Governments to take or recommend to their legislatures such measures as might be necessary "to prevent the use by private persons . . . of the emblem or the name of the *Red Cross*," from the time set in the legislation and not later than five years after the effective date of the convention. Congress enacted no legislation to effectuate this undertaking. In 1942 the Federal Trade Commission charged petitioner with a violation of § 5 (a) of the Federal Trade Commission Act, as amended by the Act of March 21, 1938, which makes unlawful "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." After appropriate administrative proceedings, the Commission found that respondent's use of the words and symbol were misleading to the purchasing public and ordered respondent to cease and desist from using the words "Red Cross" to describe its products and from displaying the symbol on them. *Held:*

1. Under the facts of this case, the Commission may not absolutely forbid the use of the words and symbol by respondent. Pp. 198, 200, 204.

(a) The 1910 Act granted, or at least recognized, the right of pre-1905 users to continue their use. P. 200.

(b) This specific right was not intended to be swept away by the 1938 amendment to the Federal Trade Commission Act. P. 202.

(c) Since Congress has taken no action to effectuate the undertaking in the Geneva Convention of 1929 to prevent their use by private persons, it does not impair the rights of good faith pre-1905 users granted or recognized by the 1910 Act. P. 203.

2. Reading the 1910 and 1938 Acts *in pari materia*, the good faith use of the words and symbols by pre-1905 users is permissible; but the Commission may require the addition of language which removes any misleading inference that the products are in fact sponsored, approved, or in any manner associated with the American National Red Cross. P. 202.

3. The fashioning of the order which should be entered is entrusted to the Commission, which has wide latitude for judgment. P. 203.

149 F. 2d 424, affirmed.

The Federal Trade Commission ordered respondent to cease and desist from using the words "Red Cross" to describe its products and from displaying the Greek red cross on them. 38 F. T. C. 1. On petition for review, the Circuit Court of Appeals reversed the Commission's order and remanded the case to the Commission for the formulation of a new order which, though not forbidding the use of the words and symbol, might require statements which would avoid any inference that the goods were sponsored or approved or in any way connected with the American National Red Cross. 149 F. 2d 424. This Court granted certiorari. 326 U. S. 704. *Affirmed,* p. 204.

Solicitor General McGrath argued the cause for petitioner. With him on the brief were *Assistant Attorney General Berge, Charles H. Weston* and *W. T. Kelley.*

Edward H. Green argued the cause for respondent. With him on the brief was *E. H. Sykes.*

Kenneth Perry and *Hector M. Holmes* filed a brief for Johnson & Johnson, as *amicus curiae,* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondent manufactures and sells toilet tissues and paper towels in interstate commerce. On each package or roll of one brand are a Greek red cross and the words "Red Cross". Respondent registered the words "Red Cross" and the Red Cross symbol as a trade mark; and it features them in its advertisements and on its letterheads.

By § 4 of the American Red Cross Act of January 5, 1905, 33 Stat. 600, 36 U. S. C. § 4, it was made unlawful "for any person or corporation, other than the Red Cross

of America, not now lawfully entitled to use the sign of the Red Cross, hereafter to use such sign or any insignia colored in imitation thereof for the purposes of trade or as an advertisement to induce the sale of any article whatsoever." That section was amended by the Act of June 23, 1910, 36 Stat. 604, 36 U. S. C. § 4. Sec. 4 of that Act made unlawful the use of the Greek red cross on a white ground or the words "Red Cross" for the purpose of trade or as an advertisement "to induce the sale of any article" or "for any business or charitable purpose" by any person other than the American National Red Cross [1] or its duly authorized employees and agents or the sanitary and hospital authorities of the army and navy. It contained, however, a proviso which reads as follows: "That no person, corporation, or association that actually used or whose assignor actually used the said emblem, sign, insignia, or words for any lawful purpose prior to January fifth, nineteen hundred and five, shall be deemed forbidden by this Act to continue the use thereof for the same purpose and for the same class of goods."

Petitioner's use of the trade name and emblem antedate January 5, 1905.[2] But in 1942 the Federal Trade Commis-

[1] The Red Cross organization had its origin in a treaty drafted at the Geneva Convention in 1864 and acceded to by the United States in 1882. 22 Stat. 940. The American Association of the Red Cross was incorporated in 1881 under the laws of the District of Columbia. It was reincorporated in 1893 under the laws of the District of Columbia as the American National Red Cross. On June 6, 1900, it was incorporated under the same name by Act of Congress (31 Stat. 277) and was reincorporated January 5, 1905. 33 Stat. 599. From the time of its first incorporation in 1881 down to the present, it has used the words "Red Cross" as a part of its name and has also used the emblem adopted by the 1864 Geneva Convention, the Greek red cross on a white ground.

[2] Toilet tissues were marketed by petitioner under that trade name and emblem since 1897 and paper towels since 1933. The trade-mark

sion charged petitioner with a violation of § 5 (a) of the Federal Trade Commission Act, 38 Stat. 719, as amended 52 Stat. 111, 15 U. S. C. § 45, which makes unlawful "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce."

A hearing was had, findings were made and a cease and desist order was issued. The Commission found that "the use by respondent of the words 'Red Cross' and of the mark of the Greek red cross to designate its products has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public, in that such name and mark represent or imply that respondent's products are sponsored, endorsed, or approved by the Red Cross; that the Red Cross is financially interested in the sale of the products; that the products are used by the Red Cross; that the products are manufactured in accordance with sanitary standards set up by the Red Cross; or that there is some other connection between the products and the Red Cross. Not only are these, in the opinion of the Commission, reasonable inferences to be drawn from the use of the name and mark, but the record affirmatively shows that the name and mark are in fact so understood and interpreted by many members of the public." The Commission also found that statements on respondent's products that they are made by respondent and that the name and mark are registered "do not serve to correct the erroneous and misleading impression created through the use of the trade name and mark." The Commission entered an order which, among other things, forbade respondent from using the words "Red Cross" to

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was first registered in the Patent Office in 1911 and was extended to cover paper towels in 1934.

The Commission made no finding as to whether the paper towels were of the same class of goods as the toilet tissue within the meaning of the proviso to § 4 of the 1910 Act.

describe its products and from displaying the Greek red cross on them.[3] 38 F. T. C. 1.

On a petition for review, the Circuit Court of Appeals, by a divided vote, reversed the order of the Commission. 149 F. 2d 424. It held that the order went beyond permissible limits in forbidding any use of the words and the mark. It remanded the case to the Commission for the formulation of a new order which, though not forbidding the use of the words and the symbol, might require statements which would avoid any inference that the goods were sponsored or approved or in any way connected with the American National Red Cross. The case is here on petition for a writ of certiorari which we granted because of the importance of the problem in the administration of the Federal Trade Commission Act.

There is no suggestion that the pre-1905 use of the words and the symbol was an unlawful one within the meaning of either the 1905 or the 1910 Act. Nor has the Commission found that respondent has engaged in any fraudulent activity or made any untruthful statements in connection with its use of the words and the symbol. Therefore this is not a case where the words and symbols

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[3] It ordered respondent to cease and desist from

"1. Using the words 'Red Cross' or any abbreviation or simulation thereof, either alone or in combination or connection with any other word or words, to designate, describe, or refer to respondent's products.

"2. Using or displaying on respondent's products or in any advertisement of such products the mark of a Greek red cross, or any other mark, emblem, sign, or insignia simulating or resembling such cross.

"3. Representing in any manner or by any means, directly or by implication, that respondent's products are sponsored, endorsed, or approved by the Red Cross; that the Red Cross is financially interested in the sale of said products; that said products are used by the Red Cross; that said products are manufactured in accordance with sanitary standards set up by the Red Cross; or that there is any other connection between said products and the Red Cross."

were either adopted or used pursuant to a fraudulent design, aimed at creating the impression that these products were sponsored by or otherwise carried the imprimatur of the Red Cross. Hence, here, as in *Jacob Siegel Co. v. Federal Trade Commission,* 327 U. S. 608, we have no problem involving the power of the Commission to uproot a fraudulent scheme in its entirety. But it is argued that however lawful the earlier use may have been, it cannot survive a finding by the Commission that the use constitutes an unfair or deceptive act or practice in commerce. It is pointed out that the 1938 amendment to the Federal Trade Commission Act gave the Commission power to protect consumers, as well as competitors, against unfair or deceptive practices.[4] It is said that there are no exceptions to that broad power and none should be implied from the Red Cross Act of 1910. The latter Act, it is said, confers no general rights but only a limited immunity and should not be construed as exempting pre-1905 users of the name and emblem from regulatory legislation of general application which Congress may from time to time enact for the protection of the public. It is also argued that by the Geneva Convention of 1929, which was ratified

[4] In *Federal Trade Commission* v. *Raladam Co.,* 283 U. S. 643, 647–648, the Court had ruled that, "The paramount aim of the act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree, and this presupposes the existence of some substantial competition to be affected, since the public is not concerned in the maintenance of competition which itself is without real substance." The 1938 amendment to § 5 of the Federal Trade Commission Act was designed to make "the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor." H. Rep. No. 1613, 75th Cong., 1st Sess., p. 3. And see S. Rep. No. 221, 75th Cong., 1st Sess., p. 3.

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by the United States [5] in 1932, the United States agreed to prohibit the use by private persons of the name and the symbol and that the Red Cross Act and the Federal Trade Commission Act should not be construed in favor of conduct which this nation is under international obligation to terminate.

We agree, however, with the Circuit Court of Appeals. It is clear that the 1910 Act granted, or at least recognized, the right of pre-1905 users to continue the use of the words and the symbol.[6] The House Report stated that the Act as amended "will permit the use of the symbol by . . . such persons, corporations, and associations as actually used the emblem prior to January 5, 1905, for the purposes

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[5] 47 Stat. 2074. Article 28 provides in part (47 Stat. 2092):

"The Governments of the High Contracting Parties whose legislation may not now be adequate shall take or shall recommend to their legislatures such measures as may be necessary at all times:

"*a*) to prevent the use by private persons or by societies other than those upon which this Convention confers the right thereto, of the emblem or of the name of the *Red Cross* or *Geneva Cross*, as well as any other sign or designation constituting an imitation thereof, whether for commercial or other purposes;

. . . . . .

"The prohibition mentioned in subparagraph *a*) of the use of signs or designations constituting an imitation of the emblem or designation of the *Red Cross* or *Geneva Cross*, . . . shall take effect from the time set in each act of legislation and at the latest five years after this Convention goes into effect. After such going into effect it shall be unlawful to take out a trademark or commercial label contrary to such prohibitions."

[6] The manager of the bill which became the 1905 Act stated on the floor of the House during the debate that it would not "interfere with any lawful right now existing." 39 Cong. Rec. 406.

Judge Learned Hand, speaking of the 1910 Act in *Loonen* v. *Deitsch*, 189 F. 487, 492, stated: "Whatever may have been the policy before, Congress has now definitely declared in the proviso of the latter act that it would permit such marks if they antedated 1905. Congress had power so to legalize the use of it; the question of public policy was for it and for it alone, and it is now finally closed."

for which they were so entitled to use it and for the same class of goods. The section, as so amended, grants to the American National Red Cross the fullest protection it is possible to afford it by congressional enactment and at the same time amply protects the concerns possessing vested property rights in the emblem." H. Rep. No. 1256, 61st Cong., 2d Sess., pp. 2–3. It is apparent from the terms of the 1905 Act and the 1910 Act [7] that Congress was concerned not only with protecting the Red Cross against pretenders but also with protecting the public against the false impression that goods purchased were the products of the Red Cross or were sponsored by it. Congress, however, did not go the full distance. It preserved the right of earlier, good faith users to continue the use of the words and the symbol. It may have concluded that the mark which had been acquired was a valuable business asset

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[7] As we have already noted, the 1905 Act made it unlawful "for any person or corporation, other than the Red Cross of America, not now lawfully entitled to use the sign of the Red Cross, hereafter to use such sign or any insignia colored in imitation thereof for the purposes of trade or as an advertisement to induce the sale of any article whatsoever."

And § 4 of the 1910 Act, which we have already summarized, provided:

> "It shall be unlawful for any person, corporation, or association other than the American National Red Cross and its duly authorized employees and agents and the army and navy sanitary and hospital authorities of the United States for the purpose of trade or as an advertisement to induce the sale of any article whatsoever or for any business or charitable purpose to use within the territory of the United States of America and its exterior possessions the emblem of the Greek Red Cross on a white ground, or any sign or insignia made or colored in imitation thereof, or of the words 'Red Cross' or 'Geneva Cross' or any combination of these words: *Provided, however,* That no person, corporation, or association that actually used or whose assignor actually used the said emblem, sign, insignia, or words for any lawful purpose prior to January fifth, nineteen hundred and five, shall be deemed forbidden by this Act to continue the use thereof for the same purpose and for the same class of goods."

which should not be destroyed. Or it may have thought that the extent and manner of the use by the established concerns were not likely to injure the public.[8] But whatever the purpose, the fact remains that the good faith use of the mark by the pre-1905 users was intended to be preserved unimpaired.

We cannot lightly infer that this specific right was intended to be swept away under the 1938 amendment to the Federal Trade Commission Act. Repeals by implication are not favored. Yet if the order of the Commission stands, the right granted or recognized by the 1910 Act becomes a nullity. For the use of the words and the symbol by good faith pre-1905 users becomes *per se* unlawful. As the 1910 Act, like the Federal Trade Commission Act, was in part directed towards protection of the public against deceptive practices, we think the two Acts must be read *in pari materia.* The problem is to reconcile the two, if possible, and to give effect to each. We think that may be done by recognizing that while the good faith use of the words and symbols by pre-1905 users is permissible, the Commission may require the addition of language which removes any misleading inference that the

[8] Judge Learned Hand in *Loonen* v. *Deitsch, supra,* note 6, p. 489, stated:

> "Does the mark actually mean that the society is in any way concerned with the manufacture of the goods? I think not. We have become familiar with it in the past for many other uses than that of the society, though happily such uses will now slowly disappear. It had been used on hospital ambulances, upon medicaments, upon doctors' motor cars, upon barber shops, upon laundries, and for military field service not connected with the Red Cross Society. In short, until the legislation of 1905 (Act Jan. 5, 1905, c. 23, 33 Stat. 599 [U. S. Comp. St. Supp. 1909, p. 1038]), it had been quite instinctively adopted for many uses which were congruous with the chief objects of the society, but which did not indicate that the society had anything to do with them, or certainly with the frequency of the use ceased to do so. Finally, Congress has clearly recognized that fact by permitting all those who prior to 1905 had used the mark lawfully, to continue."

products are in fact sponsored, approved, or in any manner associated with the American National Red Cross.

We need comment only briefly on the Geneva Convention of 1929, which was ratified by the United States in 1932.[9] The undertaking "to prevent the use by private persons" of the words or symbol is a matter for the executive and legislative departments. The problem has been before the Congress in recent years.[10] No action has yet been taken. But we can find in that inaction no basis for concluding that the rights of good faith, pre-1905 users granted or recognized by the 1910 Act are today in any way impaired. Indeed, the existence of that right was recognized as giving rise to the need for additional legislation.[11] That assumption can hardly be reconciled with the conclusion that complete relief is already accorded under the Federal Trade Commission Act.

We do not undertake to prescribe the order which the Commission should enter. The fashioning of the remedy

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[9] See note 5, *supra*.

[10] In the 77th Congress a bill to eliminate over a period of years the exemption given to pre-1905 users was favorably reported by the Committee on Foreign Affairs of the House. H. Rep. 2387, 77th Cong., 2d Sess. This proposed legislation was designed to discharge the obligation of the United States under the Geneva Convention of 1929. *Id.*, pp. 1, 2, 4.

In the 78th Congress a bill passed the Senate with similar provisions. 90 Cong. Rec. 398, 401, 3656. It was reported favorably, with amendments, by the Committee on Foreign Affairs of the House. H. Rep. No. 2054, 78th Cong., 2d Sess. This proposed legislation was likewise designed to discharge the obligation of the United States under the Geneva Convention of 1929. *Id.*, pp. 4–6. And see 90 Cong. Rec. 399.

[11] See H. Rep. No. 2387, *supra*, note 10, pp. 2, 3; H. Rep. No. 2054, *supra*, note 10, pp. 4–6. In the latter Report it was, indeed, recognized "that under existing law, there are legal uses of the symbol by commercial users." p. 4.

is a matter entrusted to the Commission, which has wide latitude for judgment. *Jacob Siegel Co.* v. *Trade Commission, supra.* We only hold that under the facts of this case the Commission may not absolutely forbid the use of the words and the symbol by respondent.

Affirmed.

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

RECONSTRUCTION FINANCE CORPORATION *v.* BEAVER COUNTY.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 40. Argued April 30, 1946.—Decided May 13, 1946.

By § 10 of the Reconstruction Finance Corporation Act, Congress forbade States and local governments to tax personal property of the R. F. C. or its subsidiaries, but provided that their "real property" shall be subject to state and local taxation "to the same extent according to its value as other real property is taxed." An R. F. C. subsidiary acquired certain land in Pennsylvania, erected buildings thereon, and equipped them with machinery and attachments necessary for a manufacturing plant. Most of the machinery was heavy, not attached to the buildings, and was held in place by its own weight. Other portions were attached by easily removable screws and bolts. Some of the equipment could be moved from place to place in the plant. The plant was leased to a manufacturer of war equipment under a contract providing that the machinery should "remain personalty notwithstanding the fact it may be affixed or attached to realty." The Supreme Court of Pennsylvania sustained the imposition of a tax by a county on the machinery, holding that it was real estate under a long-established rule in Pennsylvania applying to all essential machinery of a manufacturing plant. *Held:*

1. The tax is sustained. P. 210.

2. The interpretation of Pennsylvania's tax law by its Supreme Court is binding on this Court. P. 208.

3. Pennsylvania's definition of "real property" cannot govern if it conflicts with the scope of that term as used in the federal statute. P. 208.

4. By permitting local taxation of the real property, Congress made it impossible to apply the federal legislation with uniform consequences in each State and locality. P. 209.

5. The application of a local rule as to what is "real property" for tax purposes would not impair the congressional program for the production of war materials any more than the action of Congress in leaving the fixing of rates of taxation to local communities. Pp. 209, 210.

6. The congressional purpose can best be accomplished by the application of settled state rules as to what constitutes "real property," so long as they do not effect a discrimination against the Government or run counter to the terms of the Act. P. 210.

7. Any other course would create the kind of confusion and resulting hampering of local tax machinery which Congress did not intend when it sought to integrate its permission to tax with local tax assessment and collection machinery. P. 210.

350 Pa. 520, 39 A. 2d 713, affirmed.

Appeal from a decision of the Supreme Court of Pennsylvania, 350 Pa. 520, 39 A. 2d 713, sustaining a tax on machinery of a manufacturing plant owned by the Defense Plant Corporation, a subsidiary of the R. F. C. *Affirmed*, p. 210.

Robert L. Stern argued the cause for appellant. With him on the brief were *Solicitor General McGrath, John D. Goodloe, J. Bowers Campbell, Henry J. Crawford* and *Harold F. Reed.*

John G. Marshall and *Edward G. Bothwell* argued the cause and filed a brief for appellee.

By special leave of Court, *John L. Nourse,* Deputy Attorney General of California, argued the cause for the State of California, and *Sherrill Halbert* argued the cause for Stanislaus County, as *amici curiae.* With them on a

brief filed for that State, as *amicus curiae,* were *Robert W. Kenny,* Attorney General, *Leslie A. Cleary* and *Harold W. Kennedy,* urging affirmance.

Edward G. Bothwell filed a brief for Allegheny County, Pa., as *amicus curiae,* in support of appellee.

MR. JUSTICE BLACK delivered the opinion of the Court.

By § 10 of the Reconstruction Finance Corporation Act, as amended, 47 Stat. 5, 9; 55 Stat. 248, Congress made it clear that it did not permit States and local governments to impose taxes of any kind on the franchise, capital, reserves, surplus, income, loans, and personal property of the Reconstruction Finance Corporation or any of its subsidiary corporations.[1] Congress provided in the same section that "any real property" of these governmental agencies "shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed." The Supreme Court of Pennsylvania sustained the imposition of a tax on certain machinery owned and used in Beaver County, Pennsylvania, by the Defense Plant Corporation, an RFC subsidiary.[2] The question presented on this appeal from the Supreme Court judgment is whether the Supreme Court's holding that this machinery is "subject to" a local "real property" tax means that the Pennsylvania tax statute, 72 Purdon's Pennsylvania Stat. (1936) 5020–201, as applied, conflicts with § 10 of the Reconstruction Finance Corporation Act. This appeal, thus, challenges the validity of a state statute sustained by the highest

[1] As to the constitutional tax immunity of governmental properties see *United States* v. *County of Allegheny,* 322 U. S. 174. See also *Pittman* v. *Home Owners' Loan Corporation,* 308 U. S. 21; *Maricopa County* v. *Valley National Bank,* 318 U. S. 357.

[2] 350 Pa. 520, 39 A. 2d 713.

court of the State and raises a substantial federal question. We have jurisdiction under 28 U. S. C. § 344 (a) and appellee's motion to dismiss is denied.

In 1941 Defense Plant Corporation [3] acquired certain land in Beaver County. It erected buildings on the property and equipped them with machinery and attachments necessary and essential to the existence and operation of a manufacturing plant for aircraft propellers. The plant, thus fully equipped, was leased to Curtiss-Wright Corporation, to carry out its war contracts with the Government for the manufacture of propellers. Most of the machinery was heavy, not attached to the buildings, and was held in place by its own weight. Other portions of the machinery were attached by easily removable screws and bolts, and some of the equipment and fixtures could be moved from place to place within the plant. The lease contract with Curtiss-Wright authorized the Government to receive and to replace existing equipment, and parts of the machinery appear to have been frequently interchanged and replaced as the convenience of the Government required. The lease contract also provided that the machinery should "remain personalty notwithstanding the fact it may be affixed or attached to realty."

The Government contends that under these circumstances the machinery was not "real" but was "personal" property, and that therefore its taxation was forbidden by Congress. The "real property" which Congress made "subject" to state taxation should in the Government's view be limited to "land and buildings and those fixtures

[3] By joint resolution of Congress, 59 Stat. 310, Defense Plant Corporation was dissolved and all of its functions, powers, duties and liabilities were transferred to Reconstruction Finance Corporation. Pursuant to this joint resolution this Court granted a motion to substitute Reconstruction Finance Corporation as party appellant in succession to Defense Plant Corporation.

which are so integrated with the buildings as to be uniformly, or, at most, generally, regarded as real property." "Real property," within this definition, would include buildings and "fixtures as are essential to a building's operations" but would not include fixtures, movable machinery, or equipment, which, though essential to applicant's operations as a plant, are not essential to a building's operation as a building.

The county would, for tax purposes, define real property so as to treat machinery, equipment, fixtures, and the land on which a manufacturing establishment is located as an integral real property unit. This is in accord with the view of the State's Supreme Court which made the following statement in sustaining the tax here involved: "It has long been the rule in Pennsylvania that 'Whether fast or loose, therefore, all the machinery of a manufactory which is necessary to constitute it, and without which it would not be a manufactory at all, must pass for a part of the freehold.' . . . Appellant's machinery, being an integrated part of the manufactory, and so, of the freehold, was therefore taxable" under Pennsylvania's definition of real property. This interpretation of Pennsylvania's tax law is of course binding on us. But Pennsylvania's definition of "real property" cannot govern if it conflicts with the scope of that term as used in the federal statute. What meaning Congress intended is a federal question which we must determine.

The 1941 Act does not itself define real property. Nor do the legislative reports or other relevant data provide any single decisive piece of evidence as to congressional intent.[4] Obviously, it could have intended either, as the

[4] The 1941 amendments to § 10 added among others the following provision: ". . . such exemptions shall not be construed to be applicable in any State to any buildings which are considered by the laws of such State to be personal property for taxation purposes." The Government contends that this indicates a congressional intent to

Government argues, that content be given to the term "real property" as a matter of federal law, under authoritative decisions of this Court, or, as the county contends, that the meaning of the term should be its meaning under local tax laws so long as those tax laws were not designed to discriminate against the Government.

In support of its contention that a federal definition of real property should be applied, the Government relies on the generally accepted principle that Congress normally intends that its laws shall operate uniformly throughout the nation so that the federal program will remain unimpaired. *Jerome* v. *United States,* 318 U. S. 101, 104; *Commissioner* v. *Tower,* 327 U. S. 280. But Congress, in permitting local taxation of the real property, made it impossible to apply the law with uniform tax consequences in each State and locality. For the several States, and even the localities within them, have diverse methods of assessment, collection, and refunding. Tax rates vary widely. To all of these variable tax consequences, Congress has expressly subjected the "real property" of the Defense Plant Corporation. In view of this express provision, the normal assumption that Congress intends its law to have the same consequences throughout the nation cannot be made. Furthermore, Congress, had it desired complete nationwide uniformity as to tax consequences, could have stipulated for fixed payments in lieu of taxes, as it has done in other statutes.[5] Nor can we see how application of a

establish a uniform meaning of the term "real property" regardless of local rules. But the addition also might be taken to indicate that Congress understood that without it under the language of § 10 the local rule would be followed with respect to taxing buildings. In our opinion the addition of the above-quoted language does not tend to lead to one conclusion or the other.

[5] See, *e. g.,* 42 U. S. C. 1546. See also list of Acts in *Federal Contributions to States and Local Governmental Units with Respect to Federally Owned Real Estate,* House Document No. 216, pp. 39–41.

local rule governing what is "real property" for tax purposes would impair the congressional program for the production of war materials any more than the program would be impaired by the action of Congress in leaving the fixing of rates of taxation to local communities.

We think the congressional purpose can best be accomplished by application of settled state rules as to what constitutes "real property," so long as it is plain, as it is here, that the state rules do not effect a discrimination against the Government, or patently run counter to the terms of the Act. Concepts of real property are deeply rooted in state traditions, customs, habits, and laws. Local tax administration is geared to those concepts. To permit the States to tax, and yet to require them to alter their long-standing practice of assessments and collections, would create the kind of confusion and resultant hampering of local tax machinery which we are certain Congress did not intend. The fact that Congress subjected Defense Plant Corporation's properties to local taxes "to the same extent according to its value as other real property is taxed" indicated an intent to integrate congressional permission to tax with established local tax assessment and collection machinery.

Affirmed.

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

WOODS *v.* NIERSTHEIMER, WARDEN.

NO. 631. CERTIORARI TO THE CIRCUIT COURT OF RANDOLPH COUNTY, ILLINOIS.*

Argued May 2, 1946.—Decided May 20, 1946.

More than five years after his conviction for murder on an alleged plea of guilty, petitioner petitioned two Illinois courts for writs of habeas corpus, alleging circumstances which, if true, were sufficient to show that he had been convicted without due process of law in violation of the Fourteenth Amendment. Each court denied the petition without an opinion, on the ground that it failed to state a cause of action. These orders were not appealable to a higher state court. It appeared that the proper remedy under Illinois law was not a writ of habeas corpus but a statutory substitute for a writ of error *coram nobis*, in respect of which there was a five-year limitation. *Held:*

1. Since the orders denying writs of habeas corpus were not appealable to a higher state court, this Court is authorized to review them if they are based on decisions of federal questions. P. 213.

2. Since it appears that the petitions for writs of habeas corpus probably were denied because that was not the proper remedy under Illinois law, the judgments do not clearly present federal questions. P. 216.

3. The situation is not altered by the fact that the five-year statute of limitations on the proper remedy has expired, since it is not known whether the state courts will construe the statute as depriving petitioner of his right to challenge a judgment rendered in violation of constitutional guaranties. P. 216.

4. Whether petitioner will be denied any remedy in the state courts will not be known until they have passed on a petition for the proper remedy under state law. P. 216.

5. If the State should at all times deny all remedies to persons imprisoned in violation of the Constitution, the federal courts would be available to provide a remedy to correct such wrongs. P. 217.

Dismissed.

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*Together with No. 671, *Woods* v. *Nierstheimer, Warden,* on certiorari to the Criminal Court of Cook County, Illinois, argued and decided on the same dates.

Petitioner was denied writs of habeas corpus by state courts from which there was no appeal. This Court granted certiorari. 327 U. S. 772. *Dismissed*, p. 217.

Edward H. Levi argued the cause and filed a brief for petitioner.

William C. Wines, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief was *George F. Barrett*, Attorney General.

MR. JUSTICE BLACK delivered the opinion of the Court.

In 1940 the petitioner was indicted for murder in the Criminal Court of Cook County, Illinois. Adjudged to be guilty on an alleged plea of guilty, he was sentenced to serve ninety-nine years in the state penitentiary. In 1945 he filed two identical petitions for habeas corpus, one in the Criminal Court of Cook County and the other in the Randolph County Circuit Court. In summary the allegations of these petitions were:

On March 8th or 9th, 1940, Chicago policemen came to petitioner's home, accused him of murder, and arrested him. For a period of four days these policemen subjected him to mistreatment in an effort to force him to confess to the crime of murder. The policemen allegedly abused him, beat him with their hands, with blackjacks, and with clubs. At the end of four days, under threat of instant death if he failed to do so, petitioner signed a paper which he later discovered to be a confession. Petitioner averred that he was unable to employ counsel, that he had no counsel, and that he did not consult with counsel during the next two months while he was confined to jail. According to the allegations, petitioner was brought into court at the end of that period, and a public defender appeared as

his counsel; but the public defender declined to permit petitioner to explain the circumstances surrounding the confession. Moreover, despite petitioner's repeated assertion of his innocence, the defender allegedly entered a plea of guilty on behalf of petitioner. The allegations further assert that the public defender and the State's attorney threatened petitioner by telling him that he would burn in the electric chair if he did not keep his mouth shut, and that despite these threats petitioner pleaded not guilty and never did at any time consent to the guilty plea which is the basis for his ninety-nine year sentence.

Petitioner's contention before the two trial courts was that a judgment and sentence under these circumstances amounted to a denial of due process of law in violation of the Fourteenth Amendment to the United States Constitution. The Randolph County Circuit Court denied petitioner's application for habeas corpus "for want of jurisdiction and failure to state a cause of action." The Cook County Criminal Court granted the State's motion to dismiss, made on the ground that the petition on its face failed to state a cause of action. In neither court was petitioner afforded an opportunity to offer evidence to prove his allegations. Neither court wrote an opinion explaining its order. Since Illinois does not provide for appellate review of an order denying a petition for a writ of habeas corpus, the orders here involved were entered by the highest courts of the State that could have entered them. See *White* v. *Ragen,* 324 U. S. 760. This Court is consequently authorized to review these orders if they are based on decisions of federal questions. *Tucker* v. *Texas,* 326 U. S. 517. Because of the serious violations of the Fourteenth Amendment alleged by the petitioner, and because of uncertainty as to whether denial of his petitions rested on an adequate state ground, we granted certiorari.

The State, through its Attorney General, concedes that the allegations of the petitions for habeas corpus, if true, would show that conviction and sentencing of the petitioner violated the due process clause of the Fourteenth Amendment. The State contends, however, that the applications for habeas corpus were not denied on the ground that the allegations, if proved, would fail to show a violation of due process. According to the State, the denials of petitioner's applications rested on the separate and distinct ground that in the Illinois state courts habeas corpus is not the proper remedy for relief from judgments violating due process of law in the manner here alleged. The contention is that the exclusive relief against such judgments is provided by a statutory substitute for the common law writ of error *coram nobis,* Ch. 110, par. 196, Illinois Revised Statutes, 1945. The petitioner counters by calling attention to the fact that the statutory remedy is not available unless brought within five years after the rendition of a judgment; that the judgment and sentence against petitioner was rendered more than five years ago; that consequently, if petitioner has no remedy for habeas corpus, he has no remedy at all; that we should not assume that Illinois grants no relief to one whose imprisonment violates rights protected by the United States Constitution, cf. *Smith* v. *O'Grady,* 312 U. S. 329; and that we should therefore hold that habeas corpus is available to the petitioner.

From our investigation of the law of the State of Illinois we conclude that the denials of the applications in this case could have rested, and probably did rest, on the ground that habeas corpus is not the proper remedy in cases such as the one before us. For this reason we are without power to review the judgments, see *Williams* v. *Kaiser,* 323 U. S. 471, 477, and the writs of certiorari must be dismissed. The Supreme Court of Illinois has repeatedly held that a court of the State has jurisdiction of a

habeas corpus proceeding only where the original judgment of conviction was void or where something has happened since its rendition to entitle the petitioner to his release. According to Illinois Supreme Court decisions, this means that if the petition and return in the habeas corpus proceeding show that the court which rendered the original judgment had jurisdiction over the person and over the subject matter, and nothing has happened since the conviction to entitle the applicant to his release, the court to which the petition is addressed lacks power to discharge the prisoner.[1] The petitions for habeas corpus here involved did not challenge the court's jurisdiction over the person, nor did they allege that anything had happened since the rendition of the judgment which would entitle the petitioner to his release. The allegations that petitioner did not consent to the guilty plea and that he was not represented by proper counsel, moreover, did not challenge jurisdiction over the subject matter, within the meaning of that term as used in defining the power of Illinois courts to release prisoners on habeas corpus.[2]

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[1] See e. g. *People* v. *Zimmer*, 252 Ill. 9, 96 N. E. 529, and cases discussed; *People* v. *Siman*, 284 Ill. 28, 32, 119 N. E. 940; *People* v. *Shurtleff*, 355 Ill. 210, 189 N. E. 291; *People* v. *Thompson*, 358 Ill. 81, 192 N. E. 693; *People* v. *Bradley*, 391 Ill. 169, 62 N. E. 2d 788.

[2] See *People* v. *Fisher*, 340 Ill. 250, 172 N. E. 722, where the Supreme Court of Illinois made the following statement on p. 260:

> "If the jury is an essential part of the tribunal without which the court has no jurisdiction of the subject matter, it is not discernible how, upon a plea of guilty in a criminal case, a valid judgment can be rendered. Yet the power of the court, without a jury, upon such a plea, to find the defendant guilty and render judgment is unquestioned. A court's jurisdiction of the subject matter is not determined by the plea which a person charged with crime may interpose. Before he appeared at the bar of the tribunal, it either was or was not vested with jurisdiction of the subject matter of his cause. If the court possessed such jurisdiction, it was conferred by or pursuant to some provision of the constitution, and not by the act or consent of the defendant."

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Consequently, it seems highly probable that under the Illinois decisions the writ of habeas corpus was not the proper remedy in this case. That this is so is further borne out by the fact that in Illinois orders denying petitions for habeas corpus are not subject to appellate review. *People* v. *McAnally,* 221 Ill. 66, 68, 77 N. E. 544. We cannot assume that Illinois would so far depart from its general appellate procedure as to deny appellate review of orders denying applications for habeas corpus, if such applications were the proper procedure for challenging violations of fundamental rights to life and liberty guaranteed by the United States Constitution.

Since the record thus shows that petitioner's applications for a writ of habeas corpus were probably denied because he did not seek the proper remedy under Illinois law, it does not appear that the judgments we are asked to review do not rest on an adequate non-federal ground. Nor do the denials of petitioner's applications for habeas corpus present a federal question merely because the five-year statute of limitations on the statutory substitute for the writ of error *coram nobis* has expired. Petitioner claims that this leaves him without any remedy in the state courts. But we do not know whether the state courts will construe the statute so as to deprive petitioner of his right to challenge a judgment rendered in violation of constitutional guarantees where his action is brought more than five years after rendition of the judgment. Nor can we at this time pass upon the suggestion that the Illinois statute so construed would itself violate due process of law in that a denial of that remedy, together with a denial of the writ of habeas corpus, would, taken together, amount to a complete deprivation of a state remedy where constitutional rights have been denied. We would reach that question only after a denial of the statutory substitute for the writ of error *coram nobis* based on the statute

of limitations had been affirmed by the Supreme Court of the State.[3] Furthermore, it cannot be doubted that if the State of Illinois should at all times deny all remedies to individuals imprisoned within the State in violation of the Constitution of the United States, the federal courts would be available to provide a remedy to correct such wrongs. *Ex parte Hawk*, 321 U. S. 114.

Dismissed.

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

THIEL *v.* SOUTHERN PACIFIC CO.

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

No. 349. Argued March 25, 1946.—Decided May 20, 1946.

1. A federal court jury panel from which persons who work for a daily wage were intentionally and systematically excluded *held* unlawfully constituted. Pp. 221, 225.
2. Such discrimination against daily wage earners as a class was not justified by either federal or California law. P. 222.
3. The choice of the means by which unlawful distinctions and discriminations in the selection of jury panels are to be avoided rests largely in the sound discretion of the trial courts and their officers. P. 220.
4. The pay period of an individual is irrelevant to his eligibility and capacity to serve as a juror. P. 223.
5. Although a federal judge may be justified in excusing a daily wage earner for whom jury service would entail an undue financial hardship, that fact can not support the complete exclusion of all daily wage earners regardless of whether there is actual hardship involved. P. 224.

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[3] A judgment in a *coram nobis* proceeding is final and appealable in Illinois. See *People* v. *Green*, 355 Ill. 468, 189 N. E. 500.

6. Jury service is a duty as well as a privilege of citizenship. A claim of financial embarrassment will excuse only when a real burden or hardship would be imposed. P. 224.
7. A judgment of the District Court in a case in which that court denied a motion to strike a jury panel from which persons who work for a daily wage were intentionally and systematically excluded is here reversed by this Court in the exercise of its power of supervision over the administration of justice in the federal courts. P. 225.
8. It is unnecessary in this case to determine whether the unsuccessful litigant was in any way prejudiced by the wrongful exclusion or whether he was one of the excluded class. P. 225.
9. Nor is it material that the jury which actually decided the factual issue in this case was found to include at least five persons who were of the laboring class though not per diem workers. P. 225.

149 F. 2d 783, reversed.

Petitioner brought suit in a state court against the railroad company to recover damages for alleged negligence in its treatment of him while a passenger on one of its trains. On application of the railroad company, the suit was removed to the federal district court on the ground of diversity of citizenship. The judgment of the District Court, upon a trial by jury, was in favor of the railroad company. The Circuit Court of Appeals affirmed. 149 F. 2d 783. This Court granted certiorari limited to the question whether petitioner's motion to strike the jury panel was properly denied by the District Court. 326 U. S. 716. *Reversed,* p. 225.

Allen Spivock argued the cause and filed a brief for petitioner.

Arthur B. Dunne argued the cause and filed a brief for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Petitioner, a passenger, jumped out of the window of a moving train operated by the respondent, the Southern

Pacific Company. He filed a complaint in a California state court to recover damages, alleging that the respondent's agents knew that he was "out of his normal mind" and should not be accepted as a passenger or else should be guarded and that, having accepted him as a passenger, they left him unguarded and failed to stop the train before he finally fell to the ground. At respondent's request the case was removed to the Federal District Court at San Francisco on the ground of diversity of citizenship, respondent being a Kentucky corporation. Several vain attempts were then made by the petitioner to obtain a remand of the case to the state court; petitioner was also restrained from attempting to proceed further in the state court.[1]

After demanding a jury trial, petitioner moved to strike out the entire jury panel, alleging *inter alia* that "mostly business executives or those having the employer's viewpoint are purposely selected on said panel, thus giving a majority representation to one class or occupation and discriminating against other occupations and classes, particularly the employees and those in the poorer classes who constitute, by far, the great majority of citizens eligible for jury service . . ." Following a hearing at which testimony was taken, the motion was denied. Petitioner then attempted to withdraw his demand for a jury trial but the respondent refused to consent. A jury of twelve was chosen. Petitioner thereupon challenged these jurors upon the same grounds previously urged in relation to the entire jury panel and upon the further ground that six of the twelve jurors were closely affiliated and connected with the respondent. The court denied this challenge. The trial proceeded and the jury returned a verdict for the respondent.

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[1] The injunction against petitioner proceeding in the state court was affirmed upon appeal. *Thiel* v. *Southern Pacific Co.*, 126 F. 2d 710; certiorari denied, 316 U. S. 698.

Petitioner renewed his objections in his motion to set aside the verdict or, in the alternative, to grant a new trial. In denying this motion the court orally found that five of the twelve jurors "belong more closely and intimately with the working man and employee class than they do with any other class" and that they might be expected to be "sympathetic with the experiences in life, the affairs of life, and with the economic views, of people who belong to the working or employee class." The Ninth Circuit Court of Appeals affirmed the judgment in its entirety, 149 F. 2d 783, and we brought the case here on certiorari "limited to the question whether petitioner's motion to strike the jury panel was properly denied."

The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. *Smith* v. *Texas,* 311 U. S. 128, 130; *Glasser* v. *United States,* 315 U. S. 60, 85. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.

The choice of the means by which unlawful distinctions and discriminations are to be avoided rests largely in the sound discretion of the trial courts and their officers. This

discretion, of course, must be guided by pertinent statutory provisions. So far as federal jurors are concerned, they must be chosen "without reference to party affiliations," 28 U. S. C. § 412; and citizens cannot be disqualified "on account of race, color, or previous condition of servitude," 28 U. S. C. § 415. In addition, jurors must be returned from such parts of the district as the court may direct "so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service," 28 U. S. C. § 413. For the most part, of course, the qualifications and exemptions in regard to federal jurors are to be determined by the laws of the state where the federal court is located, 28 U. S. C. § 411.[2] *Pointer* v. *United States,* 151 U. S. 396. A state law creating an unlawful qualification, however, is not binding and should not be utilized in selecting federal jurors. See *Kie* v. *United States,* 27 F. 351, 357.

The undisputed evidence in this case demonstrates a failure to abide by the proper rules and principles of jury selection. Both the clerk of the court and the jury commissioner testified that they deliberately and intentionally excluded from the jury lists all persons who work for a daily wage. They generally used the city directory as the

[2] Federal statutes prohibit the service by any person as a petit juror "more than one term in a year," 28 U. S. C. § 423, exempt from jury service artificers and workmen employed in the armories and arsenals of the United States, 50 U. S. C. § 57, and set up disqualifications for service as a juryman or talesman "in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States," 28 U. S. C. § 426.

See, in general, Blume, "Jury Selection Analyzed: Proposed Revision of Federal System," 42 Mich. L. Rev. 831; Report to the Judicial Conference of Senior Circuit Judges of the United States of the Committee on Selection of Jurors (1942); Report of the Commission on the Administration of Justice in New York (1934).

source of names of prospective jurors. In the words of the clerk, "If I see in the directory the name of John Jones and it says he is a longshoreman, I do not put his name in, because I have found by experience that that man will not serve as a juror, and I will not get people who will qualify. The minute that a juror is called into court on a venire and says he is working for $10 a day and cannot afford to work for four, the Judge has never made one of those men serve, and so in order to avoid putting names of people in who I know won't become jurors in the court, won't qualify as jurors in this court, I do leave them out. . . . Where I thought the designation indicated that they were day laborers, I mean they were people who were compensated solely when they were working by the day, I leave them out." The jury commissioner corroborated this testimony, adding that he purposely excluded "all the iron craft, bricklayers, carpenters, and machinists" because in the past "those men came into court and offered that [financial hardship] as an excuse, and the judge usually let them go." The evidence indicated, however, that laborers who were paid weekly or monthly wages were placed on the jury lists, as well as the wives of daily wage earners.

It was further admitted that business men and their wives constituted at least 50% of the jury lists, although both the clerk and the commissioner denied that they consciously chose according to wealth or occupation. Thus the admitted discrimination was limited to those who worked for a daily wage, many of whom might suffer financial loss by serving on juries at the rate of $4 a day and would be excused for that reason.

This exclusion of all those who earn a daily wage cannot be justified by federal or state law. Certainly nothing in the federal statutes warrants such an exclusion. And the California statutes are equally devoid of justification for

the practice. Under California law a daily wage earner may be fully competent as a juror. A juror, to be competent, need only be a citizen of the United States over the age of 21, a resident of the state and county for one year preceding selection, possessed of his natural faculties and of ordinary intelligence and not decrepit, and possessed of sufficient knowledge of the English language. California Code of Civil Procedure, § 198. Cf. § 199. Nor is a daily wage earner listed among those exempt from jury service. § 200. And under the state law, "A juror shall not be excused by a court for slight or trivial causes, or for hardship, or for inconvenience to said juror's business, but only when material injury or destruction to said juror's property or of property entrusted to said juror is threatened . . ." § 201.

Moreover, the general principles underlying proper jury selection clearly outlaw the exclusion practiced in this instance. Jury competence is not limited to those who earn their livelihood on other than a daily basis. One who is paid $3 a day may be as fully competent as one who is paid $30 a week or $300 a month. In other words, the pay period of a particular individual is completely irrelevant to his eligibility and capacity to serve as a juror. Wage earners, including those who are paid by the day, constitute a very substantial portion of the community,[3] a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system. Were we to sanction an exclusion of this nature we would encourage whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low

[3] In the San Francisco-Oakland industrial area in 1939 there were 76,374 wage earners employed by manufacturers out of a total population (as of 1940) of 1,412,686. Sixteenth Census of the United States: 1940, Manufactures 1939, Vol. III, p. 80.

economic and social status. We would breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged. That we refuse to do.

It is clear that a federal judge would be justified in excusing a daily wage earner for whom jury service would entail an undue financial hardship.[4] But that fact cannot support the complete exclusion of all daily wage earners regardless of whether there is actual hardship involved. Here there was no effort, no intention, to determine in advance which individual members of the daily wage earning class would suffer an undue hardship by serving on a jury at the rate of $4 a day. All were systematically and automatically excluded. In this connection it should be noted that the mere fact that a person earns more than $4 a day would not serve as an excuse. Jury service is a duty as well as a privilege of citizenship; it is a duty that cannot be shirked on a plea of inconvenience or decreased earning power. Only when the financial embarrassment is such as to impose a real burden and hardship does a valid excuse of this nature appear. Thus a blanket exclusion of all daily wage earners, however well-intentioned and however justified by prior actions of trial judges, must be counted among those tendencies which undermine and weaken the institution of jury trial. "That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may, one by

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[4] See statement of Judge John C. Knox in Hearings before the House Committee on the Judiciary, 79th Cong., 1st Sess., on H. R. 3379, H. R. 3380 and H. R. 3381, Serial No. 3, June 12 and 13, 1945, p. 4. ". . . when jurors' compensation is limited to $4 per day, and when their periods of service are often protracted, thousands upon thousands of persons simply cannot afford to serve. To require them to do so is nothing less than the imposition upon them of extreme hardship." *Id.*, p. 8.

one, lead to the irretrievable impairment of substantial liberties." *Glasser* v. *United States, supra,* 86.

It follows that we cannot sanction the method by which the jury panel was formed in this case. The trial court should have granted petitioner's motion to strike the panel. That conclusion requires us to reverse the judgment below in the exercise of our power of supervision over the administration of justice in the federal courts. See *McNabb* v. *United States,* 318 U. S. 332, 340. On that basis it becomes unnecessary to determine whether the petitioner was in any way prejudiced by the wrongful exclusion or whether he was one of the excluded class. See *Glasser* v. *United States, supra; Walter* v. *State,* 208 Ind. 231, 195 N. E. 268; *State ex rel. Passer* v. *County Board,* 171 Minn. 177, 213 N. W. 545. It is likewise immaterial that the jury which actually decided the factual issue in the case was found to contain at least five members of the laboring class. The evil lies in the admitted wholesale exclusion of a large class of wage earners in disregard of the high standards of jury selection. To reassert those standards, to guard against the subtle undermining of the jury system, requires a new trial by a jury drawn from a panel properly and fairly chosen.

Reversed.

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

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

This was a suit brought by the petitioner, a salesman, against the Southern Pacific Company for injuries suffered by him while a passenger on one of the Railroad's trains, and attributed to the Company's negligence. The trial was in the United States District Court sitting in San Francisco. The jury rendered a verdict against the peti-

tioner. The District Court found no ground for setting it aside and entered judgment on the verdict. Upon full review of the trial, the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment. 149 F. 2d 783. Thus, a verdict arrived at by a jury whose judgment on the merits the District Court has found unassailable, which the Circuit Court of Appeals has affirmed on the merits, and which this Court has refused to review on the merits, 326 U. S. 716, is here nullified because of an abstract objection to the manner in which the district judges for the Northern District of California have heretofore generally discharged their duty, with the approval of the reviewing judges of the Ninth Circuit, to secure appropriate jury panels.

The process of justice must of course not be tainted by property prejudice any more than by racial or religious prejudice. The task of guarding against such prejudice devolves upon the district judges, who have the primary responsibility for the selection of jurors, and the circuit judges, whose review of verdicts is normally final. It is embraced in the duty, formulated by the judicial oath, to "administer justice without respect to persons, and do equal right to the poor and to the rich . . ." 1 Stat. 73, 76, 36 Stat. 1087, 1161; 28 U. S. C. § 372. But it is not suggested that the jury was selected so as to bring property prejudice into play in relation to this specific case or type of case, nor is there the basis for contending that the trial judge allowed the selective process to be manipulated in favor of the particular defendant. No such claim is now sustained. Neither is it claimed that the district judges for the Northern District of California, with the approval of the circuit judges, designed racial, religious, social, or economic discrimination to influence the makeup of jury panels, or that such unfair influence infused the selection of the panel, or was reflected in those who were

chosen as jurors in this case. Nor is there any suggestion that the method of selecting the jury in this case was an innovation. What is challenged is a long-standing practice adopted in order to deal with the special hardship which jury service entails for workers paid by the day. What is challenged, in short, is not a covert attempt to benefit the propertied but a practice designed, wisely or unwisely, to relieve the economically least secure from the financial burden which jury service involves under existing circumstances.

No constitutional issue is at stake. The problem is one of judicial administration. The sole question over which the Court divides is whether the established practice in the Northern District of California not to call for jury duty those otherwise qualified but dependent on a daily wage for their livelihood requires reversal of a judgment which is inherently without flaw.

Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. Since the color of a man's skin is unrelated to his fitness as a juror, negroes cannot be excluded from jury service because they are negroes. *E. g., Carter* v. *Texas,* 177 U. S. 442. A group may be excluded for reasons that are relevant not to their fitness but to competing considerations of public interest, as is true of the exclusion of doctors, ministers, lawyers, and the like. *Rawlins* v. *Georgia,* 201 U. S. 638. But the broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility. See *Smith* v. *Texas,* 311 U. S. 128, 130.

Obviously these accepted general considerations must have much leeway in application. In the abstract the Court acknowledges this. "The choice of the means by

which unlawful distinctions and discriminations are to be avoided rests largely in the sound discretion of the trial courts and their officers." Congress has made few inroads upon this discretion. Its chief enactment underlines the importance of avoiding rigidities in the jury system and recognizes that ample play must be allowed the joints of the machinery. The First Judiciary Act adopted for the federal courts the qualifications and exemptions, with all their diversities, prevailing in the States where the federal courts sit. 1 Stat. 73, 88. That has remained the law. 36 Stat. 1087, 1164; 28 U. S. C. § 411. (For a collection of federal statutes regulating the composition and selection of jurors, see 37 Harv. L. Rev. 1010, 1098–1100.) We would hardly have taken this case to consider whether the federal court in San Francisco deviated from the requirements of California law, and nothing turns on that here. But it is not without illumination that under California law all those belonging to this long string of occupations are exempted from jury service: judicial, civil, naval, and military officers of the United States or California; local government officials; attorneys, their clerks, secretaries, and stenographers; ministers; teachers; physicians, dentists, chiropodists, optometrists, and druggists; officers, keepers, and attendants at hospitals or other charitable institutions; officers in attendance at prisons and jails; employees on boats and ships in navigable waters; express agents, mail carriers, employees of telephone and telegraph companies; keepers of ferries or tollgates; national guardsmen and firemen; superintendents, engineers, firemen, brakemen, motormen, or conductors of railroads; practitioners treating the sick by prayer. *California Code of Civil Procedure*, § 200.

Placed in its proper framework the question now before us comes to this: Have the district judges for the Northern District of California, supported by the circuit judges of

the Ninth Circuit, abused their discretion in sanctioning a practice of not calling for jury duty those who are dependent upon a daily wage for their livelihood?

The precise issue must be freed from all atmospheric innuendoes. Not to do so is unfair to the administration of justice, which should be the touchstone for the disposition of the judgment under challenge, and no less unfair to a group of judges of long experience and tested fidelity. If workmen were systematically not drawn for the jury, the practice would be indefensible. But concern over discrimination against wage earners must be put out of the reckoning. Concededly those who are paid weekly or monthly wages were placed on the jury lists. And that no line was drawn against the wage earners because they were wage earners, and that there was merely anticipatory excuse of daily wage earners, is conclusively established by the fact that the wives of such daily wage earners were included in the jury lists. As to any claim of the operation of a designed economic bias in the method of selecting the juries, the Circuit Court of Appeals rightly found "no evidence that the persons whose names were in the box, or the persons whose names were drawn therefrom and who thus became members of the panel, were 'mostly business executives or those having the employer's viewpoint.'" 149 F. 2d 783, 786.

"When the question is narrowed to its proper form the answer does not need much discussion. The nature of the classes excluded was not such as was likely to affect the conduct of the members as jurymen, or to make them act otherwise than those who were drawn would act. The exclusion was not the result of race or class prejudice. It does not even appear that any of the defendants belonged to any of the excluded classes. The ground of omission no doubt was that pointed out by the state court, that the business of the persons omitted was such that either they

would have been entitled to claim exemption or that probably they would have been excused." So this Court speaking through Mr. Justice Holmes answered a related question in *Rawlins* v. *Georgia,* 201 U. S. 638, 640. And the justification for the answer applies to the present situation.

It is difficult to believe that this judgment would have been reversed if the trial judge had excused, one by one, all those wage earners whom the jury commissioner, acting on the practice of trial judges of San Francisco, excluded. For it will hardly be contended that the absence of such daily wage earners from the jury panel removed a group who would act otherwise than workers paid by the week or the wives of the daily wage earners themselves. The exclusion of the daily wage earners does not remove a group who would, in the language of Mr. Justice Holmes, "act otherwise than those who are drawn would act." Judged by the trend of census statistics, laborers paid by the day are not a predominant portion of the workers of the country. See Sixteenth Census of the United States, 1940, Population, Vol. III, The Labor Force, Part 2, pp. 290 *et seq.* It certainly is too large an assumption on which to base judicial action that those workers who are paid by the day have a different outlook psychologically and economically than those who earn weekly wages. In the language of Mr. Chief Justice Hughes, "Impartiality is not a technical conception. It is a state of mind." *United States* v. *Wood,* 299 U. S. 123, 145. And American society is happily not so fragmentized that those who get paid by the day adopt a different social outlook, have a different sense of justice, and a different conception of a juror's responsibility than their fellow workers paid by the week. No doubt the insecurities of a system of daily earnings, or generally of wages on less than an annual basis, raise serious problems as does, of course, also the

question of guaranteed wage plans. See the letter of President Roosevelt to the Director of War Mobilization, James F. Byrnes, on the date of March 20, 1945, carrying out the suggestion of a report to the President by the War Labor Board for the creation of a Commission to study the question of guaranteed wage plans. And see *Basic Steel Case,* 19 W. L. B. 568, 653 *et seq.;* N. W. L. B. Research and Statistics Report No. 25, Guaranteed Employment and Annual Wage Plans (1944). But these are matters quite irrelevant to the problem confronting district judges in dealing with the present plight of daily wage earners when called to serve as jurors and the power of the judges, as a matter of discretion, to excuse such daily wage earners from duty.

For it cannot be denied that jury service by persons dependent upon a daily wage imposes a very real burden. Judge John C. Knox, Senior District Judge of the Southern District of New York, thus described the problem:

> ". . . when jurors' compensation is limited to $4 per day, and when their periods of service are often protracted, thousands upon thousands of persons simply cannot afford to serve. To require them to do so is nothing less than the imposition upon them of extreme hardship.
>
> "With respect to the item last-mentioned, it is easy to say that jury duty should be regarded as a patriotic service, and that all public-spirited persons should willingly sacrifice pecuniary rewards in the performance of an obligation of citizenship. With that statement I am in full accord, but it does not solve the difficulty. Adequate provision for one's family is the first consideration of most men. And if, with this thought predominant in a man's mind, he is required to perform a public service that means a default of an insurance premium, the sacrifice of a suit of clothes,

> or the loss of this [his] job, he will entertain feelings of resentment that will be anything but conducive to the rendition of justice. In other words, persons with a grievance against the Government or who serve under conditions that expose them to self-denial are not likely to have the spiritual contentment and mental detachment that good jurors require." Hearings before H. R. Committee on the Judiciary on H. R. 3379, H. R. 3380, H. R. 3381, 79th Cong., 1st Sess. (1945) 8.

No doubt, in view of the changes in the composition and distribution of our population and the growth of metropolitan areas, a reexamination is due of the operation of the jury system in the federal courts. Just as the federal judicial system has been reorganized and administratively modified through a series of recent enactments (see Act of September 14, 1922, 42 Stat. 837, 838, 28 U. S. C. §§ 218 *et seq.;* Act of February 13, 1925, 43 Stat. 936, 28 U. S. C. §§ 41 *et seq.;* Act of August 7, 1939, 53 Stat. 1223, 28 U. S. C. §§ 444 *et seq.*), the jury system, that indispensable adjunct of the federal courts, calls for review to meet modern conditions. The object is to devise a system that is fairly representative of our variegated population, exacts the obligation of citizenship to share in the administration of justice without operating too harshly upon any section of the community, and is duly regardful of the public interest in matters outside the jury system. This means that the many factors entering into the manner of selection, with appropriate qualifications and exemptions, the length of service and the basis of compensation must be properly balanced. These are essentially problems in administration calling for appropriate standards flexibly adjusted.

Wise answers preclude treatment by rigid legislation or rigid administration. Congress has devised the appro-

priate procedure and instrument for making these difficult and delicate adjustments by its creation, in 1922, of the Conference of Senior Circuit Judges. The Conference, under the presidency of the Chief Justice of the United States, is charged with the duty of continuous oversight of the actual workings of the federal judicial system and of meeting disclosed needs, either through practices formulated by the Conference, or, when legislation is necessary or more appropriate, through proposals submitted to Congress. See 40 Harv. L. Rev. 431. That is precisely the course that has been followed in regard to the inadequacies in the operation of the federal jury system. In September, 1941, the late Chief Justice brought the matter before the Conference. As a result, Mr. Chief Justice Stone appointed a committee of experienced district judges, see Report of the Judicial Conference (1941) 16, under the chairmanship of Judge Knox who, because of the length and richness of his experience in the busiest district of the country, brought unusual equipment for devising appropriate reforms. In September, 1942, the Committee reported, Report to the Judicial Conference of the Committee on Selection of Jurors (1942) 1, and submitted proposals for legislation. *Id.* at 44, 62, 107. Bills to carry out these recommendations were introduced in the Senate on January 11, 1944, S. 1623, 1624, 1625, 78th Cong., 2d Sess., and in the House on June 5, 1945, H. R. 3379, 3380, 3381, 79th Cong., 1st Sess. Hearings were had upon the House Bills on June 12 and 13, 1945, and action on them is now pending.

The Court now deals by adjudication with one phase of an organic problem and does so by nullifying a judgment which, on the record, was wholly unaffected by difficulties inherent in a situation that calls for comprehensive treatment, both legislative and administrative. If it be suggested that until there is legislation this decision will be

the means of encouraging the district judges to uncover a better answer than they have thus far given to a lively problem, an appropriate admonition from the Court would accomplish the same result, or common action regarding the practice now under review may be secured from the Conference of Senior Circuit Judges. To reverse a judgment free from intrinsic infirmity and perhaps to put in question other judgments based on verdicts that resulted from the same method of selecting juries, reminds too much of burning the barn in order to roast the pig.

I would affirm the judgment.

UNITED STATES *v.* JOSEPH A. HOLPUCH CO.

CERTIORARI TO THE COURT OF CLAIMS.

Nos. 696 and 697. Argued May 3, 1946.—Decided May 20, 1946.

Respondent had two construction contracts with the United States, each of which provided that "disputes concerning questions arising under this contract shall be decided by the contracting officer . . . subject to written appeal . . . to the head of the department." *Held:*

1. Disputes as to extra pay for footing excavations and for increased wages paid to bricklayers were "questions arising under this contract" within the meaning of the quoted provision. Pp. 238–239.

2. Respondent's failure to exhaust the administrative appeal provisions of the contracts barred recovery in the Court of Claims in respect of such disputes. P. 239.

3. In the absence of clear evidence that the appeal procedure prescribed is inadequate or unavailable, that procedure must be pursued and exhausted before respondent may be heard to complain in a court. P. 240.

4. The designation on the covers of the contracts of the disbursing officer who would make payment on the contracts was not a part of the contracts and can not be used in any way to alter or amend any actual provisions thereof. P. 240.

5. Even if it be assumed that the dispute as to extra pay for footing excavations concerned only the amount of payment under the contract, such an issue is a question "arising under" the contract and therefore expressly subject to the administrative appeal provision. P. 241.

6. There being no evidence that the wage increase to bricklayers was established by the Federal Emergency Administration of Public Works, which under the contracts was the only agency that had authority to do so, a provision for an automatic adjustment of the amount due the contractor in that event did not become operative. P. 242.

104 Ct. Cls. 254, reversed.

The respondent brought two suits in the Court of Claims on two contracts with the United States, and was adjudged entitled to recover on both. This Court granted certiorari. 327 U. S. 772. *Reversed,* p. 243.

Abraham J. Harris argued the cause for the United States. With him on the brief were *Solicitor General McGrath, Assistant Attorney General Sonnett* and *Paul A. Sweeney.*

No appearance for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

The narrow question here is whether a contractor's failure to exhaust the administrative appeal provisions of a government construction contract bars him from bringing suit in the Court of Claims to recover damages.

Respondent, a building contractor, entered into two contracts [1] with the United States through the War Department in 1933 to construct officers' quarters at Fort Sam Houston, Texas, which were being built as a Federal

[1] The contracts here involved were both executed on U. S. Government Form No. P. W. A. 51.

Emergency Administration of Public Works project. Disputes arose as to excavations for footings and as to increased wages ordered to be paid to respondent's bricklayers. Respondent brought suit against the Government on these matters in the Court of Claims, which entered judgments in favor of respondent on both items.[2]

Article 15, which appeared in both contracts, provided: "All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor, within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed."

The dispute concerning the footing excavations arose out of an apparent inconsistency between certain figures used in the specifications and in the drawings. The specifications estimated that respondent was to excavate to a depth of 37½ feet below the first-floor level of the buildings. The drawings, on the other hand, were found by the Court of Claims to call for excavations to the depth of 33 feet. Additional payments were to be made to respondent for excavations deeper than indicated "on the drawings," while the Government was to receive a credit for excavations of a lesser depth. Respondent made vari-

[2] The Court of Claims entered separate judgments and opinions in relation to each of the two contracts, although both of them were identical and involved the same issues. The only difference between the contracts concerned the particular buildings to be constructed.

ous excavations ranging in depth from 27.58 feet to 42.42 feet. The problem thus presented itself as to whether the 37½-foot figure in the specifications or the 33-foot figure in the drawings should serve as the basis for extra compensation to the respondent and for credit to the Government.

Article 2 of the contracts provided: "In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer . . ." The specifications contained a similar provision and added that the constructing quartermaster was to be the interpreter of the "intent and meaning of the drawings and specifications." The constructing quartermaster duly resolved the discrepancy in this instance by interpreting the specifications and drawings to mean that the footing excavations were to be paid for on the basis of the 37½ feet estimated in the specifications. Respondent made no attempt to appeal from this decision to the contracting officer or to the departmental head in accordance with the terms of Article 15.

The other dispute concerned a required increase in wages for respondent's bricklayers. The contracts established $1.00 per hour as the minimum wage rate for skilled labor unless, as of April 30, 1933, there should be a higher prevailing hourly rate prescribed by collective agreements between employers and employees. Article 18 (e) provided that this minimum wage rate "shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review," in which case "the contract price shall be adjusted accordingly." On March 3, 1934, the Board of Labor Review ruled that bricklayers on another Army construction project at San Antonio, Texas, with which respond-

ent was unconnected, should be paid at the rate of $1.25 per hour retroactive to February 2, 1934. Respondent was informed of this decision and on March 23, 1934, the constructing quartermaster advised respondent that all bricklayers employed on the instant project "will be paid at the rate of $1.25 per hour." Respondent stated that it "would be governed accordingly but under protest, and [that it] expected reimbursement of the difference of 25 cents per hour." On May 12, 1934, the constructing quartermaster advised respondent "that it was the decision of the contracting officer that bricklayers employed on War Department construction projects at San Antonio, Texas, and vicinity [Fort Sam Houston is in this vicinity] should be paid $1.25 per hour, retroactive to February 2, 1934," and that respondent would be within its rights "to file appeal with the Board of Labor Review from the decision of the contracting officer." [3] No such appeal was taken; respondent merely paid its bricklayers $1.25 per hour and then filed a claim in the court below for the 25-cent differential. Here again the provisions of Article 15 were ignored.

We cannot sanction respondent's failure to abide by the appeal provisions of Article 15 of the contracts which it made with the United States. Both the dispute over the

[3] The constructing quartermaster was in error in stating that respondent could have appealed the wage increase decision to the Board of Labor Review. Under Article 15, the Board is charged with handling appeals only on matters involving "labor issues." This plainly means labor issues between employers and employees. See *Blair* v. *United States*, 99 Ct. Cls. 71, 149–150, reversed in other respects, 321 U. S. 730. Here, however, the only controversy lay between the respondent and the Government rather than between respondent and its bricklayers. Hence the ordinary review provisions of Article 15 were applicable, enabling respondent to appeal the contracting officer's decision to the departmental head or his representative. The Court of Claims made a like error in this respect.

footing excavations and the dispute over the bricklayers' wages were "questions arising under this contract" within the meaning of Article 15. The first was a question arising under Article 2 of the contracts as well as under the specifications, which expressly contemplated that government officers would resolve all discrepancies between specifications and drawings. Their decisions in such matters were clearly appealable under Article 15. The second dispute was a question arising under the wage provisions of Article 18 of the contracts; that question involved a consideration of the factual situation surrounding the required wage increase and a determination of the validity and effect of the increase under the circumstances. Any decision or order of a subordinate government officer in this respect was also appealable under Article 15. Yet respondent did not even seek the contracting officer's opinion as to the footing excavation decision of the constructing quartermaster. And as to the contracting officer's order requiring an increase in the bricklayers' wages, respondent neglected to file a written appeal to the departmental head or his representative.

But Article 15 is something more than a dead letter to be revived only at the convenience or discretion of the contractor. It is a clear, unambiguous provision applicable at all times and binding on all parties to the contract. No court is justified in disregarding its letter or spirit. Article 15 is controlling as to all disputes "concerning questions arising under this contract" unless otherwise specified in the contract. It creates a mechanism whereby adjustments may be made and errors corrected on an administrative level, thereby permitting the Government to mitigate or avoid large damage claims that might otherwise be created. *United States* v. *Blair*, 321 U. S. 730, 735. This mechanism, moreover, is exclusive in nature. Solely through its operation may claims be made and adjudicated

as to matters arising under the contract. *United States* v. *Blair, supra,* 735; *United States* v. *Callahan Walker Co.,* 317 U. S. 56, 61. And in the absence of some clear evidence that the appeal procedure is inadequate or unavailable, that procedure must be pursued and exhausted before a contractor can be heard to complain in a court.

It follows that when a contractor chooses without due cause to ignore the provisions of Article 15 he destroys his right to sue for damages in the Court of Claims. That court is then obliged to outlaw his claims, whatever may be their equity. To do otherwise is to rewrite the contract.

In this instance no justifiable excuse is apparent for respondent's failure to exhaust the appeal provisions of Article 15. Certainly the reasons relied upon by the Court of Claims are lacking in merit. The court felt that the dispute over the footing excavation figures involved only a matter of contract price computation and that the responsibility for such a computation rested solely with the Army Finance Officer at Fort Sam Houston, any decision by the contracting officer on the matter being no more than advisory. Since the contracts made no provision for an appeal of the Finance Officer's computation, the Court of Claims held that there was no appealable decision confronting respondent and that respondent's claim could be heard and determined by that court. Support for this novel interpretation was sought in the statement on the covers of the contracts that payment on the contracts was to be made "by the Finance Officer, U. S. Army, Fort Sam Houston, Texas." The short answer is that this designation of a disbursing officer is not a part of the contracts and cannot be used in any way to alter or amend any actual provisions thereof. The designation only identifies the person whose duty it is to perform the ministerial

function of disbursement and is subject to change at any time by the War Department without notice to the contractor.[4] Moreover, even if it be assumed that the issue did concern only the amount of payment under the contracts,[5] such an issue is a question arising under the contracts and hence expressly subject to the provisions of Article 15.

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[4] The Government points out that in 1933 and 1934 there were 18 Army Finance Officers located at various places in the United States and that all the notation on the cover could mean was that payment was to be made by the Finance Officer at Fort Sam Houston, Texas, and not by a Finance Officer located elsewhere.

Moreover, an affidavit by the Chief, Receipts and Disbursements Division, Office of the Fiscal Director, Army Service Forces, appearing as an appendix to the Government's brief, states in regard to the notation: "This is merely an indication to the constructing quartermaster to which disbursing officer the constructing quartermaster should certify vouchers. The designation of the Finance Officer is not a term of the contract. It is part of an outline showing the parties, the amount, the site of the work, the services to be performed, and the authorized accounts to which payments will be charged. . . . On a construction contract containing the above terms the disbursing officer would not in practice alter or modify and would not be authorized to alter or modify the decision of a certifying construction quartermaster as to the basis on which payments can be made under the contract when such basis, as here, is dependent upon an interpretation of the specifications or has been covered by a decision on a dispute by the contracting officer. . . . Another reason why the Finance Officer would not undertake to determine the question presented in this case is that finance officers as a rule have no experience with construction and would not be qualified to make such decisions."

[5] Such an assumption is faulty in that nearly every dispute between a contractor and the Government ultimately involves the amount of payment under the contract. Hence, under the view of the Court of Claims, all such disputes would be subject to the Finance Officer's review, thereby nullifying Article 15 as well as other portions of the contract contemplating final decision by the contracting officer or the departmental head on these matters.

The Court of Claims sought to justify respondent's refusal to appeal the contracting officer's decision to increase the bricklayers' wages by holding that this decision automatically increased the contract price under the terms of Article 18 (e). It stated that the constructing quartermaster reasonably construed the ruling of the Board of Labor Review in regard to the San Antonio project as applicable to the vicinity of San Antonio as well, the wages prevailing in the vicinity being the wages to apply to a contract within that vicinity. Thus it was said that it was plainly of no special interest to respondent to appeal the contracting officer's decision. But the assumption that this decision automatically resulted in a contract price increase is not in accord with the facts or with the contract provisions. Under Article 18 (e) no automatic price increase results unless the wage change is established by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review.[6] The Board alone cannot effect a change; it can only make a recommendation. Here, however, there was no evidence that the wage increase either as to respondent or as to the San Antonio project was established by the Federal Emergency Administration of Public Works, the only agency that had authority to do so. Accordingly the provision of Article 18 (e) for an automatic price increase did not come into operation, as was recognized by respondent in its protest. Serious questions were thus raised as to the authority of the contracting officer to direct a wage increase under these circumstances and as to the validity

[6] The Board of Labor Review, although a part of the Federal Emergency Administration of Public Works, is a distinct entity. And Article 18 (e) of the contracts made a clear functional distinction between the two in regard to wage rate increases. We are not free to disregard that distinction and rewrite the procedure established by Article 18 (e).

and effect of the ruling of the Board of Labor Review. Respondent should have secured a determination of those questions by challenging the contracting officer's decision pursuant to the provisions of Article 15.

Respondent having failed to avail itself of the procedure created by Article 15 for the settlement of disputes arising under the contracts, it was precluded from bringing suit on such matters in the Court of Claims. And the Court of Claims erred in entertaining and deciding the claims involving those disputes.

Reversed.

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

MR. JUSTICE DOUGLAS, dissenting in part.

The Court requires this contractor to pay out of his own pocket the wage increase which he was directed to make. Whatever support that conclusion may have in a literal reading of the contract, it is so harsh and unfair as to be avoided if the contract does not compel the result. I do not think it does.

The contract set a minimum wage rate of $1 an hour for bricklayers. But it also provided that if the "prevailing" hourly rates under agreements between organized labor and employers on April 30, 1933, were above that minimum rate, the higher rate would become the minimum and be paid.[1] The Federal Emergency Administration of Public Works on recommendation of the Board

[1] "In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: *Provided*, That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract."

of Labor Review could change the contract rate of $1 an hour; it could also change the "prevailing" hourly rate. If it did either, it would establish a "different" minimum wage rate within the meaning of the contract.[2] And the contract price would be adjusted accordingly.

The Board of Labor Review, acting for the Federal Emergency Administration of Public Works,[3] ruled that bricklayers on another government project at San Antonio should be paid at the rate of $1.25 an hour. San Antonio, as held by the Court of Claims, is in the same vicinity as Fort Sam Houston where the present projects were under way. And plainly the "prevailing" hourly rate refers to the rate which obtains in the vicinity.

So the respondent paid the extra wages under a ruling which, as I read the contract, was binding on him. It seems, therefore, manifestly unfair to hold that he must pay the wage increase out of his own pocket.

A contractor confronted with an order of the quartermaster to raise the wages of his employees is in an ex-

[2] "The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract."

[3] The suggestion that the wage increase at San Antonio was not authorized by the Federal Emergency Administration of Public Works is not warranted by the record. The Board of Labor Review is a part of the Federal Emergency Administration of Public Works. It did not "recommend" an increase at San Antonio. It "formally ruled" that the bricklayers on that project "should be paid at the rate of $1.25 per hour." The Court of Claims treated that as action by the Federal Emergency Administration of Public Works. That seems to me to be the fair construction; and it was so treated both by the quartermaster and the contractor.

tremely difficult position. If he disobeys the order, he risks a strike and industrial turmoil. Yet the Court holds that he must take that risk or else pay the wage increase from his own pocket. Such a literal reading of the contract is not a fair one. And it is not a necessary one, as I have shown. Hence I would choose a construction which avoided that harsh and unfair result and did not victimize the contractor. If he had not protested the order of the quartermaster but had acquiesced, I suppose no one would say that there had been a dispute "concerning questions arising under" the contract,[4] which should have been or could have been appealed. It is not doubted that then the contractor would be entitled to reimbursement. I see no difference in substance if the contractor, after an initial protest, acquiesces in the ruling and accepts the new "prevailing" rate and thus avoids dissension with his employees.

There is justice in what the Court of Claims ruled and I would sustain it.

MR. JUSTICE FRANKFURTER and MR. JUSTICE RUTLEDGE join in this dissent.

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[4] The Government concedes that the quartermaster's advice to respondent that he could file an appeal with the Board of Labor Review was erroneous. It points out that the Board of Labor Review was charged with the decision only of "labor issues," which embrace controversies between employers and employees. The confusion existing in the mind of the Government's own representative emphasizes the trap set for this contractor whether he followed the quartermaster's suggestion or acquiesced in his ruling.

PORTER, PRICE ADMINISTRATOR, *v.* LEE ET AL.

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

Nos. 1116 and 1117. Argued May 13, 1946.—Decided May 27, 1946.

While an eviction suit by a landlord against a tenant was pending in a state court, the Price Administrator sued in a Federal District Court under § 205 of the Emergency Price Control Act to enjoin the landlord from evicting that tenant "or any other tenant" and from violating the Rent Regulation for Housing (promulgated under the Emergency Price Control Act), which forbids the eviction of tenants so long as they pay the rent to which the landlord is entitled. The District Court dismissed the Administrator's complaint for want of jurisdiction. While an appeal was pending, the tenant was evicted. The Circuit Court of Appeals dismissed the appeal as moot. *Held:*

1. The District Court had jurisdiction under § 205 (c) of the Emergency Price Control Act, which provides that "The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with State and Territorial Courts, of all other proceedings under section 205 of this Act." P. 249.

(a) The landlord's eviction proceeding in the state court was not an enforcement proceeding authorized by the Act and, therefore, not within the "concurrent" jurisdiction contemplated by § 205. P. 250.

(b) Over the enforcement proceedings contemplated by § 205, not only did the District Court acquire jurisdiction first, but the state court never acquired any jurisdiction at all. P. 250.

2. The Circuit Court of Appeals erred in holding that the case was moot. P. 251.

(a) The mere fact that the tenant vacated the premises in compliance with a writ of possession did not end the controversy, since the court could have restored the *status quo* by a mandatory injunction. P. 251.

(b) Moreover, the Administrator sought to restrain the eviction of any other tenant of the landlord as well as other acts in violation of the Regulation; and § 205 (a) authorizes such a broad injunction upon a finding that the landlord has engaged in violations. P. 251.

Reversed and remanded.

The Price Administrator sued to enjoin the eviction of a tenant and other violations of the Rent Regulation for Housing promulgated under the Emergency Price Control Act. The District Court dismissed the suit for want of jurisdiction. 59 F. Supp. 639. The Circuit Court of Appeals dismissed an appeal as moot. This Court granted certiorari. 328 U. S. 826. *Reversed and remanded* to the District Court for trial on the merits, p. 252.

Robert L. Stern argued the cause for petitioner. With him on the brief were *Solicitor General McGrath, Milton Klein, David London* and *Irving M. Gruber.*

Howell W. Vincent argued the cause and filed a brief for respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

October 24, 1944, Dr. Lee brought a forcible detainer suit in the Justice of the Peace Court of Kenton County, Kentucky, to recover possession of an apartment he had rented to R. C. and Sarah Beever by reason of an alleged nonpayment of rent due on October 18, 1944. On December 4, 1944, before any judgment had been rendered, the Price Administrator, under § 205 of the Emergency Price Control Act, 56 Stat. 23, sought an injunction in the Federal District Court to order respondents, Dr. and Mrs. Lee, not to prosecute eviction proceedings against "Beever or any other tenant" and to restrain them from violating the Rent Regulation for Housing, 10 F. R. 3436, 13528, promulgated pursuant to the Emergency Price Control Act.[1] That

[1] The part of the Regulation here in question (§ 6) was promulgated pursuant to § 2 (d) of the Emergency Price Control Act, 56 Stat. 23, which authorizes the Administrator, whenever such action is necessary or proper in order to effectuate the purposes of the Act, to " regulate or prohibit . . . renting or leasing practices (including practices re-

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Regulation provides among other things that so long as the tenant continues to pay the rent to which the landlord is entitled no tenant shall be removed or evicted by any landlord. The Administrator's complaint in the injunction proceeding alleged that Beever owed no rent; that tender of the rent due had been refused by Dr. Lee; that this had been done not because there had been a default in payment but rather because Dr. Lee did not want families with children, such as the Beevers, living on the premises; and that the eviction proceeding, thus, violated the Rent Regulation for Housing. The District Court issued a temporary restraining order, but later, without passing on the disputed factual issue of whether Beever had actually been delinquent in paying his rent at the time of the commencement of the Justice of the Peace Court proceedings, dismissed the Price Administrator's complaint on the ground that it lacked jurisdiction to enjoin the Lees from prosecuting an eviction proceeding in the state court. *Bowles* v. *Lee,* 59 F. Supp. 639.[2] The Justice of the Peace Court on the landlord's motion then dismissed the forcible detainer action and on June 25, 1945, a new action was brought in the same Justice of the Peace Court asking for a writ of restitution to remove the Beevers on the ground of nonpayment of rent. The Justice of the Peace Court then entered a judgment directing the eviction of the Beevers. The Price Administrator this time asked the Federal District Court to restrain enforcement and execution of the judgment of eviction. This action by the Price

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lating to recovery of the possession) in connection with any defense-area housing accommodations, which in his judgment are equivalent to or are likely to result in . . . rent increases . . . inconsistent with the purposes of this Act."

[2] The original petition for injunction was filed by Chester Bowles as Price Administrator. Petitioner Porter is his successor in office, and upon motion he has been substituted as petitioner in this Court.

Administrator was again dismissed on the ground of lack of jurisdiction.

The Price Administrator appealed from both District Court orders dismissing his complaints and made prompt application to the Circuit Court of Appeals for an injunction pending appeal in the first case. This motion was denied. The landlord moved to have the case dismissed as moot and in support of that motion filed an affidavit setting forth that the premises had been vacated by the Beevers. In response the Price Administrator submitted an affidavit by R. C. Beever stating that he had not vacated the apartment as a matter of choice, but had moved to several basements and into the home of his wife's parents because he was compelled to do so by a writ of possession which had been served on him. The Circuit Court of Appeals dismissed both cases as moot. We granted certiorari because of the obvious importance of the questions raised by the Federal District Court's dismissals for want of jurisdiction and the holding of the Circuit Court of Appeals that the proceedings had become moot.

First. As to jurisdiction, the provisions of the Price Control Act and the Rent Regulation for Housing, promulgated pursuant thereto and not challenged here, make it clear that the Price Administrator's allegations in his complaint before the District Court stated an enjoinable violation over which the District Court as an enforcement court ordinarily would have jurisdiction under § 205 (a) and (c) of the Act. But the landlord claims that here the District Court was without power to act because the provisions of § 205 (c) permit actions in state courts alone under the particular circumstances here. He relies on that part of subsection (c) which provides that "The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with State and Territorial courts, of all other proceedings under

section 205 of this Act." The landlord's argument is as follows: The Administrator's proceeding in the Federal District Court was a proceeding under § 205 over which the state courts have concurrent jurisdiction. The only issue in the federal proceeding would have been whether the landlord had legally sought to evict the Beevers because of nonpayment of rent or whether eviction was sought for other reasons in violation of the applicable regulation. That question could have been raised in the Justice of the Peace Court in view of its "concurrent" jurisdiction under § 205 (c). Since the Justice of the Peace Court action by the landlord was commenced prior to the Administrator's injunction proceeding in the federal court, the Justice of the Peace Court had acquired sole power to decide the crucial issue and the Federal District Court therefore lacked jurisdiction.

We think this contention is without merit. Section 205 (c) gives the state courts concurrent jurisdiction only over non-criminal enforcement "proceedings under section 205." *Bowles* v. *Willingham,* 321 U. S. 503, 511–512. Here the landlord's eviction proceeding in the Justice of the Peace Court clearly was not an enforcement proceeding authorized by the Act. It was, rather, if the allegations of the Administrator proved to be true, a violation of the Act. The state court's jurisdiction was based on state law and not on § 205 of the Price Control Act. It was therefore not part of the "concurrent" jurisdiction contemplated by § 205. Over the enforcement proceedings contemplated by that section not only did the District Court acquire jurisdiction first, but the state court never acquired any jurisdiction at all. It was consequently within the power of the Federal District Court to grant the injunction, provided the Government succeeded in proving the merits of its case.

To rule otherwise would require the Administrator to bring enforcement proceedings, in situations such as the

one before us, always in the state courts. Such a requirement would certainly not be in accord with the "concurrent" jurisdiction provision of § 205 (c). Or the Administrator in order to protect the public interest would always be forced to intervene in state court proceedings brought by the landlord. This procedure would be inadequate, because the speedy manner in which eviction suits are handled will frequently make it too late to intervene when the Administrator becomes aware of a violation. Furthermore, justice of the peace courts do not, at least ordinarily, have jurisdiction to grant injunctions to prevent future violations of the Act. Since there is nothing in the Act that limits the Administrator's action to intervention in the state courts, we see no reason, nor are we authorized, to so restrict him.[3]

Second. We also think the Circuit Court of Appeals erred in holding that the case was moot. The mere fact that the Beevers, in order to comply with the writ of possession, vacated the apartment was not enough to end the controversy. It has long been established that where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the *status quo*. *Texas & New Orleans R. Co.* v. *Northside Belt R. Co.*, 276 U. S. 475, 479. The Administrator, therefore, was entitled to seek a restoration of the *status quo* in this case. See *Henderson* v. *Fleckinger*, 136 F. 2d 381–382. Moreover, here the Administrator sought to restrain not merely the eviction of Beever but also that of any other tenant of the landlord as well as other acts in violation of the Regulation. Section 205 (a) authorizes the District Court in its discretion to grant such a broad injunction upon a finding that the landlord has engaged in violations. See

[3] And for the reasons stated in *Porter* v. *Dicken*, *post*, p. 252, § 265 of the Judicial Code does not require a different result.

Hecht Co. v. *Bowles,* 321 U. S. 321. If the eviction proceeding actually was a violation of the Regulation, then Beever's vacating the premises was merely the completion of one violation. The issue as to whether future violations should be enjoined was still before the Court and was by no means moot.

The judgments of the Circuit Court of Appeals are reversed and the cases are remanded to the District Court for trial of the issues on the merits.

It is so ordered.

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

PORTER, PRICE ADMINISTRATOR, *v.* DICKEN ET AL.

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

No. 1118. Argued May 13, 1946.—Decided May 27, 1946.

Under § 205 of the Emergency Price Control Act, authorizing the Price Administrator to bring injunction proceedings to enforce the Act in either state or federal courts, a federal district court has jurisdiction to grant an injunction sought by the Price Administrator to restrain eviction of a tenant under an order of a state court where the Administrator alleges that eviction would violate the Act and regulations pursuant thereto—notwithstanding § 265 of the Judicial Code, which forbids federal courts to grant injunctions to stay proceedings in state courts except in bankruptcy proceedings. Pp. 254, 255.

Reversed and remanded.

A writ of possession to evict a tenant having been issued by a state court, the Price Administrator sued in a Federal District Court for an injunction to restrain the eviction. The District Court dismissed the suit for want of jurisdiction. The Circuit Court of Appeals denied an application for an injunction prohibiting the

eviction pending an appeal to that Court. Before judgment of the Circuit Court of Appeals on the merits, this Court granted certiorari. 328 U. S. 827. *Reversed and remanded,* p. 255.

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

Submitted on brief by respondents, *pro se.*

MR. JUSTICE BLACK delivered the opinion of the Court.

This case, like *Porter* v. *Lee, ante,* p. 246, involves the jurisdiction of the Federal District Court to grant an injunction, sought by the Price Administrator under § 205 (a) of the Emergency Price Control Act, to restrain eviction of a tenant under an order of a state court where the Administrator alleges that eviction would violate the Act and valid regulations promulgated pursuant to it. Briefly stated the circumstances of the controversy are these: B. M. Murray, as executor of an estate, pursuant to authority granted him by the Probate Court of Franklin County, Ohio, sold a house located within the Columbus Defense Rental Area. A writ of possession directing the sheriff of the County to evict the tenant and to place the respondent purchasers in possession was obtained in the Probate Court. No certificate authorizing the eviction was sought or obtained from the Price Administrator as is required by § 6 of the Rent Regulation for Housing. 10 F. R. 3436, 13528. Before the sheriff executed the writ the Price Administrator brought this action for an injunction in the Federal District Court. The District Court issued a temporary restraining order but later dismissed the complaint on the ground that § 265 of the Judicial Code, 28 U. S. C. 379, deprived the Federal District Court of jurisdiction to stay the proceedings in the state court.

This section provides that: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." The District Court in dismissing the cause entered an order restraining respondents from evicting the tenant pending determination by the Circuit Court of Appeals for an application for an injunction prohibiting the eviction pending an appeal to that Court. The Administrator made this application in the Circuit Court of Appeals, but it was denied, thus removing all obstacles to eviction of the tenant. The Circuit Court of Appeals has not heard this case. In order to prevent eviction of the tenant, the Administrator sought and obtained from Mr. Justice Reed an injunction pending final disposition of this case in this Court and applied for certiorari directly to this Court under § 240 (a) of the Judicial Code, which authorizes us to grant certiorari "either before or after a judgment or decree by such lower court . . ." We were prompted to bring the District Court's judgment directly to this Court for review by reason of the close relationship of the important question raised to the question presented in *Porter* v. *Lee, ante,* p. 246.

The District Court was of the opinion that since § 205 (c) of the Act gave concurrent jurisdiction to state courts to grant relief by injunction, the policy of § 265 against federal injunctions of state proceedings should not be considered impaired by the Emergency Price Control Act. The District Court's conclusion was that if the Administrator wanted an injunction to restrain eviction under state court procedure he should have gone into some state court that had jurisdiction of the cause. The District Court erred in holding that the policy of § 265 of the Judicial Code should not be considered impaired by the Emergency Price Control Act. While we realize that § 265 embodies a long-standing governmental policy to

prevent unnecessary friction between state and federal courts, *Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118, we still hold as we held in *Bowles* v. *Willingham*, 321 U. S. 503, that § 205 of the Price Control Act which authorizes the Price Administrator to seek injunctive relief in appropriate courts, including federal district courts, is an implied legislative amendment to § 265, creating an exception to its broad prohibition.[1] This is true because § 205 authorizes the Price Administrator to bring injunction proceedings to enforce the Act in either state or federal courts, and this authority is broad enough to justify an injunction to restrain state court evictions. But if § 265 controls, as the District Court held, the Administrator here could not proceed in the federal court, since there is a proceeding pending in a state court. Since the provisions of the Price Control Act, enacted long after § 265, do not compel the Administrator to go into the state courts but leave him free to seek relief in the federal courts, he was not barred by § 265 from seeking an injunction to restrain an unlawful eviction. Cf. *Hale* v. *Bimco Trading, Inc.*, 306 U. S. 375.

The judgment of the District Court is reversed and the case is remanded to that Court to exercise the jurisdiction conferred upon it by § 205 of the Emergency Price Control Act.

Reversed and remanded.

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

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[1] An alternative reason given for the decision in the *Willingham* case was that, since the state court there was attempting to enjoin the Administrator from performing his duties under the Act, the District Court had power both under § 205 (a) of the Act and § 24 (1) of the Judicial Code to protect the exclusive federal jurisdiction which Congress had granted. But our opinion did not, as the District Court thought, depend entirely on this alternative ground.

UNITED STATES *v.* CAUSBY ET UX.

CERTIORARI TO THE COURT OF CLAIMS.

No. 630. Argued May 1, 1946.—Decided May 27, 1946.

Respondents owned a dwelling and a chicken farm near a municipal airport. The safe path of glide to one of the runways of the airport passed directly over respondents' property at 83 feet, which was 67 feet above the house, 63 feet above the barn and 18 feet above the highest tree. It was used 4% of the time in taking off and 7% of the time in landing. The Government leased the use of the airport for a term of one month commencing June 1, 1942, with a provision for renewals until June 30, 1967, or six months after the end of the national emergency, whichever was earlier. Various military aircraft of the United States used the airport. They frequently came so close to respondents' property that they barely missed the tops of trees, the noise was startling, and the glare from their landing lights lighted the place up brightly at night. This destroyed the use of the property as a chicken farm and caused loss of sleep, nervousness and fright on the part of respondents. They sued in the Court of Claims to recover for an alleged taking of their property and for damages to their poultry business. The Court of Claims found that the Government had taken an easement over respondents' property and that the value of the property destroyed and the easement taken was $2,000; but it made no finding as to the precise nature or duration of the easement. *Held:*

1. A servitude has been imposed upon the land for which respondents are entitled to compensation under the Fifth Amendment. Pp. 260–267.

(a) The common law doctrine that ownership of land extends to the periphery of the universe has no place in the modern world. Pp. 260, 261.

(b) The air above the minimum safe altitude of flight prescribed by the Civil Aeronautics Authority is a public highway and part of the public domain, as declared by Congress in the Air Commerce Act of 1926, as amended by the Civil Aeronautics Act of 1938. Pp. 260, 261, 266.

(c) Flights below that altitude are not within the navigable air space which Congress placed within the public domain, even though they are within the path of glide approved by the Civil Aeronautics Authority. Pp. 263, 264.

(d) Flights of aircraft over private land which are so low and frequent as to be a direct and immediate interference with the enjoyment and use of the land are as much an appropriation of the use of the land as a more conventional entry upon it. Pp. 261, 262, 264–267.

2. Since there was a taking of private property for public use, the claim was "founded upon the Constitution," within the meaning of § 141 (1) of the Judicial Code, and the Court of Claims had jurisdiction to hear and determine it. P. 267.

3. Since the court's findings of fact contain no precise description of the nature or duration of the easement taken, the judgment is reversed and the cause is remanded to the Court of Claims, so that it may make the necessary findings. Pp. 267, 268.

(a) An accurate description of the easement taken is essential, since that interest vests in the United States. P. 267.

(b) Findings of fact on every "material issue" are a statutory requirement, and a deficiency in the findings can not be rectified by statements in the opinion. Pp. 267, 268.

(c) A conjecture in lieu of a conclusion from evidence would not be a proper foundation for liability of the United States. P. 268.

104 Ct. Cls. 342, 60 F. Supp. 751, reversed and remanded.

The Court of Claims granted respondents a judgment for the value of property destroyed and damage to their property resulting from the taking of an easement over their property by low-flying military aircraft of the United States, but failed to include in its findings of fact a specific description of the nature or duration of the easement. 104 Ct. Cls. 342, 60 F. Supp. 751. This Court granted certiorari. 327 U. S. 775. *Reversed and remanded,* p. 268.

Walter J. Cummings, Jr. argued the cause for the United States. With him on the brief were *Solicitor General McGrath, J. Edward Williams, Roger P. Marquis* and *Alvin O. West.*

William E. Comer argued the cause and filed a brief for respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a case of first impression. The problem presented is whether respondents' property was taken, within the meaning of the Fifth Amendment, by frequent and regular flights of army and navy aircraft over respondents' land at low altitudes. The Court of Claims held that there was a taking and entered judgment for respondents, one judge dissenting. 104 Ct. Cls. 342, 60 F. Supp. 751. The case is here on a petition for a writ of certiorari which we granted because of the importance of the question presented.

Respondents own 2.8 acres near an airport outside of Greensboro, North Carolina. It has on it a dwelling house, and also various outbuildings which were mainly used for raising chickens. The end of the airport's northwest-southeast runway is 2,220 feet from respondents' barn and 2,275 feet from their house. The path of glide to this runway passes directly over the property—which is 100 feet wide and 1,200 feet long. The 30 to 1 safe glide angle [1] approved by the Civil Aeronautics Authority [2] passes over this property at 83 feet, which is 67 feet above the house, 63 feet above the barn and 18 feet above the highest tree.[3] The use by the United States of this airport is pursuant to a lease executed in May, 1942, for a term commencing June 1, 1942 and ending June 30, 1942, with a provision for renewals until June 30, 1967, or six

[1] A 30 to 1 glide angle means one foot of elevation or descent for every 30 feet of horizontal distance.

[2] Military planes are subject to the rules of the Civil Aeronautics Board where, as in the present case, there are no Army or Navy regulations to the contrary. *Cameron* v. *Civil Aeronautics Board*, 140 F. 2d 482.

[3] The house is approximately 16 feet high, the barn 20 feet, and the tallest tree 65 feet.

months after the end of the national emergency, whichever is the earlier.

Various aircraft of the United States use this airport—bombers, transports and fighters. The direction of the prevailing wind determines when a particular runway is used. The northwest-southeast runway in question is used about four per cent of the time in taking off and about seven per cent of the time in landing. Since the United States began operations in May, 1942, its four-motored heavy bombers, other planes of the heavier type, and its fighter planes have frequently passed over respondents' land and buildings in considerable numbers and rather close together. They come close enough at times to appear barely to miss the tops of the trees and at times so close to the tops of the trees as to blow the old leaves off. The noise is startling. And at night the glare from the planes brightly lights up the place. As a result of the noise, respondents had to give up their chicken business. As many as six to ten of their chickens were killed in one day by flying into the walls from fright. The total chickens lost in that manner was about 150. Production also fell off. The result was the destruction of the use of the property as a commercial chicken farm. Respondents are frequently deprived of their sleep and the family has become nervous and frightened. Although there have been no airplane accidents on respondents' property, there have been several accidents near the airport and close to respondents' place. These are the essential facts found by the Court of Claims. On the basis of these facts, it found that respondents' property had depreciated in value. It held that the United States had taken an easement over the property on June 1, 1942, and that the value of the property destroyed and the easement taken was $2,000.

I. The United States relies on the Air Commerce Act of 1926, 44 Stat. 568, 49 U. S. C. § 171, as amended by the Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U. S. C. § 401. Under those statutes the United States has "complete and exclusive national sovereignty in the air space" over this country. 49 U. S. C. § 176 (a). They grant any citizen of the United States "a public right of freedom of transit in air commerce [4] through the navigable air space of the United States." 49 U. S. C. § 403. And "navigable air space" is defined as "airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority." 49 U. S. C. § 180. And it is provided that "such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation." *Id.* It is, therefore, argued that since these flights were within the minimum safe altitudes of flight which had been prescribed, they were an exercise of the declared right of travel through the airspace. The United States concludes that when flights are made within the navigable airspace without any physical invasion of the property of the landowners, there has been no taking of property. It says that at most there was merely incidental damage occurring as a consequence of authorized air navigation. It also argues that the landowner does not own superadjacent airspace which he has not subjected to possession by the erection of structures or other occupancy. Moreover, it is argued that even if the United States took airspace owned by respondents, no compensable damage was shown. Any damages are said to be merely consequential for which no compensation may be obtained under the Fifth Amendment.

It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*Cujus*

[4] "Air commerce" is defined as including "any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce." 49 U. S. C. § 401 (3).

est solum ejus est usque ad coelum.[5] But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.

But that general principle does not control the present case. For the United States conceded on oral argument that if the flights over respondents' property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment. It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken. *United States* v. *Miller,* 317 U. S. 369. Market value fairly determined is the normal measure of the recovery. *Id.* And that value may reflect the use to which the land could readily be converted, as well as the existing use. *United States* v. *Powelson,* 319 U. S. 266, 275, and cases cited. If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete.[6] It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.

We agree that in those circumstances there would be a taking. Though it would be only an easement of flight

[5] 1 Coke, Institutes (19th ed. 1832) ch. 1, § 1 (4a); 2 Blackstone, Commentaries (Lewis ed. 1902) p. 18; 3 Kent, Commentaries (Gould ed. 1896) p. 621.

[6] The destruction of all uses of the property by flooding has been held to constitute a taking. *Pumpelly* v. *Green Bay Co.,* 13 Wall. 166; *United States* v. *Lynah,* 188 U. S. 445; *United States* v. *Welch,* 217 U. S. 333.

which was taken, that easement, if permanent and not merely temporary, normally would be the equivalent of a fee interest. It would be a definite exercise of complete dominion and control over the surface of the land. The fact that the planes never touched the surface would be as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate. The owner's right to possess and exploit the land—that is to say, his beneficial ownership of it—would be destroyed. It would not be a case of incidental damages arising from a legalized nuisance such as was involved in *Richards* v. *Washington Terminal Co.*, 233 U. S. 546. In that case, property owners whose lands adjoined a railroad line were denied recovery for damages resulting from the noise, vibrations, smoke and the like, incidental to the operations of the trains. In the supposed case, the line of flight is over the land. And the land is appropriated as directly and completely as if it were used for the runways themselves.

There is no material difference between the supposed case and the present one, except that here enjoyment and use of the land are not completely destroyed. But that does not seem to us to be controlling. The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value.[7] That was the philosophy of *Portsmouth Co.* v.

[7] It was stated in *United States* v. *General Motors Corp.*, 323 U. S. 373, 378, "The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." The present case falls short of the *General Motors* case. This is not a case where the United States has merely

United States, 260 U. S. 327. In that case the petition alleged that the United States erected a fort on nearby land, established a battery and a fire control station there, and fired guns over petitioner's land. The Court, speaking through Mr. Justice Holmes, reversed the Court of Claims, which dismissed the petition on a demurrer, holding that "the specific facts set forth would warrant a finding that a servitude has been imposed." [8] 260 U. S. p. 330. And see *Delta Air Corp.* v. *Kersey,* 193 Ga. 862, 20 S. E. 2d 245. Cf. *United States* v. *357.25 Acres of Land,* 55 F. Supp. 461.

The fact that the path of glide taken by the planes was that approved by the Civil Aeronautics Authority does not change the result. The navigable airspace which Congress has placed in the public domain is "airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority." 49 U. S. C. § 180. If that agency prescribed 83 feet as the minimum safe altitude, then we would have presented the question of the validity of the regulation. But nothing of the sort has been done. The path of glide governs the method of operating—of landing or taking off. The altitude required for that operation is not the minimum safe altitude of flight which is the downward reach of the navigable airspace. The minimum prescribed by the Authority is 500 feet during the day and 1,000 feet at night for air carriers (Civil Air Regulations, Pt. 61, §§ 61.7400, 61.7401, Code Fed. Reg. Cum. Supp., Tit. 14, ch. 1), and from 300 feet to 1,000 feet for

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destroyed property. It is using a part of it for the flight of its planes.

Cf. *Warren Township School Dist.* v. *Detroit,* 308 Mich. 460, 14 N. W. 2d 134; *Smith* v. *New England Aircraft Co.,* 270 Mass. 511, 170 N. E. 385; *Burnham* v. *Beverly Airways, Inc.,* 311 Mass. 628, 42 N. E. 2d 575.

[8] On remand the allegations in the petition were found not to be supported by the facts. 64 Ct. Cls. 572.

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other aircraft, depending on the type of plane and the character of the terrain. *Id.*, Pt. 60, §§ 60.350–60.3505, Fed. Reg. Cum. Supp., *supra*. Hence, the flights in question were not within the navigable airspace which Congress placed within the public domain. If any airspace needed for landing or taking off were included, flights which were so close to the land as to render it uninhabitable would be immune. But the United States concedes, as we have said, that in that event there would be a taking. Thus, it is apparent that the path of glide is not the minimum safe altitude of flight within the meaning of the statute. The Civil Aeronautics Authority has, of course, the power to prescribe air traffic rules. But Congress has defined navigable airspace only in terms of one of them—the minimum safe altitudes of flight.

We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land.[9] The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. See *Hinman* v. *Pacific Air Transport*, 84 F. 2d 755. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material. As we have said, the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. We would not doubt that, if the United States erected

[9] *Baten's Case*, 9 Coke R. 53b; *Meyer* v. *Metzler*, 51 Cal. 142; *Codman* v. *Evans*, 89 Mass. 431; *Harrington* v. *McCarthy*, 169 Mass. 492, 48 N. E. 278. See Ball, *The Vertical Extent of Ownership in Land*, 76 U. Pa. L. Rev. 631, 658–671.

an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land.[10] The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it. While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used. The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.[11]

In this case, as in *Portsmouth Co.* v. *United States, supra,* the damages were not merely consequential. They were the product of a direct invasion of respondents' do-

[10] It was held in *Butler* v. *Frontier Telephone Co.,* 186 N. Y. 486, 79 N. E. 716, that ejectment would lie where a telephone wire was strung across the plaintiff's property, even though it did not touch the soil. The court stated, pp. 491–492: ". . . an owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as much as a mine beneath. If the wire had been a huge cable, several inches thick and but a foot above the ground, there would have been a difference in degree, but not in principle. Expand the wire into a beam supported by posts standing upon abutting lots without touching the surface of plaintiff's land, and the difference would still be one of degree only. Enlarge the beam into a bridge, and yet space only would be occupied. Erect a house upon the bridge, and the air above the surface of the land would alone be disturbed."

[11] See Bouvé, Private Ownership of Navigable Airspace Under the Commerce Clause, 21 Amer. Bar Assoc. Journ. 416, 421–422; Hise, Ownership and Sovereignty of the Air, 16 Ia. L. Rev. 169; Eubank, The Doctrine of the Airspace Zone of Effective Possession, 12 Boston Univ. L. Rev. 414.

main. As stated in *United States* v. *Cress*, 243 U. S. 316, 328, ". . . it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."

We said in *United States* v. *Powelson, supra,* p. 279, that while the meaning of "property" as used in the Fifth Amendment was a federal question, "it will normally obtain its content by reference to local law." If we look to North Carolina law, we reach the same result. Sovereignty in the airspace rests in the State "except where granted to and assumed by the United States." Gen. Stats. 1943, § 63–11. The flight of aircraft is lawful "unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath." *Id.*, § 63–13. Subject to that right of flight, "ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath . . ." *Id.*, § 63–12. Our holding that there was an invasion of respondents' property is thus not inconsistent with the local law governing a landowner's claim to the immediate reaches of the superadjacent airspace.

The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment. The airspace, apart from the immediate reaches above the land, is part of the public domain. We need not determine at this time what those precise limits are. Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. We need not speculate on that phase of the present case. For the findings of the Court

of Claims plainly establish that there was a diminution in value of the property and that the frequent, low-level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land.

II. By § 145 (1) of the Judicial Code, 28 U. S. C. § 250 (1), the Court of Claims has jurisdiction to hear and determine "All claims (except for pensions) founded upon the Constitution of the United States or . . . upon any contract, express or implied, with the Government of the United States . . ."

We need not decide whether repeated trespasses might give rise to an implied contract. Cf. *Portsmouth Co.* v. *United States, supra.* If there is a taking, the claim is "founded upon the Constitution" and within the jurisdiction of the Court of Claims to hear and determine. See *Hollister* v. *Benedict Mfg. Co.,* 113 U. S. 59, 67; *Hurley* v. *Kincaid,* 285 U. S. 95, 104; *Yearsley* v. *Ross Construction Co.,* 309 U. S. 18, 21. Thus, the jurisdiction of the Court of Claims in this case is clear.

III. The Court of Claims held, as we have noted, that an easement was taken. But the findings of fact contain no precise description as to its nature. It is not described in terms of frequency of flight, permissible altitude, or type of airplane. Nor is there a finding as to whether the easement taken was temporary or permanent. Yet an accurate description of the property taken is essential, since that interest vests in the United States. *United States* v. *Cress, supra,* 328–329 and cases cited. It is true that the Court of Claims stated in its opinion that the easement taken was permanent. But the deficiency in findings cannot be rectified by statements in the opinion. *United States* v. *Esnault-Pelterie,* 299 U. S. 201, 205–206; *United States* v. *Seminole Nation,* 299 U. S. 417, 422. Findings of fact on every "material issue" are a statutory

requirement. 53 Stat. 752, 28 U. S. C. § 288. The importance of findings of fact based on evidence is emphasized here by the Court of Claims' treatment of the nature of the easement. It stated in its opinion that the easement was permanent because the United States "no doubt intended to make some sort of arrangement whereby it could use the airport for its military planes whenever it had occasion to do so." That sounds more like conjecture rather than a conclusion from evidence; and if so, it would not be a proper foundation for liability of the United States. We do not stop to examine the evidence to determine whether it would support such a finding, if made. For that is not our function. *United States* v. *Esnault-Pelterie, supra,* p. 206.

Since on this record it is not clear whether the easement taken is a permanent or a temporary one, it would be premature for us to consider whether the amount of the award made by the Court of Claims was proper.

The judgment is reversed and the cause is remanded to the Court of Claims so that it may make the necessary findings in conformity with this opinion.

Reversed.

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

MR. JUSTICE BLACK, dissenting.

The Fifth Amendment provides that "private property" shall not "be taken for public use without just compensation." The Court holds today that the Government has "taken" respondents' property by repeatedly flying Army bombers directly above respondents' land at a height of eighty-three feet where the light and noise from these planes caused respondents to lose sleep and their chickens to be killed. Since the effect of the Court's decision is

to limit, by the imposition of relatively absolute constitutional barriers, possible future adjustments through legislation and regulation which might become necessary with the growth of air transportation, and since in my view the Constitution does not contain such barriers, I dissent.

The following is a brief statement of the background and of the events that the Court's opinion terms a "taking" within the meaning of the Fifth Amendment: Since 1928 there has been an airfield some eight miles from Greensboro, North Carolina. In April, 1942, this airport was taken over by the Greensboro-High Point Municipal Airport Authority and it has since then operated as a municipal airport. In 1942 the Government, by contract, obtained the right to use the field "concurrently, jointly, and in common" with other users. Years before, in 1934, respondents had bought their property, located more than one-third of a mile from the airport. Private planes from the airport flew over their land and farm buildings from 1934 to 1942 and are still doing so. But though these planes disturbed respondents to some extent, Army bombers, which started to fly over the land in 1942 at a height of eighty-three feet, disturbed them more because they were larger, came over more frequently, made a louder noise, and at night a greater glare was caused by their lights. This noise and glare disturbed respondents' sleep, frightened them, and made them nervous. The noise and light also frightened respondents' chickens so much that many of them flew against buildings and were killed.

The Court's opinion seems to indicate that the mere flying of planes through the column of air directly above respondents' land does not constitute a "taking." Consequently, it appears to be noise and glare, to the extent and under the circumstances shown here, which make the Government a seizer of private property. But the allegation

of noise and glare resulting in damages, constitutes at best an action in tort where there might be recovery if the noise and light constituted a nuisance, a violation of a statute,[1] or were the result of negligence.[2] But the Government has not consented to be sued in the Court of Claims except in actions based on express or implied contract. And there is no implied contract here, unless by reason of the noise and glare caused by the bombers the Government can be said to have "taken" respondents' property in a constitutional sense. The concept of taking property as used in the Constitution has heretofore never been given so sweeping a meaning. The Court's opinion presents no case where a man who makes noise or shines light onto his neighbor's property has been ejected from that property for wrongfully taking possession of it. Nor would anyone take seriously a claim that noisy automobiles passing on a highway are taking wrongful possession of the homes located thereon, or that a city elevated train which greatly interferes with the sleep of those who live next to it wrongfully takes their property. Even the one case in this Court which in considering the sufficiency of a complaint gave the most elastic meaning to the phrase "private property be taken" as used in the Fifth Amendment, did not go so far. *Portsmouth Co.* v. *United States*, 260 U. S.

[1] *Neiswonger* v. *Goodyear Tire & Rubber Co.*, 35 F. 2d 761.

[2] As to the damage to chickens, Judge Madden, dissenting from this judgment against the Government, said, "When railroads were new, cattle in fields in sight and hearing of the trains were alarmed, thinking that the great moving objects would turn aside and harm them. Horses ran away at the sight and sound of a train or a threshing machine engine. The farmer's chickens have to get over being alarmed at the incredible racket of the tractor starting up suddenly in the shed adjoining the chicken house. These sights and noises are a part of our world, and airplanes are now and will be to a greater degree, likewise a part of it. These disturbances should not be treated as torts, in the case of the airplane, any more than they are so treated in the case of the railroad or public highway." 104 Ct. Cls. 342, 358.

327. I am not willing, nor do I think the Constitution and the decisions authorize me, to extend that phrase so as to guarantee an absolute constitutional right to relief not subject to legislative change, which is based on averments that at best show mere torts committed by government agents while flying over land. The future adjustment of the rights and remedies of property owners, which might be found necessary because of the flight of planes at safe altitudes, should, especially in view of the imminent expansion of air navigation, be left where I think the Constitution left it, with Congress.

Nor do I reach a different conclusion because of the fact that the particular circumstance which under the Court's opinion makes the tort here absolutely actionable, is the passing of planes through a column of air at an elevation of eighty-three feet directly over respondents' property. It is inconceivable to me that the Constitution guarantees that the airspace of this Nation needed for air navigation is owned by the particular persons who happen to own the land beneath to the same degree as they own the surface below.[1] No rigid constitutional rule, in my judgment, commands that the air must be considered as marked off into separate compartments by imaginary metes and bounds in order to synchronize air ownership with land ownership. I think that the Constitution entrusts Congress with full power to control all navigable airspace. Congress has already acted under that power. It has by statute, 44 Stat. 568, 52 Stat. 973, provided that "the United States of America is . . . to possess and exercise complete and exclusive national sovereignty in the

[1] The House in its report on the Air Commerce Act of 1926 stated:

"The public right of flight in the navigable air space owes its source to the same constitutional basis which, under decisions of the Supreme Court, has given rise to a public easement of navigation in the navigable waters of the United States, regardless of the ownership of the adjacent or subjacent soil." H. Rep. No. 572, 69th Cong., 1st Sess., p. 10.

air space above the United States . . ." This was done under the assumption that the Commerce Clause of the Constitution gave Congress the same plenary power to control navigable airspace as its plenary power over navigable waters. H. Rep. No. 572, 69th Cong., 1st Sess., p. 10; H. Rep. No. 1162, 69th Cong., 1st Sess., p. 14; see *United States* v. *Commodore Park,* 324 U. S. 386. To make sure that the airspace used for air navigation would remain free, Congress further declared that "navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation," and finally stated emphatically that there exists "a public right of freedom of transit . . . through the navigable air space of the United States." Congress thus declared that the air is free, not subject to private ownership, and not subject to delimitation by the courts. Congress and those acting under its authority were the only ones who had power to control and regulate the flight of planes. "Navigable airspace" was defined as "airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority . . ." 49 U. S. C. § 180. Thus, Congress has given the Civil Aeronautics Authority exclusive power to determine what is navigable airspace subject to its exclusive control. This power derives specifically from the Section which authorizes the Authority to prescribe "air traffic rules governing the flight of, and for the navigation, protection, and identification of, aircraft, including rules as to safe altitudes of flight and rules for the prevention of collisions between aircraft, and between aircraft and land or water vehicles." Here there was no showing that the bombers flying over respondents' land violated any rule or regulation of the Civil Aeronautics Authority. Yet, unless we hold the Act unconstitutional, at least such a showing would be necessary before the courts could act without interfering with the exclusive authority which Congress gave to the administrative agency. Not even a

showing that the Authority has not acted would be sufficient. For in that event, were the courts to have any authority to act in this case at all, they should stay their hand till the Authority has acted.

The broad provisions of the congressional statute cannot properly be circumscribed by making a distinction, as the Court's opinion does, between rules of safe altitude of flight while on the level of cross-country flight and rules of safe altitude during landing and taking off. First, such a distinction cannot be maintained from the practical standpoint. It is unlikely that Congress intended that the Authority prescribe safe altitudes for planes making cross-country flights, while at the same time it left the more hazardous landing and take-off operations unregulated. The legislative history, moreover, clearly shows that the Authority's power to prescribe air traffic rules includes the power to make rules governing landing and take-off. Nor is the Court justified in ignoring that history by labeling rules of safe altitude while on the level of cross-country flight as rules prescribing the safe altitude proper and rules governing take-off and landing as rules of operation. For the Conference Report explicitly states that such distinctions were purposely eliminated from the original House Bill in order that the Section on air traffic rules "might be given the broadest possible construction by the . . . [Civil Aeronautics Authority] and the courts." [2] In construing the statute narrowly, the Court

[2] The full statement reads:

"The substitute provides that the Secretary shall by regulation establish air traffic rules for the navigation, protection, and identification of all aircraft, including rules as to safe altitudes of flight and rules for the prevention of collisions between vessels and aircraft. The provision as to rules for taking off and alighting, for instance, was eliminated as unnecessary specification, for the reason that such rules are but one class of air traffic rules for the navigation and protection of aircraft. Rules as to marking were eliminated for the reason that such rules were fairly included within the scope of air rules for the identification of air-

thwarts the intent of Congress. A proper broad construction, such as Congress commanded, would not permit the Court to decide what it has today without declaring the Act of Congress unconstitutional. I think the Act given the broad construction intended is constitutional.

No greater confusion could be brought about in the coming age of air transportation than that which would result were courts by constitutional interpretation to hamper Congress in its efforts to keep the air free. Old concepts of private ownership of land should not be introduced into the field of air regulation. I have no doubt that Congress will, if not handicapped by judicial interpretations of the Constitution, preserve the freedom of the air, and at the same time, satisfy the just claims of aggrieved persons. The noise of newer, larger, and more powerful planes may grow louder and louder and disturb people more and more. But the solution of the problems precipitated by these technological advances and new ways of living cannot come about through the application of rigid constitutional restraints formulated and enforced by the courts. What adjustments may have to be made, only the future can reveal. It seems certain, however,

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craft. No attempt is made by either the Senate bill or the House amendment to fully define the various classes of rules that would fall within the scope of air traffic traffic [*sic*] rules, as, for instance, lights and signals along airways and at air-ports and upon emergency landing fields. In general, these rules would relate to the same subjects as those covered by navigation laws and regulations and by the various State motor vehicle traffic codes. As noted above, surplusage was eliminated in specifying particular air traffic rules in order that the term might be given the broadest possible construction by the Department of Commerce and the courts." H. Rep. No. 1162, 69th Cong., 1st Sess., p. 12.

That the rules for landing and take-off are rules prescribing "minimum safe altitudes of flight" is shown by the following further statement in the House Report: ". . . the minimum safe altitudes of flight . . . would vary with the terrene [terrain] and location of cities and would coincide with the surface of the land or water at airports." *Id.* at p. 14.

that courts do not possess the techniques or the personnel to consider and act upon the complex combinations of factors entering into the problems. The contribution of courts must be made through the awarding of damages for injuries suffered from the flying of planes, or by the granting of injunctions to prohibit their flying. When these two simple remedial devices are elevated to a constitutional level under the Fifth Amendment, as the Court today seems to have done, they can stand as obstacles to better adapted techniques that might be offered by experienced experts and accepted by Congress. Today's opinion is, I fear, an opening wedge for an unwarranted judicial interference with the power of Congress to develop solutions for new and vital national problems. In my opinion this case should be reversed on the ground that there has been no "taking" in the constitutional sense.

MR. JUSTICE BURTON joins in this dissent.

FISHGOLD *v.* SULLIVAN DRYDOCK & REPAIR CORP. ET AL.

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

No. 970. Argued May 6, 1946.—Decided May 27, 1946.

After serving in the Army and receiving an honorable discharge, petitioner was reinstated in his former position pursuant to § 8 (a) of the Selective Training and Service Act of 1940. Subsequently, when there was not enough work to keep all employees busy, he was laid off temporarily on nine days while non-veterans with higher shop seniorities were permitted to work; but he was given work when enough became available. He sued for a declaratory judgment as to his rights under the Act and to obtain compensation for the days that he was laid off. The union intervened and alleged in its answer that the employer's action was in accordance with the provisions of a collective bargaining agreement

and was not a violation of the Act. The District Court held that petitioner was laid off in violation of the Act and gave him a money judgment for the loss of wages. Only the union appealed. *Held:*

1. The Circuit Court of Appeals had jurisdiction of the appeal, since the union's answer put in issue the question whether there was a conflict between the collective bargaining agreement and the Act and, if so, which one prevailed. That issue being adjudicated with the union and the employer as parties, would have been *res judicata* as to the union had it not appealed. Pp. 281–284.

2. The temporary "lay-off" of petitioner while other employees with higher shop seniorities were permitted to work did not violate § 8 of the Selective Training and Service Act of 1940. Pp. 284–291.

(a) Sections 8 (b) and (c) do not grant a veteran an increase in seniority over what he would have had if he had never entered the armed services. P. 285.

(b) An employee who has been laid off in accordance with a seniority system and put on a waiting list for reassignment has not been "discharged" within the meaning of § 8 (c), which forbids the discharge of a reemployed veteran without cause within one year. Pp. 286, 287.

(c) Nothing in the legislative history of the Act indicates a purpose to accord a veteran the right to work when by operation of the seniority system there is none available for him. P. 289.

(d) The fact that, when Congress amended § 8 of the Act in 1944 and extended the Act in 1945 without any change in § 8, it was apprised of an administrative interpretation by the Director of Selective Service that a veteran was entitled to his job regardless of seniority is not controlling—especially when the National War Labor Board has given § 8 (c) a different construction in handling disputes arising out of the negotiation of collective bargaining agreements. Pp. 289–291.

3. Administrative interpretations of the Act by the Director of Selective Service may be resorted to for guidance; but, not being made in adversary proceedings, they are not entitled to the weight which is accorded administrative interpretations by administrative agencies entrusted with the responsibility of making *inter partes* decisions. P. 290.

154 F. 2d 785, affirmed.

Petitioner sued under § 8 (e) of the Selective Training and Service Act to obtain a declaratory judgment as to his

rights under the Act and compensation for the days he was laid off from work. The District Court refused the declaratory judgment but gave petitioner a money judgment for the loss of wages. 62 F. Supp. 25. The Circuit Court of Appeals reversed. 154 F. 2d 785. This Court granted certiorari. 327 U. S. 775. *Affirmed*, p. 291.

Assistant Attorney General Sonnett argued the cause for petitioner. With him on the brief were *Solicitor General McGrath, Frederick Bernays Wiener, Robert L. Werner, Searcy L. Johnson, Paul A. Sweeney, Abraham J. Harris* and *Cecelia Goetz.*

J. Read Smith argued the cause and filed a brief for the Sullivan Dry Dock Corporation, respondent.

M. H. Goldstein argued the cause and filed a brief for Roy Granata, respondent.

Ralph B. Gregg filed a brief for the American Legion, as *amicus curiae*, urging reversal.

Briefs were filed as *amici curiae* by *Joseph A. Padway* and *Herbert S. Thatcher* for the American Federation of Labor, by *Frank L. Mulholland, Clarence M. Mulholland* and *Willard H. McEwen* for the Railway Labor Executives' Association, and by *Lee Pressman, Eugene Cotton, Frank Donner, John J. Abt, Isadore Katz, Lindsay P. Walden, Ben Meyers, William Standard* and *Leon M. Despres* for the Congress of Industrial Organizations and certain affiliated organizations, in support of respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner is an employee of the Sullivan Drydock & Repair Corporation. He entered its employ in 1942 and

worked for it at a shipyard until he was inducted into the Army in 1943. He served in the Army a little over a year and was honorably discharged and received a certificate to that effect. He had worked for the corporation as a welder and, after his tour of duty in the Army ended, he was still qualified to perform the duties of a welder. Within forty days of his discharge, he applied to the corporation, as was his right under the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U. S. C. App. § 301, for restoration to his former position.[1] He was reemployed as a welder on August 25, 1944.

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[1] The Act provides in part:

"SEC. 8 (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. . . .

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within forty days after he is relieved from such training and service—

"(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

"(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; . . ."

The forty-day period has been extended to ninety days. Section 8 (b) as amended in 1944, 58 Stat. 798, gives the veteran a right to be reemployed if he makes application "within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year."

The corporation and Local 13 of the Industrial Union of Marine and Shipbuilding Workers of America had a collective bargaining agreement which provided: [2]

> "Promotions and reclassifications and increases or decreases in the working force shall be based upon length of service and ability to do the job. Wherever between two or more men, ability is fairly equal, length of service shall be the controlling factor."

As work at the shipyard decreased, men would be laid off. The men selected by the foremen, on the basis of ability and seniority, to be laid off would report to a department head for reassignment on the basis of their relative seniority when work became available. On each of nine days in the spring of 1945 petitioner was laid off although other welders, not veterans of the recent war, possessing the same or similar skill as petitioner, were given work on those days. These men were preferred because they had a higher shop seniority than petitioner. The decision to lay off petitioner followed a decision of an arbitrator who ruled that the seniority provisions of the collective bargaining agreement, which we have quoted, required it and

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[2] The agreement also provided:

> "Any employee other than a probationary employee who is drafted or volunteers for the Naval, Military or Merchant Marine Service of the United States, shall retain his seniority standing. In any further determination of said employee's seniority status, the length of time spent by the employee in such service shall count toward his seniority as if he were actually and continuously employed by the Company. Any such employee who volunteers or is drafted must give the Company notice of his intention to so leave his employment. Any such employee who, within forty (40) days after his release or discharge from said service applies for re-employment, shall be rehired by the Company, provided work is available and the employee is reasonably fit for duty. Availability for work will be determined according to accumulated seniority and ability. If re-employed, said employee shall then receive the then current rate of pay for the job for which he is re-employed."

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that they were not inconsistent with the provisions of the Selective Training and Service Act of 1940.

Thereupon petitioner brought this suit, pursuant to § 8 (e) of the Act,[3] to obtain a declaratory judgment as to his rights under the Act and to obtain compensation for the days he was not allowed to work. The corporation answered, justifying its action by the provisions of the collective bargaining agreement and the decision of the arbitrator. The union was permitted to intervene.[4] It alleged in its answer that the action of the corporation was warranted by the provisions of the collective bargaining agreement and was not in violation of the Act. The District Court refused the declaratory judgment requested,

[3] Section 8 (e) provides:

"In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided*, That no fees or court costs shall be taxed against the person so applying for such benefits."

The United States appeared as *amicus curiae* in the Circuit Court of Appeals. It appears in this Court as representative of petitioner by reason of the provisions of § 8 (e).

[4] Permissive intervention is governed by Rule 24 (b) of the Rules of Civil Procedure which allows it on timely application "when an applicant's claim or defense and the main action have a question of law or fact in common."

but entered a money judgment for petitioner for the loss of wages during the nine days in question. 62 F. Supp. 25. It held that petitioner was laid off in violation of the Act. It was also of the view that the collective bargaining agreement was not inconsistent with the Act. Only the union appealed. The Circuit Court of Appeals reversed, one judge dissenting. 154 F. 2d 785. It held that the Act did not give petitioner the preference which he claimed and that the terms of the collective bargaining agreement justified the corporation's action. The case is here on a petition for a writ of certiorari which we granted because of the importance of the question presented.

I. We are met at the outset with the claim that the union had no appealable interest in the judgment entered by the District Court and accordingly that the Circuit Court of Appeals lacked jurisdiction to entertain it. It is pointed out that a money judgment was entered only against the corporation and that no relief was granted against the union. It is therefore argued that the judgment did not affect any substantive right of the union and that at most the union had merely an interest in the outcome of litigation which might establish a precedent adverse to it. *Boston Tow Boat Co.* v. *United States*, 321 U. S. 632. It is also pointed out that the statutory guarantee against discharge without cause for one year [5] had

[5] Section 8 (c) of the Act provides:

"Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

Paragraphs (A) and (B) of subsection (b) of § 8 are set forth in note 1, *supra*.

expired at the time of the District Court's judgment, that therefore no declaratory relief was granted, and that petitioner's rights for the future were not adjudicated. It is contended that the dispute between petitioner and the union has thus become moot.

But that argument misses the point. The answer of the corporation and the union put in issue the question whether there was a conflict between the collective bargaining agreement and the Act and, if so, which one prevailed. The parties to the collective bargaining agreement—the union and the corporation—were before the court. A decision on the merits of petitioner's claim necessarily involved a reconciliation between the Act and the collective bargaining agreement or, if it appeared that they conflicted, an adjudication that one superseded the other. As we have noted, the District Court was of the view that the collective bargaining agreement was not inconsistent with the Act. But, however the result might be rationalized, a decision for or against petitioner necessarily involved a construction of the collective bargaining agreement. That issue was adjudicated, with the union as a party. Hence, if the union had thereafter instituted a separate suit for an interpretation of the agreement, it would be met with the plea of *res judicata*. And that plea would be sustained, for the prior decision was on the precise point which the union sought to relitigate and was adverse to the union. And both parties to the agreement—the union and the corporation—were parties to the prior suit. This elementary principle has long been recognized. Black, The Law of Judgments (2d ed.), pp. 764, 821, 936. As stated in *Cromwell* v. *County of Sac*, 94 U. S. 351, 352, a prior judgment "is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter

which might have been offered for that purpose." And see *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413, 415; *Grubb* v. *Public Utilities Commission*, 281 U. S. 470, 479; *Stoll* v. *Gottlieb*, 305 U. S. 165; *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371, 375, 378. The case of *Boston Tow Boat Co.* v. *United States, supra*, would be relevant if the collective bargaining agreement in issue was one between different parties.[6] Then the union's interest would be merely the interest of one seeking reversal of an adverse precedent. And its "independent right to relief" would not be increased by reason of its intervention in the cause. *Alexander Sprunt & Son* v. *United States*, 281 U. S. 249, 255. But here the rights of the union and its members under a contract with the corporation were adjudicated in a proceeding in which the union was a party. The contract was still in existence at the time of the appeal. Hence the case was not moot. And the only way the union could protect itself against that binding interpretation of the agreement was by an appeal. For then the union found itself in the position where a right of its own (*Alexander Sprunt & Son* v. *United States, supra*, p. 255) was adjudicated.[7]

It is suggested, however, that the result of what we do is to free the union and the employer from costs and burden Fishgold with them. There are several answers to that. The allowance of costs has no bearing on what

[6] In that case Boston Tow Boat Co. intervened in a proceeding before the Interstate Commerce Commission involving the status of another carrier. It sought to appeal from the adverse decision against the other carrier. That right was denied. The order in question was not determinative of the status of Boston Tow Boat Co. That question was involved in another order of the Commission from which Boston Tow Boat Co. had an appeal pending.

[7] The case is therefore closely analogous to one where the interest of an intervenor in property involved in the litigation was adjudicated. *Dexter Horton National Bank* v. *Hawkins*, 190 F. 924; *United States* v. *Northwestern Development Co.*, 203 F. 960.

is or what is not *res judicata*. Their allowance to the prevailing party is not, moreover, a rigid rule. Under the Rules of Civil Procedure the court can direct otherwise. Rule 54 (d). And finally, Congress has provided in § 8 (e) of this Act that when a veteran applies to the District Court for the benefits of the Act "no fees or court costs shall be taxed" against him.

II. We turn then to the merits. The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind.

These guarantees are contained in § 8 of the Act [8] and extend to a veteran, honorably discharged and still qualified to perform the duties of his old position. (1) He has a stated period of time in which to apply for reemployment.[9] § 8 (b). He is not pressed for a decision immediately on his discharge but has the opportunity to make plans for the future and readjust himself to civilian life. (2) He must be restored to his former position "or to a position of like seniority, status, and pay." § 8 (b) (A), (B). He is thus protected against receiving a job inferior to that which he had before entering the armed services. (3) He shall be "restored without loss of seniority" and be considered "as having been on furlough or leave of absence" during the period of his service for his country, with all of the insurance and other benefits accruing to employees on furlough or leave of absence. § 8 (c). Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise

[8] Section 8 (b) is set forth in note 1, *supra*, and § 8 (c) in note 5, *supra*.

[9] As we have noted, the original forty-day period has been extended to ninety days. See note 1, *supra*.

point he would have occupied had he kept his position continuously during the war. (4) He "shall not be discharged from such position without cause within one year after such restoration." § 8 (c).

Petitioner's case comes down to the meaning of this guarantee against "discharge." "Discharge" is construed by him to include "lay-off." And it is earnestly argued that Congress could not have intended to restore the veteran to his position, prevent his discharge without cause for one year, and yet not intend that he perform actual work if it was available.

This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. See *Boone* v. *Lightner,* 319 U. S. 561, 575. And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act. Our problem is to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits.

We can find no support for petitioner's position in the provision of § 8 (b) which restores him to his former position or to a "position of like seniority." Nor can we find it in § 8 (c) which directs that he "shall be so restored without loss of seniority." As we have said, these provisions guarantee the veteran against loss of position or loss of seniority by reason of his absence. He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence. But we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed serv-

ices. We agree with the Circuit Court of Appeals that by these provisions Congress made the restoration as nearly a complete substitute for the original job as was possible. No step-up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority mean no more.

Nor can we read into the guarantee against discharge "from such position" a gain or step-up in seniority. That guarantee does not in terms deal with the seniority problem. The problem of seniority is covered by the preceding provisions. The guarantee against discharge "from such position" is broad enough to cover demotions. The veteran is entitled to be restored to his old position or to a "position of like seniority, status, and pay." If within the statutory period he is demoted, his status, which the Act was designed to protect, has been affected and the old employment relationship has been changed. He would then lose his old position and acquire an inferior one. He would within the meaning of § 8 (c) be "discharged from such position." But the guarantee against discharge does not on its face suggest the grant of a preference to the veteran over and above that which was accorded by the seniority of "such position."

Discharge normally means termination of the employment relationship or loss of a position.[10] In common parlance and in industrial parlance a person who has been laid off by operation of a seniority system and put on a waiting list for reassignment would hardly be considered

[10] "Release or dismissal from an office, employment, etc.; as, the *discharge* of a workman." Webster's New International Dictionary (2d ed.).

"To relieve of a charge or office; (more usually) to dismiss from office, service, or employment; to cashier." Oxford English Dictionary.

as having been "discharged." [11] There are three terms used in § 8 (c) which relate to various types of cessation of work—a "furlough," a "leave of absence" and a discharge. A furlough is not considered a discharge. It is a form of lay-off. So is a leave of absence. And whether either results from unilateral action by the employer or otherwise, consequences are quite different from termination of the employment relationship. Section 8 (c) of the Act recognizes that insurance and other benefits may continue to accrue to an employee on furlough or on leave of absence. An employee on furlough or on leave of absence has a continuing relationship with the employer; he retains a right to be restored to work under specified conditions.[12] Thus when Congress desired to cover the contingency of a lay-off, it used apt words to describe it. If it had desired to enact that, so long as there was work, no restored veteran, regardless of seniority, could be temporarily laid off during the year following his restoration, when the slackening of work required a reduction in forces, we are bound to believe that it would have used a word of the kind which it had itself recognized as being descriptive of that situation.

The "position" to which the veteran is restored is the "position" which he left plus cumulated seniority. Certainly he would not have been discharged from such po-

[11] Temporary suspension of an employee's work commonly does not affect the continuance of his status. See *Labor Board* v. *Waterman S. S. Co.*, 309 U. S. 206; *North Whittier Heights Citrus Assn.* v. *Labor Board*, 109 F. 2d 76, 82.

"Lay-off" is defined as "A period during which a workman is temporarily dismissed or allowed to leave his work; that part or season of the year during which activity in a particular business or game is partly or completely suspended; an off-season." Oxford English Dictionary, Supp.

[12] See Union Agreement Provisions, Bureau of Labor Statistics, Department of Labor, H. Doc. No. 723, 77th Cong., 2d Sess., chs. 8, 14.

sition and unable to get it back, if at the time of his induction into the armed services he had been laid off by operation of a seniority system. Plainly he still had his "position" when he was inducted. And in the same sense he retains it though a lay-off interrupts the continuity of work in the statutory period. Moreover, a veteran on his return is entitled to his old "position" or its equivalent even though at the time of his application the plant is closed down, say for retooling, and no work is available, unless of course the private employer's "circumstances have so changed as to make it impossible or unreasonable" to restore him. § 8 (b) (B). He is entitled to be recalled to work in accordance with his seniority. His "position" exists though no work is then available. The slackening of work which causes him to be laid off by operation of a seniority system is neither a removal or dismissal or discharge from the "position" in any normal sense. Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. There is indeed no suggestion that Congress sought to sweep aside the seniority system. What it undertook to do was to give the veteran protection within the framework of the seniority system plus a guarantee against demotion or termination of the employment relationship without cause for a year.

The construction which we have given "discharged" does not rob that guarantee of vitality. As the Circuit Court of Appeals observed, where there is a closed-shop agreement the union would normally afford its members protection against termination of their employment status without cause. But in many situations the guarantee against dismissal without cause for one year is of great

practical importance and is a protection granted veterans only.

Our construction of the Act finds support in its legislative history. Representative May had charge of the bill on the floor of the House. He explained an amendment to § 8 (c), which added the words "shall be considered during the period of service in such forces as on furlough or leave of absence" and also elaborated the clause dealing with "insurance or other benefits." He said:

> "I may say that the chief purpose of the amendment is to preserve the seniority rights of the thousands and hundreds of thousands of railroad employees and other employees of that character who have certain seniority privileges on the railroads. In other words, we put them on furlough during the time they are in the service and they will even be permitted to count this time on the question of their retirement." 86 Cong. Rec. 11702.

And before that amendment the Committee Report of the Senate stated:

> "The Congress, in this bill, has declared as its purpose and intent that every man who leaves his job to participate in this training and service should be reemployed without loss of seniority or other benefits upon his return to civil life." S. Rep. No. 2002, 76th Cong., 3d Sess., p. 8.

We have searched the legislative history in vain for any statement of purpose that the protection accorded the veteran was the right to work when by operation of the seniority system there was none then available for him.

It is said, however, that when Congress amended § 8 of the Act in 1944 [13] (58 Stat. 798) and extended the Act in 1945 without any change in § 8 (c) (59 Stat. 166), it was apprised of an administrative interpretation of § 8 (c) that

[13] See note 1, *supra*.

a veteran was entitled to his former job regardless of seniority; and that therefore congressional approval of or acquiescence in the administrative construction would be inferred. See *Massachusetts Mutual Life Ins. Co.* v. *United States,* 288 U. S. 269, 273, and cases cited. An administrative interpretation was rendered by the Director of Selective Service who was authorized to administer the Act.[14] He had ruled that the Act required reinstatement of a veteran to "his former position or one of like seniority, status, and pay even though such reinstatement necessitates the discharge of a nonveteran with a greater seniority." [15] But a different construction was given to § 8 (c) by the National War Labor Board in its handling of disputes arising out of the negotiation of collective bargaining agreements.[16] The Board read the Act as we read it. The ruling of the Director may be resorted to for guidance. See *Skidmore* v. *Swift & Co.,* 323 U. S. 134, 140; *Mabee* v. *White Plains Pub. Co.,* 327 U. S. 178. But his rulings are not made in adversary proceedings and are not entitled to the weight which is accorded interpretations by administrative agencies entrusted with the responsibility of making *inter partes* decisions. *Skidmore* v. *Swift & Co., supra,* p. 139. The history and language of the Act would need be far less clear for us to give his rulings persuasive weight. Moreover, as the Circuit Court of Appeals pointed out, the contrariety of administrative rulings [17] lends less credence to the contention that Congress by the amendment in 1944 and the extension in 1945 showed a preference for one over the other. In view of the language of the Act and the nature of the

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[14] Executive Order 8545, September 23, 1940, 5 Fed. Reg. 3779.

[15] Local Board Memorandum 190–A, May 20, 1944, Part IV, § 1 (C).

[16] See *Scovill Mfg. Co.,* 21 War Labor Rep. 200, 201, 202.

[17] See Note 54 Yale L. Journ. 417.

administrative findings, we would want explicit indication by Congress that it chose the Director's interpretation before we concluded that Congress had adopted it.

Affirmed.

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

MR. JUSTICE BLACK, dissenting.

I believe we should reverse the judgment of the Circuit Court of Appeals and remand the cause to it with directions to dismiss the appeal for want of jurisdiction because the Union was not a proper party to appeal. The money judgment was in favor of Fishgold and against the Sullivan Dry Dock and Repair Company. Had the Company paid the judgment, I see no way in which the Union would have been "aggrieved." The only reason advanced by the Court for holding that the Union was "aggrieved" is that, had the District Court judgment remained on the books, the judicially formulated doctrine of *res judicata* would have barred the Union in any future proceedings from challenging the District Court's application of the federal statute to the particular collective bargaining agreement. A fair application of *res judicata* bars a party in a second litigation only if that proceeding involves the same issues as the first litigation between the same adverse parties or privies. This means that *res judicata* could bar the Union only in a new proceeding between it and Fishgold or his privies. But there is no possibility of such litigation since the seniority right which the District Court held Fishgold had under the statute had under its provisions expired by the time the Union appealed. *Res judicata* would not have barred the Union in a proceeding between it and any other party, since no other party was

a party adverse to the Union in the present suit. And this includes any possible proceeding between the Union and the Sullivan Dry Dock Company since that Company, though a party, was not an adverse party in the trial court. None of the cases cited by the Court's opinion support the proposition that a party is bound in a future litigation against a party that was not an adverse party, but on the same side, in the earlier litigation. Nor do these cases, or any other decision of this Court of which I am aware, formulate as the rule of this Court the harsh doctrine of collateral estoppel, adopted in a few state jurisdictions, which always bars a losing party, so long as the issue is the same, even though the later litigation involves different adverse parties. It is unlikely that this harsh doctrine, never adopted by this Court, would in the future have been applied to bar the Union in any further proceedings involving interpretation of the scope of its collective bargaining agreement in the light of the federal statute. In my opinion the Union would not have been barred by the trial court's judgment. It was therefore not an aggrieved party and not entitled to appeal.

The result of permitting parties not adversely affected to appeal a judgment is to impose burdens upon litigants actually interested when those litigants may themselves be fully satisfied with the judgment. The scope of *res judicata* should not be extended to produce such a result. This case illustrates the wisdom of the practice which permits parties to settle their own lawsuits without intervention by others interested only in precedents. *Boston Tow Boat Co.* v. *United States*, 321 U. S. 632.

SECURITIES & EXCHANGE COMMISSION *v.* W. J. HOWEY CO. ET AL.

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

No. 843. Argued May 2, 1946.—Decided May 27, 1946.

1. Upon the facts of this case, an offering of units of a citrus grove development coupled with a contract for cultivating, marketing and remitting the net proceeds to the investor, was an offering of an "investment contract" within the meaning of that term as used in the provision of § 2 (1) of the Securities Act of 1933 defining "security" as including any "investment contract," and was therefore subject to the registration requirements of the Act. Pp. 294–297, 299.
2. For purposes of the Securities Act, an investment contract (undefined by the Act) means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise. Pp. 298–299.
3. The fact that some purchasers, by declining to enter into the service contract, chose not to accept the offer of the investment contract in its entirety, does not require a different result, since the Securities Act prohibits the offer as well as the sale of unregistered, non-exempt securities. P. 300.
4. The test of whether there is an "investment contract" under the Securities Act is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others; and, if that test be satisfied, it is immaterial whether the enterprise is speculative or non-speculative or whether there is a sale of property with or without intrinsic value. P. 301.
5. The policy of the Securities Act of affording broad protection to investors is not to be thwarted by unrealistic and irrelevant formulae. P. 301.

151 F. 2d 714, reversed.

The Securities & Exchange Commission sued in the District Court to enjoin respondents from using the mails and instrumentalities of interstate commerce in the offer

and sale of unregistered and non-exempt securities in violation of the Securities Act of 1933. The District Court denied the injunction. 60 F. Supp. 440. The Circuit Court of Appeals affirmed. 151 F. 2d 714. This Court granted certiorari. 327 U. S. 773. *Reversed,* p. 301.

Roger S. Foster argued the cause for petitioner. With him on the brief were *Solicitor General McGrath, Robert S. Rubin* and *Alexander Cohen.*

C. E. Duncan and *George C. Bedell* argued the cause and filed a brief for respondents.

MR. JUSTICE MURPHY delivered the opinion of the Court.

This case involves the application of § 2 (1) of the Securities Act of 1933 [1] to an offering of units of a citrus grove development coupled with a contract for cultivating, marketing and remitting the net proceeds to the investor.

The Securities and Exchange Commission instituted this action to restrain the respondents from using the mails and instrumentalities of interstate commerce in the offer and sale of unregistered and non-exempt securities in violation of § 5 (a) of the Act. The District Court denied the injunction, 60 F. Supp. 440, and the Fifth Circuit Court of Appeals affirmed the judgment, 151 F. 2d 714. We granted certiorari on a petition alleging that the ruling of the Circuit Court of Appeals conflicted with other federal and state decisions and that it introduced a novel and unwarranted test under the statute which the Commission regarded as administratively impractical.

Most of the facts are stipulated. The respondents, W. J. Howey Company and Howey-in-the-Hills Service,

[1] 48 Stat. 74, 15 U. S. C. § 77b (1).

Inc., are Florida corporations under direct common control and management. The Howey Company owns large tracts of citrus acreage in Lake County, Florida. During the past several years it has planted about 500 acres annually, keeping half of the groves itself and offering the other half to the public "to help us finance additional development." Howey-in-the-Hills Service, Inc., is a service company engaged in cultivating and developing many of these groves, including the harvesting and marketing of the crops.

Each prospective customer is offered both a land sales contract and a service contract, after having been told that it is not feasible to invest in a grove unless service arrangements are made. While the purchaser is free to make arrangements with other service companies, the superiority of Howey-in-the-Hills Service, Inc., is stressed. Indeed, 85% of the acreage sold during the 3-year period ending May 31, 1943, was covered by service contracts with Howey-in-the-Hills Service, Inc.

The land sales contract with the Howey Company provides for a uniform purchase price per acre or fraction thereof, varying in amount only in accordance with the number of years the particular plot has been planted with citrus trees. Upon full payment of the purchase price the land is conveyed to the purchaser by warranty deed. Purchases are usually made in narrow strips of land arranged so that an acre consists of a row of 48 trees. During the period between February 1, 1941, and May 31, 1943, 31 of the 42 persons making purchases bought less than 5 acres each. The average holding of these 31 persons was 1.33 acres and sales of as little as 0.65, 0.7 and 0.73 of an acre were made. These tracts are not separately fenced and the sole indication of several ownership is found in small land marks intelligible only through a plat book record.

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The service contract, generally of a 10-year duration without option of cancellation, gives Howey-in-the-Hills Service, Inc., a leasehold interest and "full and complete" possession of the acreage. For a specified fee plus the cost of labor and materials, the company is given full discretion and authority over the cultivation of the groves and the harvest and marketing of the crops. The company is well established in the citrus business and maintains a large force of skilled personnel and a great deal of equipment, including 75 tractors, sprayer wagons, fertilizer trucks and the like. Without the consent of the company, the land owner or purchaser has no right of entry to market the crop;[2] thus there is ordinarily no right to specific fruit. The company is accountable only for an allocation of the net profits based upon a check made at the time of picking. All the produce is pooled by the respondent companies, which do business under their own names.

The purchasers for the most part are non-residents of Florida. They are predominantly business and professional people who lack the knowledge, skill and equipment necessary for the care and cultivation of citrus trees. They are attracted by the expectation of substantial profits. It was represented, for example, that profits during the 1943–1944 season amounted to 20% and that even greater profits might be expected during the 1944–1945 season, although only a 10% annual return was to be expected over a 10-year period. Many of these purchasers are patrons of a resort hotel owned and operated by the Howey Company in a scenic section adjacent to the groves. The hotel's advertising mentions the fine groves in the vicinity and the attention of the patrons is drawn to the

[2] Some investors visited their particular plots annually, making suggestions as to care and cultivation, but without any legal rights in the matters.

groves as they are being escorted about the surrounding countryside. They are told that the groves are for sale; if they indicate an interest in the matter they are then given a sales talk.

It is admitted that the mails and instrumentalities of interstate commerce are used in the sale of the land and service contracts and that no registration statement or letter of notification has ever been filed with the Commission in accordance with the Securities Act of 1933 and the rules and regulations thereunder.

Section 2 (1) of the Act defines the term "security" to include the commonly known documents traded for speculation or investment.[3] This definition also includes "securities" of a more variable character, designated by such descriptive terms as "certificate of interest or participation in any profit-sharing agreement," "investment contract" and "in general, any interest or instrument commonly known as a 'security.' " The legal issue in this case turns upon a determination of whether, under the circumstances, the land sales contract, the warranty deed and the service contract together constitute an "investment contract" within the meaning of § 2 (1). An affirmative answer brings into operation the registration requirements of § 5 (a), unless the security is granted an exemption under § 3 (b). The lower courts, in reaching a negative answer to this problem, treated the contracts and deeds

[3] "The term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

as separate transactions involving no more than an ordinary real estate sale and an agreement by the seller to manage the property for the buyer.

The term "investment contract" is undefined by the Securities Act or by relevant legislative reports. But the term was common in many state "blue sky" laws in existence prior to the adoption of the federal statute and, although the term was also undefined by the state laws, it had been broadly construed by state courts so as to afford the investing public a full measure of protection. Form was disregarded for substance and emphasis was placed upon economic reality. An investment contract thus came to mean a contract or scheme for "the placing of capital or laying out of money in a way intended to secure income or profit from its employment." *State* v. *Gopher Tire & Rubber Co.*, 146 Minn. 52, 56, 177 N. W. 937, 938. This definition was uniformly applied by state courts to a variety of situations where individuals were led to invest money in a common enterprise with the expectation that they would earn a profit solely through the efforts of the promoter or of some one other than themselves.[4]

By including an investment contract within the scope of § 2 (1) of the Securities Act, Congress was using a term the meaning of which had been crystallized by this prior judicial interpretation. It is therefore reasonable to attach that meaning to the term as used by Congress, especially since such a definition is consistent with the statutory aims. In other words, an investment contract for purposes of the Securities Act means a contract, trans-

[4] *State* v. *Evans*, 154 Minn. 95, 191 N. W. 425; *Klatt* v. *Guaranteed Bond Co.*, 213 Wis. 12, 250 N. W. 825; *State* v. *Heath*, 199 N. C. 135, 153 S. E. 855; *Prohaska* v. *Hemmer-Miller Development Co.*, 256 Ill. App. 331; *People* v. *White*, 124 Cal. App. 548, 12 P. 2d 1078; *Stevens* v. *Liberty Packing Corp.*, 111 N. J. Eq. 61, 161 A. 193. See also *Moore* v. *Stella*, 52 Cal. App. 2d 766, 127 P. 2d 300.

action or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise. Such a definition necessarily underlies this Court's decision in *S. E. C.* v. *Joiner Corp.*, 320 U. S. 344, and has been enunciated and applied many times by lower federal courts.[5] It permits the fulfillment of the statutory purpose of compelling full and fair disclosure relative to the issuance of "the many types of instruments that in our commercial world fall within the ordinary concept of a security." H. Rep. No. 85, 73d Cong., 1st Sess., p. 11. It embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.

The transactions in this case clearly involve investment contracts as so defined. The respondent companies are offering something more than fee simple interests in land, something different from a farm or orchard coupled with management services. They are offering an opportunity to contribute money and to share in the profits of a large citrus fruit enterprise managed and partly owned by respondents. They are offering this opportunity to persons who reside in distant localities and who lack the equip-

[5] *Atherton* v. *United States*, 128 F. 2d 463; *Penfield Co.* v. *S. E. C.*, 143 F. 2d 746; *S. E. C.* v. *Universal Service Assn.*, 106 F. 2d 232; *S. E. C.* v. *Crude Oil Corp.*, 93 F. 2d 844; *S. E. C.* v. *Bailey*, 41 F. Supp. 647; *S. E. C.* v. *Payne*, 35 F. Supp. 873; *S. E. C.* v. *Bourbon Sales Corp.*, 47 F. Supp. 70; *S. E. C.* v. *Wickham*, 12 F. Supp. 245; *S. E. C.* v. *Timetrust, Inc.*, 28 F. Supp. 34; *S. E. C.* v. *Pyne*, 33 F. Supp. 988. The Commission has followed the same definition in its own administrative proceedings. *In re Natural Resources Corp.*, 8 S. E. C. 635.

ment and experience requisite to the cultivation, harvesting and marketing of the citrus products. Such persons have no desire to occupy the land or to develop it themselves; they are attracted solely by the prospects of a return on their investment. Indeed, individual development of the plots of land that are offered and sold would seldom be economically feasible due to their small size. Such tracts gain utility as citrus groves only when cultivated and developed as component parts of a larger area. A common enterprise managed by respondents or third parties with adequate personnel and equipment is therefore essential if the investors are to achieve their paramount aim of a return on their investments. Their respective shares in this enterprise are evidenced by land sales contracts and warranty deeds, which serve as a convenient method of determining the investors' allocable shares of the profits. The resulting transfer of rights in land is purely incidental.

Thus all the elements of a profit-seeking business venture are present here. The investors provide the capital and share in the earnings and profits; the promoters manage, control and operate the enterprise. It follows that the arrangements whereby the investors' interests are made manifest involve investment contracts, regardless of the legal terminology in which such contracts are clothed. The investment contracts in this instance take the form of land sales contracts, warranty deeds and service contracts which respondents offer to prospective investors. And respondents' failure to abide by the statutory and administrative rules in making such offerings, even though the failure result from a bona fide mistake as to the law, cannot be sanctioned under the Act.

This conclusion is unaffected by the fact that some purchasers choose not to accept the full offer of an investment contract by declining to enter into a service contract with

the respondents. The Securities Act prohibits the offer as well as the sale of unregistered, non-exempt securities.[6] Hence it is enough that the respondents merely offer the essential ingredients of an investment contract.

We reject the suggestion of the Circuit Court of Appeals, 151 F. 2d at 717, that an investment contract is necessarily missing where the enterprise is not speculative or promotional in character and where the tangible interest which is sold has intrinsic value independent of the success of the enterprise as a whole. The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others. If that test be satisfied, it is immaterial whether the enterprise is speculative or non-speculative or whether there is a sale of property with or without intrinsic value. See *S. E. C.* v. *Joiner Corp., supra,* 352. The statutory policy of affording broad protection to investors is not to be thwarted by unrealistic and irrelevant formulae.

Reversed.

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

MR. JUSTICE FRANKFURTER, dissenting.

"Investment contract" is not a term of art; it is a conception dependent upon the circumstances of a particular situation. If this case came before us on a finding authorized by Congress that the facts disclosed an "investment contract" within the general scope of § 2 (1) of the Securities Act, 48 Stat. 74, 15 U. S. C. § 77b (1), the Securities and Exchange Commission's finding would govern, unless, on the record, it was wholly unsupported. But

[6] The registration requirements of § 5 refer to sales of securities. Section 2 (3) defines "sale" to include every "attempt or offer to dispose of, or solicitation of an offer to buy," a security for value.

that is not the case before us. Here the ascertainment of the existence of an "investment contract" had to be made independently by the District Court and it found against its existence. 60 F. Supp. 440. The Circuit Court of Appeals for the Fifth Circuit sustained that finding. 151 F. 2d 714. If respect is to be paid to the wise rule of judicial administration under which this Court does not upset concurrent findings of two lower courts in the ascertainment of facts and the relevant inferences to be drawn from them, this case clearly calls for its application. See *Allen* v. *Trust Company of Georgia,* 326 U. S. 630. For the crucial issue in this case turns on whether the contracts for the land and the contracts for the management of the property were in reality separate agreements or merely parts of a single transaction. It is clear from its opinion that the District Court was warranted in its conclusion that the record does not establish the existence of an investment contract:

> ". . . the record in this case shows that not a single sale of citrus grove property was made by the Howey Company during the period involved in this suit, except to purchasers who actually inspected the property before purchasing the same. The record further discloses that no purchaser is required to engage the Service Company to care for his property and that of the fifty-one purchasers acquiring property during this period, only forty-two entered into contracts with the Service Company for the care of the property." 60 F. Supp. at 442.

Simply because other arrangements may have the appearances of this transaction but are employed as an evasion of the Securities Act does not mean that the present contracts were evasive. I find nothing in the Securities Act to indicate that Congress meant to bring every innocent transaction within the scope of the Act simply because a perversion of them is covered by the Act.

Syllabus.

UNITED STATES *v.* LOVETT.

NO. 809. CERTIORARI TO THE COURT OF CLAIMS.*

Argued May 3, 6, 1946.—Decided June 3, 1946.

1. The issue as to the validity of § 304 of the Urgent Deficiency Appropriation Act of 1943, providing that, after November 15, 1943, no salary or other compensation shall be paid to certain employees of the Government (specified by name) out of any monies then or thereafter appropriated except for services as jurors or members of the armed forces, unless they were again appointed by the President with the advice and consent of the Senate prior to such date, is not a mere political issue over which Congress has final say; and a challenge to its constitutionality presents a justiciable question to the courts. P. 313.

   (a) It is not a mere appropriation measure over which Congress has complete control. P. 313.

   (b) Its purpose was not merely to cut off the employees' compensation through regular disbursing channels but permanently to bar them from government service, except as jurors or soldiers—because of what Congress thought of their political beliefs. P. 313.

   (c) The Constitution did not contemplate that congressional action aimed at three individuals, which stigmatized their reputations and seriously impaired their chances to earn a living, could never be challenged in court. P. 314.

2. Section 304 violates Article I, § 3, cl. 9 of the Constitution, which forbids the enactment of any bill of attainder or *ex post facto* law. P. 315.

   (a) Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution. *Cummings* v. *Missouri,* 4 Wall. 277; *Ex parte Garland,* 4 Wall. 333. P. 315.

   (b) Section 304 clearly accomplishes the punishment of named individuals without a judicial trial. P. 316.

*Together with Nos. 810, *United States* v. *Watson,* and No. 811, *United States* v. *Dodd,* on certiorari to the same court, argued and decided on the same dates.

(c) The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found by Congress to be guilty of disloyalty makes it no less effective than if it had been done by an Act which designated the conduct as criminal. P. 316.

104 Ct. Cls. 557, 66 F. Supp. 142, affirmed.

The Court of Claims entered judgments in favor of certain government employees for services rendered after November 15, 1943, to whom § 304 of the Urgent Deficiency Appropriation Act of 1943, 57 Stat. 431, 450, forbade payment of any compensation after that date from appropriated funds. 104 Ct. Cls. 557, 66 F. Supp. 142. This Court granted certiorari. 327 U. S. 773. *Affirmed,* p. 318.

Ralph F. Fuchs argued the cause for the United States. With him on the brief were *Solicitor General McGrath, Assistant Attorney General Sonnett, David L. Kreeger* and *Joseph B. Goldman.*

Charles A. Horsky argued the cause for respondents. With him on the brief were *Edward B. Burling* and *Amy Ruth Mahin.*

By special leave of Court, *John C. Gall* argued the cause for the Congress of the United States, as *amicus curiae,* urging reversal. With him on the brief were *Dean Hill Stanley* and *Clark M. Robertson.*

Robert W. Kenny filed a brief for the National Lawyers Guild, as *amicus curiae,* urging affirmance.

Mr. Justice Black delivered the opinion of the Court.

In 1943 the respondents, Lovett, Watson, and Dodd, were and had been for several years working for the Government. The government agencies which had lawfully

employed them were fully satisfied with the quality of their work and wished to keep them employed on their jobs. Over the protest of those employing agencies, Congress provided in § 304 of the Urgent Deficiency Appropriation Act of 1943, by way of an amendment attached to the House bill, that after November 15, 1943, no salary or compensation should be paid respondents out of any monies then or thereafter appropriated except for services as jurors or members of the armed forces, unless they were prior to November 15, 1943 again appointed to jobs by the President with the advice and consent of the Senate.[1] 57 Stat. 431, 450. Notwithstanding the congressional enactment, and the failure of the President to reappoint respondents, the agencies kept all the respondents at work on their jobs for varying periods after November 15, 1943; but their compensation was discontinued after that date. To secure compensation for this post-November 15th work, respondents brought these actions in the Court of

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[1] Section 304 provides: "No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: *Provided,* That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943: *Provided further,* That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom."

As we shall point out, the President signed the bill because he had to do so since the appropriated funds were imperatively needed to carry on the war. He felt, however, that § 304 of the bill was unconstitutional, and failed to reappoint respondents.

Claims. They urged that § 304 is unconstitutional and void on the grounds that: (1) The section, properly interpreted, shows a congressional purpose to exercise the power to remove executive employees, a power not entrusted to Congress but to the Executive Branch of Government under Article II, §§ 1, 2, 3, and 4 of the Constitution; (2) the section violates Article I, § 9, Clause 3, of the Constitution which provides that "No Bill of Attainder or ex post facto Law shall be passed"; (3) the section violates the Fifth Amendment, in that it singles out these three respondents and deprives them of their liberty and property without due process of law. The Solicitor General, appearing for the Government, joined in the first two of respondents' contentions but took no position on the third. House Resolution 386, 89 Cong. Rec. 10882, and Joint Resolution No. 230, 78th Congress, 58 Stat. 113, authorized a special counsel to appear on behalf of the Congress. This counsel denied all three of respondents' contentions. He urged that § 304 was a valid exercise of congressional power under Article I, § 8, Clause 1; § 8, Clause 18; and § 9, Clause 7 of the Constitution, which sections empower Congress "To lay and collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States," and "To make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," and provide that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ." Counsel for Congress also urged that § 304 did not purport to terminate respondents' employment. According to him, it merely cut off respondents' pay and deprived governmental agencies of any power to make enforceable contracts with respondents for any further compensation. The contention was that this involved

simply an exercise of congressional powers over appropriations, which, according to the argument, are plenary and not subject to judicial review. On this premise counsel for Congress urged that the challenge of the constitutionality of § 304 raised no justiciable controversy. The Court of Claims entered judgments in favor of respondents. Some of the judges were of the opinion that § 304, properly interpreted, did not terminate respondents' employment, but only prohibited payment of compensation out of funds generally appropriated, and that, consequently, the continued employment of respondents was valid, and justified their bringing actions for pay in the Court of Claims. Other members of the Court thought § 304 unconstitutional and void, either as a bill of attainder, an encroachment on exclusive executive authority, or a denial of due process. 104 Ct. Cls. 557, 66 F. Supp. 142. We granted certiorari because of the manifest importance of the questions involved.

In this Court the parties and counsel for Congress have urged the same points as they did in the Court of Claims. According to the view we take we need not decide whether § 304 is an unconstitutional encroachment on executive power or a denial of due process of law, and the section is not challenged on the ground that it violates the First Amendment. Our inquiry is thus confined to whether the actions in the light of a proper construction of the Act present justiciable controversies; and, if so, whether § 304 is a bill of attainder against these respondents, involving a use of power which the Constitution unequivocally declares Congress can never exercise. These questions require an interpretation of the meaning and purpose of the section, which in turn requires an understanding of the circumstances leading to its passage. We, consequently, find it necessary to set out these circumstances somewhat in detail.

In the background of the statute here challenged lies the House of Representatives' feeling in the late thirties that many "subversives" were occupying influential positions in the Government and elsewhere and that their influence must not remain unchallenged. As part of its program against "subversive" activities the House in May 1938 created a Committee on Un-American Activities, which became known as the Dies Committee, after its Chairman, Congressman Martin Dies. H. Res. 282, 83 Cong. Rec. 7568–7587. This Committee conducted a series of investigations and made lists of people and organizations it thought "subversive." See e. g.: H. Rep. No. 1, 77th Cong., 1st Sess.; H. Rep. No. 2748, 77th Cong., 2d Sess. The creation of the Dies Committee was followed by provisions such as § 9A of the Hatch Act, 53 Stat. 1148, 1149, and §§ 15 (f) and 17 (b) of the Emergency Relief Appropriation Act of 1941, 54 Stat. 611, which forbade the holding of a federal job by anyone who was a member of a political party or organization that advocated the overthrow of our constitutional form of Government in the United States. It became the practice to include a similar prohibition in all appropriations acts, together with criminal penalties for its violation.[2] Under these provisions the Federal Bureau of Investigation began wholesale investigations of federal employees, which investigations were financed by special congressional appropriations. 55 Stat. 292, 56 Stat. 468, 482. Thousands were investigated.

While all this was happening, Mr. Dies on February 1, 1943, in a long speech on the floor of the House attacked thirty-nine named government employees as "irresponsible, unrepresentative, crackpot, radical bureaucrats" and

[2] 55 Stat. 92, § 5; 55 Stat. 265, § 504; 55 Stat. 303, § 7; 55 Stat. 366, § 10; 55 Stat. 408, § 3; 55 Stat. 446, § 5; 55 Stat. 466, § 704; 55 Stat. 499, § 10; House Doc. 833, 77th Cong., 2d Sess.

affiliates of "Communist front organizations." Among these named individuals were the three respondents. Congressman Dies told the House that respondents, as well as the other thirty-six individuals he named, were because of their beliefs and past associations unfit to "hold a Government position" and urged Congress to refuse "to appropriate money for their salaries." In this connection he proposed that the Committee on Appropriations "take immediate and vigorous steps to eliminate these people from public office." 89 Cong. Rec. 474, 479, 486. Four days later an amendment was offered to the Treasury-Post Office Appropriation Bill which provided that "no part of any appropriation contained in this act shall be used to pay the compensation of" the thirty-nine individuals Dies had attacked. 89 Cong. Rec. 645. The Congressional Record shows that this amendment precipitated a debate that continued for several days. *Id.* 645–742. All of those participating agreed that the "charges" against the thirty-nine individuals were serious. Some wanted to accept Congressman Dies' statements as sufficient proof of "guilt," while others referred to such proposed action as "legislative lynching," *id.* at 651, smacking "of the procedure in the French Chamber of Deputies, during the Reign of Terror." *Id.* at 654. The Dies charges were referred to as "indictments," and many claimed this made it necessary that the named federal employees be given a hearing and a chance to prove themselves innocent. *Id.* at 711. Congressman Dies then suggested that the Appropriations Committee "weigh the evidence and . . . take immediate steps to dismiss these people from the Federal service." *Id.* at 651. Eventually a resolution was proposed to defer action until the Appropriations Committee could investigate, so that accused federal employees would get a chance to prove themselves "innocent" of communism or disloyalty, and so that each "man would

have his day in court," and "There would be no star chamber proceedings." *Id.* at 711 and 713; but see *id.* at 715. The resolution which was finally passed authorized the Appropriations Committee acting through a special subcommittee ". . . to examine into any and all allegations or charges that certain persons in the employ of the several executive departments and other executive agencies are unfit to continue in such employment by reason of their present association or membership or past association or membership in or with organizations whose aims or purposes are or have been subversive to the Government of the United States." *Id.* at 734, 742. The Committee was to have full plenary powers, including the right to summon witnesses and papers, and was to report its "findings and determination" to the House. It was authorized to attach legislation recommended by it to any general or special appropriation measure, notwithstanding general House rules against such practice. *Id.* at 734. The purpose of the resolution was thus described by the Chairman of the Committee on Appropriations in his closing remarks in favor of its passage: "The third and the really important effect is that we will expedite adjudication and disposition of these cases and thereby serve both the accused and the Government. These men against whom charges are pending are faced with a serious situation. If they are not guilty they are entitled to prompt exoneration; on the other hand, if they are guilty, then the quicker the Government removes them the sooner and the more certainly will we protect the Nation against sabotage and fifth-column activity." *Id.* at 741.

After the resolution was passed, a special subcommittee of the Appropriations Committee held hearings in secret executive session. Those charged with "subversive" beliefs and "subversive" associations were permitted to testify, but lawyers, including those representing the agen-

cies by which the accused were employed, were not permitted to be present. At the hearings, committee members, the committee staff, and whatever witness was under examination were the only ones present. The evidence, aside from that given by the accused employees, appears to have been largely that of reports made by the Dies Committee, its investigators, and Federal Bureau of Investigation reports, the latter being treated as too confidential to be made public.

After this hearing, the subcommittee's reports and recommendations were submitted to the House as part of the Appropriation Committee's report. The subcommittee stated that it had regarded the investigations "as in the nature of an inquest of office" with the ultimate purpose of purging the public service of anyone found guilty of "subversive activity." The committee, stating that "subversive activity" had not before been defined by Congress or by the courts, formulated its own definition of "subversive activity" which we set out in the margin.[3] Respondents Watson, Dodd, and Lovett were, according to the subcommittee, guilty of having engaged in "subversive activity within the definition adopted by the committee." H. Rep. No. 448, 78th Cong., 1st Sess., 5–7, 9. The ultimate finding and recommendation as to respondent Watson, which was substantially similar to the findings with respect to Lovett and Dodd, read as follows: "Upon consideration of all of the evidence, your committee finds that the membership and association of Dr. Goodwin B. Watson with the organizations mentioned,

[3] "Subversive activity in this country derives from conduct intentionally destructive of or inimical to the Government of the United States—that which seeks to undermine its institutions, or to distort its functions, or to impede its projects, or to lessen its efforts, the ultimate end being to overturn it all. Such activity may be open and direct as by effort to overthrow, or subtle and indirect as by sabotage." H. Rep. No. 448, 78th Cong., 1st Sess., p. 5.

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and his views and philosophies as expressed in various statements and writings constitute subversive activity within the definition adopted by your committee, and that he is, therefore, unfit for the present to continue in Government employment." H. Rep. No. 448, 78th Cong., 1st Sess., p. 6. As to Lovett the Committee further reported that it had rejected a "strong appeal" from the Secretary of the Interior for permission to retain Lovett in government service, because as the Committee stated, it could not "escape the conviction that this official is unfit to hold a position of trust with this Government by reason of his membership, association, and affiliation with organizations whose aims and purposes are subversive to the Government of the United States." *Id.* at 12.

Section 304 was submitted to the House along with the Committee Report. Congressman Kerr, who was chairman of the subcommittee, stated that the issue before the House was simply: ". . . whether or not the people of this country want men who are not in sympathy with the institutions of this country to run it." He said further: ". . . these people under investigation have no property rights in these offices. One Congress can take away their rights given them by another." 89 Cong. Rec. 4583. Other members of the House during several days of debate bitterly attacked the measure as unconstitutional and unwise. *Id.* at 4482–4487, 4546–4556, 4581–4605. Finally § 304 was passed by the House.

The Senate Appropriation Committee eliminated § 304 and its action was sustained by the Senate. 89 Cong. Rec. 5024. After the first conference report which left the matter still in disagreement the Senate voted 69 to 0 against the conference report which left § 304 in the bill. The House, however, insisted on the amendment and indicated that it would not approve any appropriation bill without § 304. Finally, after the fifth conference report

showed that the House would not yield, the Senate adopted § 304. When the President signed the bill he stated: "The Senate yielded, as I have been forced to yield, to avoid delaying our conduct of the war. But I cannot so yield without placing on record my view that this provision is not only unwise and discriminatory, but unconstitutional." H. Doc. 264, 78th Cong., 1st Sess.

I.

In view of the facts just set out, we cannot agree with the two judges of the Court of Claims who held that § 304 required "a mere stoppage of disbursing routine, nothing more," and left the employer governmental agencies free to continue employing respondents and to incur contractual obligations by virtue of such continued work which respondents could enforce in the Court of Claims. Nor can we agree with counsel for Congress that the section did not provide for the dismissal of respondents but merely forbade governmental agencies to compensate respondents for their work or to incur obligations for such compensation at any and all times. We therefore cannot conclude, as he urges, that § 304 is a mere appropriation measure, and that, since Congress under the Constitution has complete control over appropriations, a challenge to the measure's constitutionality does not present a justiciable question in the courts, but is merely a political issue over which Congress has final say.

We hold that the purpose of § 304 was not merely to cut off respondents' compensation through regular disbursing channels but permanently to bar them from government service, and that the issue of whether it is constitutional is justiciable. The section's language as well as the circumstances of its passage which we have just described show that no mere question of compensation procedure or of appropriations was involved, but that it

was designed to force the employing agencies to discharge respondents and to bar their being hired by any other governmental agency. Cf. *United States* v. *Dickerson*, 310 U. S. 554. Any other interpretation of the section would completely frustrate the purpose of all who sponsored § 304, which clearly was to "purge" the then existing and all future lists of government employees of those whom Congress deemed guilty of "subversive activities" and therefore "unfit" to hold a federal job. What was challenged, therefore, is a statute which, because of what Congress thought to be their political beliefs, prohibited respondents from ever engaging in any government work, except as jurors or soldiers. Respondents claimed that their discharge was unconstitutional; that they consequently rightfully continued to work for the Government and that the Government owes them compensation for services performed under contracts of employment. Congress has established the Court of Claims to try just such controversies. What is involved here is a congressional proscription of Lovett, Watson, and Dodd, prohibiting their ever holding a government job. Were this case to be not justiciable, congressional action, aimed at three named individuals, which stigmatized their reputation and seriously impaired their chance to earn a living, could never be challenged in any court. Our Constitution did not contemplate such a result. To quote Alexander Hamilton, ". . . a limited constitution . . . [is] one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." Federalist Paper No. 78.

II.

We hold that § 304 falls precisely within the category of congressional actions which the Constitution barred by providing that "No Bill of Attainder or ex post facto Law shall be passed." In *Cummings* v. *Missouri,* 4 Wall. 277, 323, this Court said, "A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." The *Cummings* decision involved a provision of the Missouri Reconstruction Constitution which required persons to take an Oath of Loyalty as a prerequisite to practicing a profession. Cummings, a Catholic Priest, was convicted for teaching and preaching as a minister without taking the oath. The oath required an applicant to affirm that he had never given aid or comfort to persons engaged in hostility to the United States and had never "been a member of, or connected with, any order, society, or organization, inimical to the government of the United States . . ." In an illuminating opinion which gave the historical background of the constitutional prohibition against bills of attainder, this Court invalidated the Missouri constitutional provision both because it constituted a bill of attainder and because it had an *ex post facto* operation. On the same day the *Cummings* case was decided, the Court, in *Ex parte Garland,* 4 Wall. 333, also held invalid on the same grounds an Act of Congress which required attorneys practicing before this Court to take a similar oath. Neither of these cases has ever been overruled. They stand for the proposition that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Con-

stitution. Adherence to this principle requires invalidation of § 304. We do adhere to it.

Section 304 was designed to apply to particular individuals.[4] Just as the statute in the two cases mentioned, it "operates as a legislative decree of perpetual exclusion" from a chosen vocation. *Ex parte Garland, supra,* at 377. This permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type. It is a type of punishment which Congress has only invoked for special types of odious and dangerous crimes, such as treason, 18 U. S. C. 2; acceptance of bribes by members of Congress, 18 U. S. C. 199, 202, 203; or by other government officials, 18 U. S. C. 207; and interference with elections by Army and Navy officers, 18 U. S. C. 58.

Section 304, thus, clearly accomplishes the punishment of named individuals without a judicial trial. The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal.[5] No one would think that Congress could have passed a valid law, stating that after investigation it had found Lovett, Dodd, and Watson "guilty" of the crime of engaging in "subversive activities," defined that term for the first time, and sentenced them to perpetual exclusion from any government employment. Section 304, while it does not use that language, accomplishes that result. The effect was to inflict punishment without the safeguards of a judicial trial and

[4] This is of course one of the usual characteristics of bills of attainder. See Wooddeson, Law Lectures: A Systematical View of the Laws of England (1792), No. 41, 622.

[5] See *Cummings* v. *Missouri, supra,* 4 Wall. at 325, 329; see also *Fletcher* v. *Peck,* 6 Cranch 87, 138–139; *Burgess* v. *Salmon,* 97 U. S. 381, 385.

"determined by no previous law or fixed rule." [6] The Constitution declares that that cannot be done either by a State or by the United States.

Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts. See *Duncan* v. *Kahanamoku*, 327 U. S. 304. And even the courts to which this important function was entrusted were commanded to stay their hands until and unless certain tested safeguards were observed. An accused in court must be tried by an impartial jury, has a right to be represented by counsel, he must be clearly informed of the charge against him, the law which he is charged with violating must have been passed before he committed the act charged, he must be confronted by the witnesses against him, he must not be compelled to incriminate himself, he cannot twice be put in jeopardy for the same offense, and even after conviction

[6] See dissent of Mr. Justice Miller in *Cummings* v. *Missouri*, *supra*, 4 Wall. at 388; see also Wooddeson, *supra*, at 624, 638 *et seq.* Section 304 has all the characteristics of bills of attainder, even as they are set out by Justice Miller's dissent, except the corruption of blood. 4 Wall. at 387. The American precedents do not consider corruption of blood a necessary element. Originally a judgment of death was necessary to attaint and the consequences of attainder were forfeiture and corruption of blood. Coke, First Institute (on Littleton) (Thomas Ed. 1818) Vol. III, 559, 563, 565. If the judgment was lesser punishment than death, there was no attaint and the bill was one of pains and penalties. Practically all the American precedents are bills of pains and penalties. See Thompson, Anti-Loyalist Legislation During the American Revolution (1908) 3 Ill. L. Rev. 81, 153 *et passim;* John C. Hamilton, History of the Republic of the United States (1859) Vol. III, 23–40. The Constitution in prohibiting bills of attainder undoubtedly included bills of pains and penalties, as the majority in the *Cummings* case held.

no cruel and unusual punishment can be inflicted upon him. See *Chambers* v. *Florida*, 309 U. S. 227, 235–238. When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder. Section 304 is one. Much as we regret to declare that an Act of Congress violates the Constitution, we have no alternative here.

Section 304 therefore does not stand as an obstacle to payment of compensation to Lovett, Watson, and Dodd. The judgment in their favor is

Affirmed.

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

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE REED joins, concurring.

Nothing would be easier than personal condemnation of the provision of the Urgent Deficiency Appropriation Act of 1943 here challenged. § 304, 57 Stat. 431, 450.[1]

[1] "SEC. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: *Provided*, That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943: *Provided further*, That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom."

But the judicial function exacts considerations very different from those which may determine a vote in Congress for or against a measure. And what may be decisive for a Presidential disapproval may not at all satisfy the established criteria which alone justify this Court's striking down an act of Congress.

It is not for us to find unconstitutionality in what Congress enacted although it may imply notions that are abhorrent to us as individuals or policies we deem harmful to the country's well-being. Although it was proposed at the Constitutional Convention to have this Court share in the legislative process, the Framers saw fit to exclude it. And so "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, K. & T. R. Co.* v. *May,* 194 U. S. 267, 270. This admonition was uttered by Mr. Justice Holmes in one of his earliest opinions and it needs to be recalled whenever an exceptionally offensive enactment tempts the Court beyond its strict confinements.

Not to exercise by indirection authority which the Constitution denied to this Court calls for the severest intellectual detachment and the most alert self-restraint. The scrupulous observance, with some deviations, of the professed limits of this Court's power to strike down legislation has been, perhaps, the one quality the great judges of the Court have had in common. Particularly when Congressional legislation is under scrutiny, every rational trail must be pursued to prevent collision between Congress and Court. For Congress can readily mend its ways, or the people may express disapproval by choosing different representatives. But a decree of unconstitutionality by this Court is fraught with consequences so enduring and far-reaching as to be avoided unless no choice is left in reason.

The inclusion of § 304 in the Appropriation Bill undoubtedly raises serious constitutional questions. But the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible. And so the "Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." Brandeis, J., concurring, in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 341, at 346. That a piece of legislation under scrutiny may be widely unpopular is as irrelevant to the observance of these rules for abstention from avoidable adjudications as that it is widely popular. Some of these rules may well appear over-refined or evasive to the laity. But they have the support not only of the profoundest wisdom. They have been vindicated, in conspicuous instances of disregard, by the most painful lessons of our constitutional history.

Such are the guiding considerations enjoined by constitutional principles and the best practice for dealing with the various claims of unconstitutionality so ably pressed upon us at the bar.

The Court reads § 304 as though it expressly discharged respondents from office which they held and prohibited them from holding any office under the Government in the future. On the basis of this reading the Court holds that the provision is a bill of attainder in that it "inflicts punishment without a judicial trial," *Cummings* v. *Missouri*, 4 Wall. 277, 323, and is therefore forbidden by Article I, § 9 of the Constitution. Congress is said to have inflicted this punishment upon respondents because it disapproved the beliefs they were thought to hold. Such a colloquial treatment of the statute neglects the relevant canons of constitutional adjudication and disregards those

features of the legislation which call its validity into question on grounds other than inconsistency with the prohibition against bills of attainder. To characterize an act of Congress as a bill of attainder readily enlists, however, the instincts of a free people who are committed to a fair judicial process for the determination of issues affecting life, liberty, or property and naturally abhor anything that resembles legislative determination of guilt and legislative punishment. As I see it, our duty precludes reading § 304 as the Court reads it. But even if it were to be so read the provision is not within the constitutional conception of a bill of attainder.

Broadly speaking, two types of constitutional claims come before this Court. Most constitutional issues derive from the broad standards of fairness written into the Constitution (*e. g.* "due process," "equal protection of the laws," "just compensation"), and the division of power as between States and Nation. Such questions, by their very nature, allow a relatively wide play for individual legal judgment. The other class gives no such scope. For this second class of constitutional issues derives from very specific provisions of the Constitution. These had their source in definite grievances and led the Fathers to proscribe against recurrence of their experience. These specific grievances and the safeguards against their recurrence were not defined by the Constitution. They were defined by history. Their meaning was so settled by history that definition was superfluous. Judicial enforcement of the Constitution must respect these historic limits.

The prohibition of bills of attainder falls of course among these very specific constitutional provisions. The distinguishing characteristic of a bill of attainder is the substitution of legislative determination of guilt and legislative imposition of punishment for judicial finding and

sentence. "A bill of attainder, by the common law, as our fathers imported it from England and practised it themselves, before the adoption of the Constitution, was an act of sovereign power, in the form of a special statute . . . by which a man was pronounced guilty or attainted of some crime, and punished by deprivation of his vested rights, without trial or judgment *per legem terrae.*" Farrar, *Manual of the Constitution* (1867) 419. And see 2 Story, *Commentaries on the Constitution* (5th ed., 1891) 216; 1 Cooley, *Constitutional Limitations* (8th ed., 1927) 536. It was this very special, narrowly restricted, intervention by the legislature, in matters for which a decent regard for men's interests indicated a judicial trial, that the Constitution prohibited. It must be recalled that the Constitution was framed in an era when dispensing justice was a well-established function of the legislature. The prohibition against bills of attainder must be viewed in the background of the historic situation when moves in specific litigation that are now the conventional and, for the most part, the exclusive concern of courts were commonplace legislative practices. See *Calder* v. *Bull,* 3 Dall. 386; *Wilkinson* v. *Leland,* 2 Pet. 627, 660; *Baltimore & Susquehanna R. Co.* v. *Nesbit,* 10 How. 395; Pound, *Justice According to Law,* II (1914) 14 Col. L. Rev. 1–12; Woodruff, *Chancery in Massachusetts* (1889) 5 L. Q. Rev. 370. *Cf. Sinking-Fund Cases,* 99 U. S. 700. Bills of attainder were part of what now are staple judicial functions which legislatures then exercised. It was this part of their recognized authority which the Constitution prohibited when it provided that "No Bill of Attainder . . . shall be passed." Section 304 lacks the characteristics of the enactments in the Statutes of the Realm and the Colonial Laws that bear the hallmarks of bills of attainder.

All bills of attainder specify the offense for which the attainted person was deemed guilty and for which the

punishment was imposed. There was always a declaration of guilt either of the individual or the class to which he belonged. The offense might be a pre-existing crime or an act made punishable *ex post facto*. Frequently a bill of attainder was thus doubly objectionable because of its *ex post facto* features. This is the historic explanation for uniting the two mischiefs in one clause—"No Bill of Attainder or ex post facto Law shall be passed." No one claims that § 304 is an *ex post facto* law. If it is in substance a punishment for acts deemed "subversive" (the statute, of course, makes no such charge) for which no punishment had previously been provided, it would clearly be *ex post facto*. Therefore, if § 304 is a bill of attainder it is also an *ex post facto* law. But if it is not an *ex post facto* law, the reasons that establish that it is not are persuasive that it cannot be a bill of attainder. No offense is specified and no declaration of guilt is made. When the framers of the Constitution proscribed bills of attainder, they referred to a form of law which had been prevalent in monarchical England and was employed in the colonies. They were familiar with its nature; they had experienced its use; they knew what they wanted to prevent. It was not a law unfair in general, even unfair because affecting merely particular individuals, that they outlawed by the explicitness of their prohibition of bills of attainder. "Upon this point a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349. Nor should resentment against an injustice displace controlling history in judicial construction of the Constitution.

Not only does § 304 lack the essential declaration of guilt. It likewise lacks the imposition of punishment in the sense appropriate for bills of attainder. The punishment imposed by the most dreaded bill of attainder was of course death; lesser punishments were imposed by similar bills more technically called bills of pains and pen-

alties. The Constitution outlaws this entire category of punitive measures. *Fletcher* v. *Peck,* 6 Cranch 87, 138; *Cummings* v. *Missouri,* 4 Wall. 277. The amount of punishment is immaterial to the classification of a challenged statute. But punishment is a prerequisite.

Punishment presupposes an offense, not necessarily an act previously declared criminal, but an act for which retribution is exacted. The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation. A man may be forbidden to practice medicine because he has been convicted of a felony, *Hawker* v. *New York,* 170 U. S. 189, or because he is no longer qualified, *Dent* v. *West Virginia,* 129 U. S. 114. "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact." *Cummings* v. *Missouri,* 4 Wall. 277, 320.

Is it clear then that the respondents were removed from office, still accepting the Court's reading of the statute, as a punishment for past acts? Is it clear, that is, to that degree of certitude which is required before this Court declares legislation by Congress unconstitutional? The disputed section does not say so. So far as the House of Representatives is concerned, the Kerr Committee, which proposed the measure, and many of those who voted in favor of the Bill (assuming it is appropriate to go behind the terms of a statute to ascertain the unexpressed motive of its members), no doubt considered the respondents "subversive" and wished to exclude them from the Government because of their past associations and their present views. But the legislation upon which we now pass judgment is the product of both Houses of Congress

and the President. The Senate five times rejected the substance of § 304. It finally prevailed, not because the Senate joined in an unexpressed declaration of guilt and retribution for it, but because the provision was included in an important appropriation bill. The stiffest interpretation that can be placed upon the Senate's action is that it agreed to remove the respondents from office (still assuming the Court's interpretation of § 304) without passing any judgment on their past conduct or present views.

Section 304 became law by the President's signature. His motive in allowing it to become law is free from doubt. He rejected the notion that the respondents were "subversive," and explicitly stated that he wished to retain them in the service of the Government. H. Doc. No. 264, 78th Cong., 1st Sess. Historically, Parliament passed bills of attainder at the behest of the monarch. See Adams, *Constitutional History of England* (Rev. ed., 1935) 228–29. The Constitution, of course, provides for the enactment of legislation even against disapproval by the Executive. But to hold that a measure which did not express a judgment of condemnation by the Senate and carried an affirmative disavowal of such condemnation by the President constitutes a bill of attainder, disregards the historic tests for determining what is a bill of attainder. At the least, there are such serious objections to finding § 304 a bill of attainder that it can be declared unconstitutional only by a failure to observe that this Court reaches constitutional invalidation only through inescapable necessity. "It must be evident to anyone that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility." 1 Cooley, *Constitutional Limitations* (8th ed., 1927) 332.

But even if it be agreed, for purposes of characterizing the deprivation of the statute as punishment, that the motive of Congress was past action of the respondents, presumed motive cannot supplant expressed legislative judgment. "The expectations of those who sought the enactment of legislation may not be used for the purpose of affixing to legislation when enacted a meaning which it does not express." *United States* v. *Goelet,* 232 U. S. 293, 298. Congress omitted from § 304 any condemnation for which the presumed punishment was a sanction. Thereby it negatived the essential notion of a bill of attainder. It may be said that such a view of a bill of attainder offers Congress too easy a mode of evading the prohibition of the Constitution. Congress need merely omit its ground of condemnation and legislate the penalty! But the prohibition against a "Bill of Attainder" is only one of the safeguards of liberty in the arsenal of the Constitution. There are other provisions in the Constitution, specific and comprehensive, effectively designed to assure the liberties of our citizens. The restrictive function of this clause against bills of attainder was to take from the legislature a judicial function which the legislature once possessed. If Congress adopted, as it did, a form of statute so lacking in any pretension to the very quality which gave a bill of attainder its significance, that of a declaration of guilt under circumstances which made its determination grossly unfair, it simply passed an act which this Court ought not to denounce as a bill of attainder. And not the less so because Congress may have been conscious of the limitations which the Constitution has placed upon it against passing bills of attainder. If Congress chooses to say that men shall not be paid, or even that they shall be removed from their jobs, we cannot decide that Congress also said that they are guilty of an offense. And particularly we cannot so decide as a

necessary assumption for declaring an act of Congress invalid. Congress has not legislated that which is attributed to it, for the simple fact is that Congress has said nothing. The words Congress used are not susceptible of being read as a legislative verdict of guilt against the respondents no matter what dictionary, or what form of argumentation, we use as aids.

This analysis accords with our prior course of decision. In *Cummings* v. *Missouri, supra,* and *Ex parte Garland,* 4 Wall. 333, the Court dealt with legislation of very different scope and significance from that now before us. While the provisions involved in those cases did not condemn or punish specific persons by name, they proscribed all guilty of designated offenses. Refusal to take a prescribed oath operated as an admission of guilt and automatically resulted in the disqualifying punishment. Avoidance of legislative proscription for guilt under the provisions in the *Cummings* and *Garland* cases required positive exculpation. That the persons legislatively punished were not named was a mere detail of identification. Congress and the Missouri legislature, respectively, had provided the most effective method for insuring identification. These enactments followed the example of English bills of attainder which condemned a named person and "his adherents." Section 304 presents a situation wholly outside the ingredients of the enactments that furnished the basis for the *Cummings* and *Garland* decisions.[2]

While § 304 is not a bill of attainder, as the gloss of history defines that phrase in the Constitution, acceptance of the Court's reading of § 304 would raise other serious

[2] Even against the holding that such enactments were bills of attainder, Mr. Justice Miller wrote the powerful dissent concurred in by Mr. Chief Justice Chase, Mr. Justice Swayne, and Mr. Justice Davis. 4 Wall. 333, 382.

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constitutional questions. The first in magnitude and difficulty derives from the constitutional distribution of power over removal. For about a century this Court astutely avoided adjudication of the power of control as between Congress and the Executive of those serving in the Executive branch of the Government "until it should be inevitably presented." *Myers* v. *United States,* 272 U. S. 52, 173. The Court then gave the fullest consideration to the problem. The case was twice argued and was under consideration for nearly three years. So far as the issues could be foreseen they were elaborately dealt with in opinions aggregating nearly two hundred pages. Within less than a decade an opinion of fifteen pages largely qualified what the *Myers* case had apparently so voluminously settled. *Humphrey's Executor* v. *United States,* 295 U. S. 602. This experience serves as a powerful reminder of the Court's duty so to deal with Congressional enactments as to avoid their invalidation unless a road to any other decision is barred.

The other serious problem the Court's interpretation of § 304 raises is that of due process. In one aspect this is another phase of the constitutional issue of the removal power. For, if § 304 is to be construed as a removal from office, it cannot be determined whether singling out three government employees for removal violated the Fifth Amendment until it is decided whether Congress has a removal power at all over such employees and how extensive it is. Even if the statute be read as a mere stoppage of disbursement, the question arises whether Congress can treat three employees of the Government differently from all others. But that question we do not have to answer. In any event, respondents are entitled to recover in this suit and their remedy—a suit in the Court of Claims—is the same whatever view one takes of the legal significance of § 304. To be sure, § 304 also purports to prescribe con-

ditions relating to future employment of respondents by the Government. This too is a question not now open for decision. Reemployment by any agency of the Government, or the desire for reemployment, is not now in controversy, "and consequently the subject may well be postponed until it actually arises for decision." *Wilson* v. *New*, 243 U. S. 332, 354. The "great gravity and delicacy" of this Court's function in passing upon the validity of an act of Congress is called into action only when absolutely necessary. *Steamship Co.* v. *Emigration Commissioners*, 113 U. S. 33, 39. It should not be exercised on the basis of imaginary and non-existent facts. See Brandeis, J., concurring, in *Ashwander* v. *Tennessee Valley Authority, supra*, at 338–45.

Since it is apparent that grave constitutional doubts will arise if we adopt the construction the Court puts on § 304, we ought to follow the practice which this Court has established from the time of Chief Justice Marshall. The approach appropriate to such a case as the one before us was thus summarized by Mr. Justice Holmes in a similar situation: ". . . the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407, 408. *United States* v. *Standard Brewery*, 251 U. S. 210, 220. *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, 217. *Bratton* v. *Chandler*, 260 U. S. 110, 114. *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 390. Words have been strained more than they need to be strained here in order to avoid that doubt. *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401, 402." *Blodgett* v. *Holden*, 275 U. S. 142, 148. " 'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of con-

stitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' *Crowell* v. *Benson*, 285 U. S. 22, 62." Brandeis, J., concurring, in *Ashwander* v. *Tennessee Valley Authority, supra*, at 348.

We are not faced inescapably with the necessity of adjudicating these serious constitutional questions. The obvious or, at the least, the one certain construction of § 304 is that it forbids the disbursing agents of the Treasury to pay out of specifically appropriated moneys sums to compensate respondents for their services. We have noted the cloud cast upon this interpretation by manifestations by committees and members of the House of Representatives before the passage of this section. On the other hand, there is also much in the debates not only in the Senate but also in the House which supports the mere fiscal scope to be given to the statute. That such a construction is tenable settles our duty to adopt it and to avoid determination of constitutional questions of great seriousness.

Accordingly, I feel compelled to construe § 304 as did Mr. Chief Justice Whaley below, 104 Ct. Cls. 557, 584, 66 F. Supp. 142, 147–148, whereby it merely prevented the ordinary disbursal of money to pay respondents' salaries. It did not cut off the obligation of the Government to pay for services rendered and the respondents are, therefore, entitled to recover the judgment which they obtained from the Court of Claims.

PENNEKAMP ET AL. *v.* FLORIDA.

CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 473. Argued February 8, 1946.—Decided June 3, 1946.

Petitioners, the publisher and the associate editor of a newspaper, were responsible for the publication of two editorials and a cartoon criticizing certain actions previously taken by a Florida trial court of general jurisdiction in certain non-jury proceedings as being too favorable to criminals and gambling establishments. Two of the cases involved had been dismissed. In the third, a rape case, an indictment had been quashed for technical defects, but a new indictment had been obtained and trial was pending. Petitioners were cited for contempt, the citation charging, *inter alia,* that the publications reflected upon and impugned the integrity of the court, tended to create a distrust for the court, wilfully withheld and suppressed the truth, and tended to obstruct the fair and impartial administration of justice in pending cases. In their answer, petitioners denied any intent to interfere with fair and impartial justice and claimed, *inter alia,* that it was their intent to condemn and criticize the system of pleading and practice created by the laws of Florida, that the publications were legitimate criticism and comment within the federal guaranties of a free press, and that they created no clear and present danger to the administration of justice. The court found the facts recited and the charges made in the citation to be true and well founded, adjudged petitioners guilty of contempt, and fined them. This judgment was sustained by the Supreme Court of Florida as being in accordance with Florida law. *Held:*

1. On this record, the danger to fair judicial administration has not the clearness and immediacy necessary to close the door of permissible public comment; and the judgment is reversed as violative of petitioners' right of free expression in the press under the First and Fourteenth Amendments. *Bridges* v. *California,* 314 U. S. 252. Pp. 334, 346–350.

2. This Court has final authority to determine the meaning and application of those words of the Constitution which require interpretation to resolve judicial issues. P. 335.

3. In cases of this type, it must examine for itself the statements in issue and the circumstances under which they were made to see

whether or not they carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character protected by the principles of the First and Fourteenth Amendments. Pp. 335, 336, 346.

4. When the highest court of a State has reached a determination upon such an issue, this Court gives most respectful attention to its reasoning and conclusion; but the state court's authority is not final. P. 335.

5. This Court agrees with the Supreme Court of Florida that the rape case was pending at the time of the publication. P. 344.

6. This Court may accept the conclusion of the Florida courts upon intent and motive as a determination of fact; but it is for this Court to determine federal constitutional rights in the setting of the facts. P. 345.

7. Discussion that follows the termination of a case may be inadequate to emphasize the danger to public welfare of supposedly wrongful judicial conduct, but it does not follow that public comment of every character upon pending trials or legal proceedings may be as free as similar comment after complete disposal of the litigation. P. 346.

8. In borderline cases where it is difficult to say upon which side the alleged offense falls, the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest possible range compatible with the essential requirement of the fair and orderly administration of justice. P. 347.

9. Since the publications concerned the attitude of the judges toward those charged with crime, not comments on evidence or rulings during a jury trial, their effect on juries that might eventually try the alleged offenders is too remote to be considered a clear and present danger to justice. P. 348.

10. This criticism of the judge's inclinations or actions in pending non-jury proceedings could not directly affect the administration of justice, although the cases were still pending on other points or might be revived by rehearings. P. 348.

11. That a judge might be influenced by a desire to placate the accusing newspaper to retain public esteem and secure reelection at the cost of unfair rulings against an accused is too remote a possibility to be considered a clear and present danger to justice. P. 349.

156 Fla. 227, 22 So. 2d 875, reversed.

Petitioners were adjudged guilty of contempt of a state court. The Supreme Court of Florida affirmed. 156 Fla. 227, 22 So. 2d 875. This Court granted certiorari. 326 U.S. 709. *Reversed*, p. 350.

Robert R. Milam and *Elisha Hanson* argued the cause for petitioners. With them on the brief were *E. T. McIlvaine* and *Edward E. Fleming*.

J. Tom Watson, Attorney General of Florida, *James M. Carson* and *Giles J. Patterson* argued the cause for respondent. With *Messrs. Watson* and *Carson* on the brief was *Sumter Leitner*, Assistant Attorney General.

William Harrison Mizell and *Osmond K. Fraenkel* filed a brief for the American Civil Liberties Union, as *amicus curiae*, urging reversal.

MR. JUSTICE REED delivered the opinion of the Court.

This proceeding brings here for review a judgment of the Supreme Court of Florida, 156 Fla. 227, 22 So. 2d 875, which affirmed a judgment of guilt in contempt of the Circuit Court of Dade County, Florida, on a citation of petitioners by that Circuit Court.

The individual petitioner was the associate editor of the Miami Herald, a newspaper of general circulation, published in Dade County, Florida, and within the jurisdiction of the trial court. The corporate petitioner was the publisher of the Miami Herald. Together petitioners were responsible for the publication of two editorials charged by the citation to be contemptuous of the Circuit Court and its judges in that they were unlawfully critical of the administration of criminal justice in certain cases then pending before the Court.

Certiorari was granted to review petitioners' contention that the editorials did not present "a clear and present danger of high imminence to the administration of justice

by the court" or judges who were criticized and therefore the judgment of contempt was invalid as violative of the petitioners' right of free expression in the press. The importance of the issue in the administration of justice at this time, in view of this Court's decision in *Bridges* v. *California,* 314 U. S. 252, three years prior to this judgment in contempt, is apparent.

Bridges v. *California* fixed reasonably well-marked limits around the power of courts to punish newspapers and others for comments upon or criticism of pending litigation. The case placed orderly operation of courts as the primary and dominant requirement in the administration of justice. Pages 263, 265, 266. This essential right of the courts to be free of intimidation and coercion was held to be consonant with a recognition that freedom of the press must be allowed in the broadest scope compatible with the supremacy of order. A theoretical determinant of the limit for open discussion was adopted from experience with other adjustments of the conflict between freedom of expression and maintenance of order. This was the clear and present danger rule. The evil consequence of comment must be "extremely serious and the degree of imminence extremely high before utterances can be punished." Page 263. It was, of course, recognized that this formula, as would any other, inevitably had the vice of uncertainty, page 261, but it was expected that, from a decent self-restraint on the part of the press and from the formula's repeated application by the courts, standards of permissible comment would emerge which would guarantee the courts against interference and allow fair play to the good influences of open discussion. As a step toward the marking of the line, we held that the publications there involved were within the permissible limits of free discussion.

In the *Bridges* case the clear and present danger rule was applied to the stated issue of whether the expressions there

under consideration prevented "fair judicial trials free from coercion or intimidation." Page 259. There was, of course, no question as to the power to punish for disturbances and disorder in the court room. Page 266. The danger to be guarded against is the "substantive evil" sought to be prevented. Pages 261, 262, 263. In the *Bridges* case that "substantive evil" was primarily the "disorderly and unfair administration of justice." Pages 270, 271, 278.[1]

The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.[2] When the highest court of a state has reached a determination upon such an issue, we give most respectful attention to its reasoning and conclusion but its authority is not final. Were it otherwise the constitutional limits of free expression in the Nation would vary with state lines.[3]

While there was a division of the Court in the *Bridges* case as to whether some of the public expressions by edi-

[1] Compare *Schenck* v. *United States,* 249 U. S. 47, 52; *Thornhill* v. *Alabama,* 310 U. S. 88, 105; *Carlson* v. *California,* 310 U. S. 106, 113; *Board of Education* v. *Barnette,* 319 U. S. 624, 633.

[2] *Gitlow* v. *New York,* 268 U. S. 652, 666; *Near* v. *Minnesota,* 283 U. S. 697, 707.

[3] *Bridges* v. *California,* 314 U. S. 252, 267. Compare *Chambers* v. *Florida,* 309 U. S. 227, 228; *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, 659.

torial comment transgressed the boundaries of a free press and as to the phrasing of the test, there was unanimous recognition that California's power to punish for contempt was limited by this Court's interpretation of the extent of protection afforded by the First Amendment. *Bridges* v. *California, supra,* at 297. Whether the threat to the impartial and orderly administration of justice must be a clear and present or a grave and immediate danger, a real and substantial threat, one which is close and direct or one which disturbs the court's sense of fairness depends upon a choice of words. Under any one of the phrases, reviewing courts are brought in cases of this type to appraise the comment on a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes.

The editorials of November 2d and 7th, 1944, which caused the court to issue the citation are set out below.[4]

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[4] November 2, 1944:

"*Courts Are Established—*

For the People

"The courts belong to the people. The people have established them to promote justice, insure obedience to the law and to Punish Those Who Willfully Violate It.

"The people maintain the courts by providing the salaries of officials and setting up costly chambers and courtrooms for the orderly and dignified procedure of the tribunals.

"Upon the judges the people must depend for the decisions and the judicial conduct that will insure society—as a whole and in its individuals—against those who would undermine or destroy the peace, the morality and the orderly living of the community.

"In Order that the courts should not be amenable to political or other pressures in their determination of matters placed before them, Florida Circuit judges are called upon to face the electorate less often than are other elective office holders.

"So long are their terms, in fact, that in Dade county no Circuit judge, and only one judge of another court, has come to the bench by public choice in the first instance. All the others have been named

Accompanying the first editorial was a cartoon which held up the law to public obloquy. It caricatured a court by a robed compliant figure as a judge on the bench tossing

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by a governor to fill a vacancy caused by death or resignation, or similar circumstance.

"Judicial terms in Dade county run:

1—Six years each for six Circuit judges.
2—Four years each for two Civil Court of Record judges.
3—Four years for the judge of the Criminal Court of Record.
4—Four years for the judge of the Court of Crimes.
5—Four years for County judge.
6—Four years for Juvenile court judge.

"These twelve judges represent the majesty and the sanctity of the law. They are the first line of defense locally of organized society against vice, corruption and crime, and the sinister machinations of the underworld.

"It Is beyond question that American courts are of, by and for the people.

"Every accused person has a right to his day in court. But when judicial instance and interpretative procedure recognize and accept, even go out to find, every possible technicality of the law to protect the defendant, to block, thwart, hinder, embarrass and nullify prosecution, then the people's rights are jeopardized and the basic reason for courts stultified.

"The seeming ease and pat facility with which the criminally charged have been given technical safeguard have set people to wondering whether their courts are being subverted into refuges for lawbreakers.

"This Week the people, through their grand jury, brought into court eight indictments for rape. Judge Paul D. Barns agreed with the defense that the indictments were not properly drawn. Back they went to the grand jury for re-presentation to the court.

"Only in the gravest emergency does a judge take over a case from another court of equal jurisdiction. A padlock action against the Brook Club was initiated last spring before Judge George E. Holt, who granted a temporary injunction.

"After five months, the case appeared Tuesday out of blue sky before Judge Marshall C. Wiseheart at the time State Attorney Stanley Milledge was engaged with the grand jury.

"Speedy decision was asked by defense counsel despite months of

aside formal charges to hand a document, marked "Defendant dismissed," to a powerful figure close at his left arm and of an intentionally drawn criminal type. At the

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stalling. The State Attorney had to choose between the grand jury and Judge Wiseheart's court.

"The judge dismissed the injunction against the club and its operators. The defense got delay when it wanted and prompt decision from the court when it profited it.

"On Oct. 10 Judge Holt had before him a suit by the state to abate a nuisance (bookmaking) at the Tepee Club.

"Five affidavits of persons who allegedly visited the premises for the purpose of placing bets were introduced by the state over the objection of the defendants.

"Judge Holt ruled them out, explaining in denying the injunction against the Tepee Club:

" 'The defendant cannot cross-examine an affidavit. The court cannot determine who is testifying and whether belief can be placed upon such testimony . . . The fact that such affidavits were taken before the State Attorney does not give them any additional weight or value.'

"This may be good law, exact judicial evaluation of the statutes. It is, however, the character of legal interpretation which causes people to raise questioning eyebrows and shake confused heads in futile wonderment.

"If Technicalities are to be the order and the way for the criminally charged either to avoid justice altogether or so to delay prosecution as to cripple it, then it behooves our courts and the legal profession to cut away the deadwood and the entanglements.

"Make it possible for the state's case, the people's case, to be seen with equal clarity of judicial vision as that accorded accused lawbreakers. Otherwise technicalities and the courts make the law, no matter what the will of the people and of their legislators."

November 7, 1944:

"Why People Wonder

"Here is an example of why people wonder about the law's delays and obstructing technicalities operating to the disadvantage of the state—which is the people—in prosecutions.

"After stalling along for months, the defense in the padlock case against the Brook Club appeared before Judge Marshall C. Wiseheart

right of the bench, a futile individual, labeled "Public Interest" vainly protests.

The citation charges that the editorials

> "did reflect upon and impugn the integrity of said Court and the Judges thereof in imputing that the Judges of said Court 'do recognize and accept, even go out to find, every possible technicality of the law to protect the defendant, to block, thwart, hinder, embarrass and nullify prosecution,' which said acts by you tend to create a distrust for said court and the judges thereof in the minds of the people of this county and state and tend to prevent and prejudice a fair and impartial action of the said Court and the Judges thereof in respect to the said pending case[s]."

After setting out details of alleged willful withholding and suppression of the whole truth in the publications, the citation further charges that

> "you, by said cartoon and editorial, have caused to be represented unto the public that concerning the cases of (A) the eight indictments for rape, (B) the said Brook Club case, and (C) the Teepee Club case, that the Judges of this Court [had not] fairly and impartially heard and decided the matters in said editorial mentioned and have thereby represented unto the general public that notwithstanding the

for a decision. The State Attorney was working with the grand jury. The court knocked out the injunction. There was speed, dispatch, immediate attention and action for those charged with violation of the law. So fast that the people didn't get in a peep.

"That's one way of gumming up prosecution. Another is to delay action. On March 29, Coy L. Jaggears, bus driver, was sentenced to fifteen days in city jail by Judge Cecil C. Curry on conviction of beating up a taxicab operator.

"The arrest precipitated the notorious bus strike. As a result, Jaggears walked out of jail after posting a $200 appeal bond. The appeal never got further.

"There you have the legal paradox, working two ways, but to the same purpose against prosecution. Speed when needed. Month after month of delay when that serves the better."

> great public trust vested in the Judges of this Court that they have not discharged their duties honorably and fairly in respect to said pending cases as hereinbefore set forth, all of which tends to obstruct and interfere with the said Judges as such in fairly and impartially administering justice and in the discharging of their duties in conformity with the true principles which you have so properly recognized in the forepart of said editorial above quoted as being incumbent upon them and each of them; . . ."

Petitioners were required to show cause why they should not be held in contempt.

Petitioners answered that the publications were legitimate criticism and comment within the federal guaranties of free press and created no clear and present danger to the administration of justice. They sought to justify the publications by stating in their return to the rule that the facts stated in the editorials were correct, that two of the cases used as examples were not pending when the comments were made, since orders of dismissal had been previously entered by the Circuit Court, and that they as editors

> "had the right if not the duty openly and forcefully to discuss these conditions to the end that these evils that are profoundly disturbing to the citizens of this county, might be remedied. The publications complained of did nothing more than discuss the generally recognized weakness and breakdown in the system of law enforcement and call for its improvement."

It is not practicable to comment at length on each of the challenged items. To make our decision as clear as possible, we shall refer in detail only to the comments concerning the "Rape Cases." These we think fairly illustrate the issues and are the most difficult comments for the petitioners to defend.

As to these cases, the editorial said:

> "This Week the people, through their grand jury, brought into court eight indictments for rape. Judge Paul D. Barns agreed with the defense that the indictments were not properly drawn. Back they went to the grand jury for re-presentation to the court."

We shall assume that the statement, "judicial instance and interpretative procedure . . . even go out to find, every possible technicality of the law to protect the defendant . . . and nullify prosecution," refers to the quashing of the rape indictments as well as other condemned steps. The comment of the last two paragraphs evidently includes these dismissals as so-called legal technicalities. See Note 4.

The citation charged that the prosecuting officer in open court agreed that the indictments were so defective as to make reindictment advisable. Reindictments were returned the next day and before the editorial. It was charged that these omissions were a wanton withholding of the full truth.

As to this charge, the petitioners made this return:

> "That as averred in the citation, a motion was made to quash the indictment in Case 856, the ruling upon which would control in the other cases mentioned. Whereupon the representative of the State Attorney's Office stated in effect that he believed the original indictment was in proper form, but to eliminate any question he would have these defendants immediately re-indicted by the Grand Jury which was still then in session. And thereupon, the Judge of said Court did sustain the motion to quash with respect to Case No. 856."

The record of the Criminal Division of the Circuit Court, set out in the findings of fact at the hearing on the citation in contempt, shows that in case No. 856 the court upheld the defendants' motion to quash "with the ap-

proval of the Assistant State Attorney" and quashed the remaining indictments on his recommendation. Reindictment of the accused on the next day, prompt arraignment and setting for trial also appears. We accept the record as conclusive of the facts.

We read the Circuit Court's judgment to find that the comment on the Rape Cases contained only "half-truths," that it did not "fairly report the proceedings" of the court, that it contained "misinformation." The judgment said:

> "To report on court proceedings is a voluntary undertaking but when undertaken the publisher who fails to fairly report does so at his own peril.
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> . . . . . .
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> "We find the facts recited and the charges made in the citation to be true and well founded; . . ."

This finding included the fact that reindictments were then pending in the Rape Cases. Defendants' assignments of error challenged the ruling that the matters referred to in the editorials were pending and the Supreme Court of Florida ruled that the cases were pending. 156 Fla. at 241, 22 So. 2d at 883:

> "We also agree that publications about a case that is closed no matter how scandalous, are not punishable as contempt. This is the general rule but the Florida Statute is more liberal than the rule."

Cf. Florida Statutes 1941, § 38.23 and § 932.03; see also 156 Fla. at 248, 249, 22 So. 2d at 886.

In *Bridges* v. *California,* 314 U. S. 252, 271–78, dissent 297–302, this Court looked upon cases as pending following completed interlocutory actions of the courts but awaiting other steps. In one instance it was sentence after verdict. In another, a motion for a new trial.

Pennekamp was fined $250 and the corporation, $1,000.00.

The Supreme Court of Florida restated the facts as to the Rape Cases from the record. 156 Fla. at 238, 22 So.

2d at 881. It then reached a conclusion as to all of the charges and so as to the Rape Cases in the words set out below.[5] After further discussion of the facts, the Court said, 156 Fla. at 241, 22 So. 2d at 883:

> "In the light of this factual recitation, it is utter folly to suggest that the object of these publications was other than to abase and destroy the efficiency of the court."

To focus attention on the critical issue, we quote below from the decision of the Supreme Court of Florida certain excerpts which we believe fairly illustrate its position as to the applicable law.[6]

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[5] 156 Fla. 227, 239, 240, 22 So. 2d 875, 882:

"So the vice in both the editorials was the distorted, inaccurate statement of the facts and with that statement were scrambled false insinuations that amounted to unwarranted charges of partisanship and unfairness on the part of the judges.

"The record was available in all these cases and it does not reveal a breath of suspicion on which to predicate partisanship and unfairness on the part of the judges. It is shown rather that they acted in good faith and handled each case to the very best advantage possible. There was no judgment that could have been entered in any of them except the one that was entered. If the editorials had stated the facts correctly, nothing but a correct conclusion could have been deduced and there would have been no basis for contempt but here they elected to publish as truth a mixture of factual misstatement and omission and impose on that false insinuation, distortion, and deception and then contend that freedom of the press immunizes them from punishment."

[6] 156 Fla. 227, 244–249, 22 So. 2d 875, 884–886:

"A newspaper may criticize, harass, irritate, or vent its spleen against a person who holds the office of judge in the same manner that it does a member of the Legislature and other elective officers, but it may not publish scurrilous or libelous criticisms of a presiding judge as such or his judgments for the purpose of discrediting the Court in the eyes of the public. Respect for courts is not inspired by shielding them from criticism. This is a responsibility of the judge, acquired over the years by the spirit in which he approaches the judicial process, his ability to humanize the law and square it with reason, the level

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From the editorials, the explanations of the petitioners and the records of the court, it is clear that the full truth in regard to the quashing of the indictments was not published. We agree with the Supreme Court that the Rape

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of his thinking, the consistency of his adherence to right and justice, and the degree to which he holds himself aloof from blocs, groups, and techniques that would sacrifice justice for expediency."

"Courts cannot function in a free country when the atmosphere is charged with the effusions of a press designed to poison the mind of the public against the presiding judges rather than to clarify the issues and propagate the truth about them. The latter was the press that Mr. Jefferson visioned when he promulgated the thesis, 'Our liberty depends on the freedom of the press and that cannot be limited without being lost.' "

"Freedom to publish one's views is a principle of universal practice, but when the press deliberately abandons the proprieties and sets out to poison its pabulum or to sow dragons' teeth and dispense canards for the purpose of doing another a wrong, it is no different category from a free man that does likewise. The most rigid safeguard thrown around a free press would not protect appellants from falsely publishing or announcing to the world that the clergy of Miami were in sympathy with the practice of polygamy or were fostering other doctrines equally obnoxious to approved moral standards."

"The theory of our system of fair trial is that the determination of every case should be induced solely by evidence and argument in open court and the law applicable thereto and not by any outside influence, whether of private talk or public print."

"The State Courts touch the public much more frequently than the Federal Courts and they have many reasons to enforce orderly administration that would not arise in the Federal Courts. If that power is to be construed by what appellants contend to be the pattern in the Bridges and Nye cases, then more than one hundred years of state law and decisions on the subject are turned into confusion or set at naught. . . .

"We do not think this can be the law. The Bridges case was disposed of on authority of the ' "clear and present danger" cases,' which are not analogous to most of the state cases because they arise from a different state of the law. The ultimate test in the Bridges case requires that the 'substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.' Even if this test is to [be] the rule in the State Courts, they

Cases were pending at the time of the editorials. We agree that the editorials did not state objectively the attitude of the judges. We accept the statement of the Supreme Court that under Florida law, "There was no judgment that could have been entered in any of them except the one that was entered." 156 Fla. at 240, 22 So. 2d at 882. And, although we may feel that this record scarcely justifies the harsh inference that the truth was willfully or wantonly or recklessly withheld from the public or that the motive behind the publication was to abase and destroy the efficiency of the courts, we may accept in this case that conclusion of the Florida courts upon intent and motive as a determination of fact.[7] While the ultimate power is here to ransack the record for facts in constitutional controversies, we are accustomed to adopt the result of the state court's examination.[8] It is the findings of the state courts on undisputed facts or the undisputed facts themselves which ordinarily furnish the basis for our appraisal of claimed violations of federal constitutional rights.[9]

The acceptance of the conclusion of a state court as to the facts of a situation leaves open to this Court the determination of federal constitutional rights in the setting of

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are authorized to apply it by their own law and standards and unless the application is shown to be arbitrary and unreasonable, their judgment should not be disturbed. The law in Florida permits the most liberal exercise possible of freedom of the press but holds to account those who abuse it.

"We therefore hold that the cartoon and the editorials afford ample support for the judgment imposed and that the issues were properly adjudicated under Florida law."

[7] See IX Wigmore, Evidence (3d Ed.) § 2557. *Crawford* v. *United States*, 212 U. S. 183, 203.

[8] *Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 287, 293–94; *Lisenba* v. *California*, 314 U. S. 219, 238.

[9] *Chambers* v. *Florida*, 309 U. S. 227, 239; *Ashcraft* v. *Tennessee*, 322 U. S. 143, 152, 153, 154; *Malinski* v. *New York*, 324 U. S. 401, 404.

those facts.[10] When the *Bridges* case was here, there was necessarily involved a determination by the California state court that all of the editorials had, at least, a tendency to interfere with the fair administration of criminal justice in pending cases in a court of that state. Yet this Court was unanimous in saying that two of those editorials had no such impact upon a court as to justify a conviction of contempt in the face of the principles of the First Amendment. We must, therefore, weigh the right of free speech which is claimed by the petitioners against the danger of the coercion and intimidation of courts in the factual situation presented by this record.

Free discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve.[11] Discussion that follows the termination of a case may be inadequate to emphasize the danger to public welfare of supposedly wrongful judicial conduct.[12] It does not follow that public comment of every character upon pending trials or legal proceedings may be as free as a similar comment after complete disposal of the litigation. Between the extremes there are areas of discussion which an understanding writer will appraise in the

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[10] See the cases in the preceding paragraph, note 8.

[11] *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115; *Board of Education* v. *Barnette*, 319 U. S. 624, 639; *Thomas* v. *Collins*, 323 U. S. 516, 527, 530.

[12] *Bridges* v. *California*, 314 U. S. at 269:

"No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. Yet, it would follow as a practical result of the decisions below that anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted."

light of the effect on himself and on the public of creating a clear and present danger to fair and orderly judicial administration. Courts must have power to protect the interests of prisoners and litigants before them from unseemly efforts to pervert judicial action. In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.

While a disclaimer of intention does not purge a contempt, we may at this point call attention to the sworn answer of petitioners that their purpose was not to influence the court. An excerpt appears below.[13] For circumstances to create a clear and present danger to judicial administration, a solidity of evidence should be required which it would be difficult to find in this record. Com-

[13] "These respondents deny any intent by either said editorial or said cartoon either in words or otherwise to interfere with fair and impartial justice in the State of Florida and deny that the large character in the cartoon was beside the judge and on the bench and being heard, recognized and favored, but, on the contrary, these respondents respectfully show that it was the intention of said editorial and said cartoon to condemn and criticise the system of pleading and practice and procedure created by the laws of Florida, whereby such cases could long be delayed and then could be dismissed upon technical grounds in the manner herein shown."

We add Mr. Pennekamp's statement of the editorial policy of the Miami Herald:

" 'We are ourselves Free—Free as the Constitution we enjoy—Free to truth, good manners and good sense. We shall be for whatever measure is best adapted to defending the rights and liberties of the people and advancing useful knowledge. We shall labor at all times to inspire the people with a just and proper sense of their condition, to point out to them their true interest and rouse them to pursue it.' "

pare *Baumgartner* v. *United States,* 322 U. S. 665, 670; *Schneiderman* v. *United States,* 320 U. S. 118.

The comments were made about judges of courts of general jurisdiction—judges selected by the people of a populous and educated community. They concerned the attitude of the judges toward those who were charged with crime, not comments on evidence or rulings during a jury trial. Their effect on juries that might eventually try the alleged offenders against the criminal laws of Florida is too remote for discussion. Comment on pending cases may affect judges differently. It may influence some judges more than others. Some are of a more sensitive fiber than their colleagues. The law deals in generalities and external standards and cannot depend on the varying degrees of moral courage or stability in the face of criticism which individual judges may possess any more than it generally can depend on the personal equations or individual idiosyncrasies of the tort-feasor. *The Germanic,* 196 U. S. 589, 596; *Arizona Employers' Liability Cases,* 250 U. S. 400, 422, 432. We are not willing to say under the circumstances of this case that these editorials are a clear and present danger to the fair administration of justice in Florida. Cf. *Near* v. *Minnesota,* 283 U. S. 697, 714–15.

What is meant by clear and present danger to a fair administration of justice? No definition could give an answer. Certainly this criticism of the judges' inclinations or actions in these pending non-jury proceedings could not directly affect such administration. This criticism of their actions could not affect their ability to decide the issues. Here there is only criticism of judicial action already taken, although the cases were still pending on other points or might be revived by rehearings. For such injuries, when the statements amount to defamation, a

judge has such remedy in damages for libel as do other public servants.

It is suggested, however, that even though his intellectual processes cannot be affected by reflections on his purposes, a judge may be influenced by a desire to placate the accusing newspaper to retain public esteem and secure reelection presumably at the cost of unfair rulings against an accused. In this case too many fine-drawn assumptions against the independence of judicial action must be made to call such a possibility a clear and present danger to justice. For this to follow, there must be a judge of less than ordinary fortitude without friends or support or a powerful and vindictive newspaper bent upon a rule or ruin policy, and a public unconcerned with or uninterested in the truth or the protection of their judicial institutions. If, as the Florida courts have held and as we have assumed, the petitioners deliberately distorted the facts to abase and destroy the efficiency of the court, those misrepresentations with the indicated motives manifested themselves in the language employed by petitioners in their editorials. The Florida courts see in this objectionable language an open effort to use purposely the power of the press to destroy without reason the reputation of judges and the competence of courts. This is the clear and present danger they fear to justice. Although we realize that we do not have the same close relations with the people of Florida that are enjoyed by the Florida courts, we have no doubt that Floridians in general would react to these editorials in substantially the same way as citizens of other parts of our common country.

As we have pointed out, we must weigh the impact of the words against the protection given by the principles of the First Amendment, as adopted by the Fourteenth, to public comment on pending court cases. We conclude

that the danger under this record to fair judicial administration has not the clearness and immediacy necessary to close the door of permissible public comment. When that door is closed, it closes all doors behind it.

Reversed.

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

MR. JUSTICE FRANKFURTER, concurring.

On the basis of two editorials and a cartoon, the Circuit Court of Florida for the County of Dade found the publisher of the Miami *Herald* and one of its editors guilty of contempt of court.[1] The editor, Pennekamp, was fined $250 and the Publishing Company, $1,000. Deeming *Bridges* v. *California*, 314 U. S. 252, not controlling, the Supreme Court of Florida, with two judges dissenting, sustained the convictions. 156 Fla. 227, 22 So. 2d 875.

In the *Bridges* case this Court recently canvassed constitutional aspects of contempt of court by publication. But it was hardly to be expected that other problems in the large field within which the *Bridges* case moved would not recur. This Court sits to interpret, in appropriate judicial controversies, a Constitution which in its Bill of Rights formulates the conditions of a democracy. But democracy is the least static form of society. Its basis

[1] The judges who tried the contempt cases were the same judges who were criticized by the editorials. The words of caution of Mr. Chief Justice Taft become relevant: "The delicacy there is in the judge's deciding whether an attack upon his own judicial action is mere criticism or real obstruction, and the possibility that impulse may incline his view to personal vindication, are manifest." *Craig* v. *Hecht*, 263 U. S. 255, 279 (concurring). But the judges who tried petitioners were sensible of the delicacy of their position, and offered to retire from the case if petitioners felt they would prefer to be tried by another judge.

is reason not authority. Formulas embodying vague and uncritical generalizations offer tempting opportunities to evade the need for continuous thought. But so long as men want freedom they resist this temptation. Such formulas are most beguiling and most mischievous when contending claims are those not of right and wrong but of two rights, each highly important to the well-being of society. Seldom is there available a pat formula that adequately analyzes such a problem, least of all solves it. Certainly no such formula furnishes a ready answer to the question now here for decision or even exposes its true elements. The precise issue is whether, and to what extent, a State can protect the administration of justice by authorizing prompt punishment, without the intervention of a jury, of publications out of court that may interfere with a court's disposition of pending litigation.

The decision in the *Bridges* case did not explicitly deny to the States the right to protect the judicial process from interference by means of a publication bearing on a pending litigation. The atmosphere and emanations of the Court's opinion, however, were calculated to sanction anything to be said or written outside the courtroom even though it may hurt or embarrass the just outcome of a proceeding. But in a series of decisions which presented most sharply the constitutional extent of freedom of speech, this Court had held that the Constitution did not allow absolute freedom of expression—a freedom unrestricted by the duty to respect other needs fulfillment of which makes for the dignity and security of man. *Schenck* v. *United States,* 249 U. S. 47; *Frohwerk* v. *United States,* 249 U. S. 204; *Debs* v. *United States,* 249 U. S. 211.

No Justice thought more deeply about the nature of a free society or was more zealous to safeguard its conditions by the most abundant regard for civil liberty than Mr. Justice Holmes. He left no doubt that judicial protection

of freedom of utterance is necessarily qualified by the requirements of the Constitution as an entirety for the maintenance of a free society. It does an ill-service to the author of the most quoted judicial phrases regarding freedom of speech, to make him the victim of a tendency which he fought all his life, whereby phrases are made to do service for critical analysis by being turned into dogma. "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." Holmes, J., dissenting, in *Hyde* v. *United States,* 225 U. S. 347, 384, at 391. Words which "are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent," *Schenck* v. *United States,* 249 U. S. 47, 52, speak their own condemnation. But it does violence to the juristic philosophy and the judicial practice of Mr. Justice Holmes to assume that in using the phrase "a clear and present danger" he was expressing even remotely an absolutist test or had in mind a danger in the abstract. He followed the observation just quoted by the emphatic statement that the question is one "of proximity and degree," as he conceived to be most questions in connection with the large, undefined rights guaranteed by the Constitution. And Mr. Justice Brandeis, co-architect of the great constitutional structure of civil liberties, also recognized that "the permissible curtailment of free speech is . . . one of degree. And because it is a question of degree the field in which the jury may exercise its judgment is, necessarily, a wide one." *Schaefer* v. *United States,* 251 U. S. 466, 482, at 483 (dissenting). If Mr. Justice Brandeis' constitutional philosophy means anything, it is clear beyond peradventure that he would not deny to a State, exercising its judgment as to the mode by which speech may be curtailed by punishment

subsequent to its utterance, a field less wide than that which he permitted a jury in a federal court.

"Clear and present danger" was never used by Mr. Justice Holmes to express a technical legal doctrine or to convey a formula for adjudicating cases. It was a literary phrase not to be distorted by being taken from its context. In its setting it served to indicate the importance of freedom of speech to a free society but also to emphasize that its exercise must be compatible with the preservation of other freedoms essential to a democracy and guaranteed by our Constitution. When those other attributes of a democracy are threatened by speech, the Constitution does not deny power to the States to curb it. "The clear and present danger" to be arrested may be danger short of a threat as comprehensive and vague as a threat to the safety of the Republic or "the American way of life." Neither Mr. Justice Holmes nor Mr. Justice Brandeis nor this Court ever suggested in all the cases that arose in connection with the First World War, that only imminent threats to the immediate security of the country would authorize courts to sustain legislation curtailing utterance. Such forces of destruction are of an order of magnitude which courts are hardly designed to counter. "The clear and present danger" with which its two great judicial exponents were concerned was a clear and present danger that utterance "would bring about the evil which Congress sought and had a right to prevent." *Schaefer* v. *United States, supra.* Among "the substantive evils" with which legislation may deal is the hampering of a court in a pending controversy, because the fair administration of justice is one of the chief tests of a true democracy. And since men equally devoted to the vital importance of freedom of speech may fairly differ in an estimate of this danger in a particular case, the field in which a State "may exercise its judgment is, necessarily, a wide one." Therefore,

every time a situation like the present one comes here the precise problem before us is to determine whether the State court went beyond the allowable limits of judgment in holding that conduct which has been punished as a contempt was reasonably calculated to endanger a State's duty to administer impartial justice in a pending controversy.

Without a free press there can be no free society.[2] Freedom of the press, however, is not an end in itself but a

[2] ". . . the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege." *Near* v. *Minnesota*, 283 U. S. 697, 719–20.

Not unrelated to this whole problem, however, are the technological and economic influences that have vastly transformed the actual operation of the right to a free, in the sense of a governmentally uncensored, press. Bigness and concentration of interest have put their impress also on this industry. "Today ideas are still flowing freely, but the sources from which they rise have shown a tendency to evaporate. . . . The controlling fact in the free flow of thought is not diversity of opinion, it is diversity of the *sources* of opinion—that is, diversity of ownership. . . . There are probably a lot more words written and spoken in America today than ever before, and on more subjects; but if it is true, as this book suggests, that these words and ideas are flowing through fewer channels, then our first freedom has been diminished, not enlarged." E. B. White, in the New Yorker, March 16, 1946, p. 97, reviewing Ernst, *The First Freedom* (1946). There are today incomparably more effective and more widespread means for the dissemination of ideas and information than in the past. But a steady shrinkage of a diffused ownership raises far reaching questions regarding the meaning of the "freedom" of a free press.

means to the end of a free society. The scope and nature of the constitutional protection of freedom of speech must be viewed in that light and in that light applied. The independence of the judiciary is no less a means to the end of a free society, and the proper functioning of an independent judiciary puts the freedom of the press in its proper perspective. For the judiciary cannot function properly if what the press does is reasonably calculated to disturb the judicial judgment in its duty and capacity to act solely on the basis of what is before the court. A judiciary is not independent unless courts of justice are enabled to administer law by absence of pressure from without, whether exerted through the blandishments of reward or the menace of disfavor. In the noble words, penned by John Adams, of the First Constitution of Massachusetts: "It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit." [3] A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press. Neither has primacy over the other; both are indispensable to a free society. The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of the potent means for assuring judges their independence is a free press.

A free press is vital to a democratic society because its freedom gives it power. Power in a democracy implies responsibility in its exercise. No institution in a democracy, either governmental or private, can have absolute

[3] Article XXIX of the Declaration of Rights of the Constitution of Massachusetts, 1780.

power.[4] Nor can the limits of power which enforce responsibility be finally determined by the limited power itself. See Carl L. Becker, *Freedom and Responsibility in the American Way of Life* (1945). In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise. Most State constitutions expressly provide for liability for abuse of the press's freedom. That there was such legal liability was so taken for granted by the framers of the First Amendment that it was not spelled out. Responsibility for its abuse was imbedded in the law.[5] The First Amendment safeguarded the right.

These are generalities. But they are generalities of the most practical importance in achieving a proper adjustment between a free press and an independent judiciary.

Especially in the administration of the criminal law—that most awesome aspect of government—society needs independent courts of justice. This means judges free from control by the executive, free from all ties with political interests, free from all fears of reprisal or hopes of

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[4] That this indispensable condition for a free society was well known to the framers of the Constitution, is the theme of Mr. Justice Brandeis in his dissenting opinion in *Myers* v. *United States*, 272 U. S. 52, 240, at 293: "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." And see Mr. Chief Justice Taft, in *Ex parte Grossman*, 267 U. S. 87, 119–22.

[5] The State constitutions make it clear that the freedom of speech and press they guarantee is not absolute. All, with the exception only of Massachusetts, New Hampshire, South Carolina, Vermont, and West Virginia, explicitly provide in practically identical language for the right to speak, write and publish freely, every one, however, "being responsible for the abuse of that right."

reward. The safety of society and the security of the innocent alike depend upon wise and impartial criminal justice. Misuse of its machinery may undermine the safety of the State; its misuse may deprive the individual of all that makes a free man's life dear.[6]

Criticism therefore must not feel cramped, even criticism of the administration of criminal justice. Weak characters ought not to be judges, and the scope allowed to the press for society's sake may assume that they are not. No judge fit to be one is likely to be influenced consciously except by what he sees and hears in court and by what is judicially appropriate for his deliberations. However, judges are also human, and we know better than did our forbears how powerful is the pull of the unconscious and how treacherous the rational process. While the ramparts of reason have been found to be more fragile than the Age of Enlightenment had supposed, the means for arousing passion and confusing judgment have been reinforced. And since judges, however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print.

The English bench is justly noted for its sturdiness, and it was no weak-kneed judge who recently analyzed the mis-

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[6] See, *e. g.*, the disturbing record in the case of Campbell, New York County Criminal Courts Bar Association, *In the Matter of the Investigation of the Conviction of Bertram M. Campbell* (Feb. 22, 1946), and the decision of the New York Court of Claims, on June 17, 1946, awarding Campbell $115,000 for wrongful conviction, including damages for loss of earnings, after his pardon by Governor Dewey following the confession by another of the crimes for which Campbell had been convicted. "He was the victim of a miscarriage of justice but fortunately for him the State has undertaken to rectify the mistake as far as possible. . . . Seven years, six months and five days elapsed from claimant's arrest until he was pardoned." *Campbell* v. *New York*, 186 Misc. 586, 591.

chief of exposing even the hardiest nature to extraneous influence: ". . . I think it is a fallacy to say or to assume that the presiding judge is a person who cannot be affected by outside information. He is a human being, and while I do not suggest that it is likely that any judge, as the result of information which had been improperly conveyed to him, would give a decision which otherwise he would not have given, it is embarrassing to a judge that he should be informed of matters which he would much rather not hear and which make it much more difficult for him to do his duty. To repeat the words I have already read from the judgment of Wills J. in *Rex* v. *Parke* [(1903) 2 K. B. 432]. 'The reason why the publication of articles like those with which we have to deal is treated as a contempt of court is because their tendency and sometimes their object is to deprive the court of the power of doing that which is the end for which it exists—namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it.' . . . I venture to think that no judge with long criminal experience will fail to be able to recall instances in which the publication of matters such as that to which I have referred has had the effect of making the task of a judge extremely difficult, and no one has the right to publish matter which will have that effect." Humphreys, J., in *Rex* v. *Davies,* [1945] 1 K. B. 435, 442–43. The observations of another judge in the same case bear quoting: ". . . jurors are not the only people whose minds can be affected by prejudice. One of the evils of inadmissible matter being disseminated is that no one can tell what effect a particular piece of information may have on his mind. Why, as my Lord has asked, and I can think of no better word, should a judge be 'embarrassed' by having matters put into his mind, the effect of which it is impossible to estimate or assess? As an illustration of this proposition, the Court of Criminal

Appeal has expressed, not once but many times, its thorough disapproval of evidence which is sometimes given by police officers at the end of a case when a man has been convicted. On such occasions all sorts of allegations are frequently made against a man's character, sometimes in the nature of hearsay and sometimes not supported by evidence at all. What is the ground for the disapproval of the Court of Criminal Appeal regarding such statements? It can only be that the judge who, after hearing the statements, has to pronounce sentence, may, quite unconsciously, have his judgment influenced by matters which he has no right to consider. . . . Not all defamatory matter can amount to contempt of court. . . . Whether defamatory matter amounts to contempt in any particular case is a question in each case of fact, of degree and of circumstances." Oliver, J., in *Rex* v. *Davies, supra,* at 445–46. *Cf. Parashuram Detaram Shamdasani* v. *King-Emperor,* [1945] A. C. 264. To deny that bludgeoning or poisonous comment has power to influence, or at least to disturb, the task of judging is to play make-believe and to assume that men in gowns are angels. The psychological aspects of this problem become particularly pertinent in the case of elected judges with short tenure.

"Trial by newspaper," like all catch phrases, may be loosely used but it summarizes an evil influence upon the administration of criminal justice in this country. Its absence in England, at least its narrow confinement there, furnishes an illuminating commentary. It will hardly be claimed that the press is less free in England than in the United States. Nor will any informed person deny that the administration of criminal justice is more effective there than here. This is so despite the commonly accepted view that English standards of criminal justice are more civilized, or, at the least, that recognized standards of fair conduct in the prosecution of crime are better ob-

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served. Thus, "the third degree" is not unjustly called "the American method." [7] This is not the occasion to enlarge upon the reasons for the greater effectiveness of English criminal justice but it may be confidently asserted that it is more effective partly because its standards are so civilized.[8] There are those who will resent such a statement as praise of another country and dispraise of one's

[7] Compare *Inquiry in Regard to the Interrogation by the Police of Miss Savidge,* Cmd. 3147 (1928); *Report of the Royal Commission on Police Powers and Procedure,* Cmd. 3297 (1929), with *Report on Lawlessness in Law Enforcement,* in 4 National Commission on Law Observance and Enforcement Reports (1931). See also *Wan* v. *United States,* 266 U. S. 1; *Brown* v. *Mississippi,* 297 U. S. 278; *Chambers* v. *Florida,* 309 U. S. 227.

[8] The recent ruling by the Speaker of the House of Commons regarding the limitation on the right to comment even in Parliament on the pending proceedings against the accused Nazis before the Nuremberg tribunal bears significantly on the attitude and controlling standards deemed appropriate in England in order to protect the judicial process from extraneous influences:

"The Rule to which the Noble Lord has drawn my attention that reflections cannot be made on judges of the High Court and certain other courts, except by way of a substantive Motion, applies only to the courts of this country. In terms, therefore, it only covers the two British members of this tribunal. I feel that it would be worse than invidious—indeed improper—not to extend the same protection to their colleagues on this tribunal who represent the three other Allied Nations.

"There is, however, another of our Rules of Debate which is relevant to this case, the Rule that matters which are *sub judice* should not be the subject of discussion in this House. This Rule again, in terms, applies only to British courts. The court in Nuremberg is a court in which British judges participate, and we have the same interest in seeing that nothing is done here to disturb its judicial atmosphere as we have in the case of British courts—indeed, perhaps a greater interest, since the eyes of the world are upon this new and difficult procedure of international justice, and the consequences of ill-advised interference might be incalculably mischievous.

"I think that the intention of both the Rules to which I have referred, is to preserve the House from even the appearance of inter-

own. What it really means is that one covets for his own country a quality of public conduct not surpassed elsewhere.

Certain features of American criminal justice have long been diagnosed by those best qualified to judge as serious and remediable defects. On the other hand, some mischievous accompaniments of our system have been so pervasive that they are too often regarded as part of the exuberant American spirit. Thus, "trial by newspapers" has sometimes been explained as a concession to our peculiar interest in criminal trials. Such interest might be an innocent enough pastime were it not for the fact that the stimulation of such curiosity by the press and the response to such stimulated interest have not failed to cause grievous tragedies committed under the forms of law. Of course trials must be public and the public have a deep interest in trials. The public's legitimate interest, however, precludes distortion of what goes on inside the courtroom, dissemination of matters that do not come before the court, or other trafficking with truth intended to influence proceedings or inevitably calculated to disturb the course of justice. The atmosphere in a courtroom may be subtly influenced from without.[9] See dissenting

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fering in the administration of British justice—and this should include trials for which this country has some responsibility; and I rule, therefore, that all the members of this International Court are protected to the same extent as British judges, and that discussion of its proceedings is out of Order, in the same way as matters under adjudication in a British court of law." 416 Parliamentary Debates (Hansard) 599–600, Nov. 22, 1945.

[9] The manner in which the Hauptmann trial was reported led to a searching inquiry by a special committee of the American Bar Association and it reported the following recommendations:

"In the foregoing report we have tried to make a fair presentation of salient facts. We have been moved less by spirit of censure than by hope of remedial action. The excesses we have described differ from practices in many other cases mainly in degree.

"The trial of a criminal case is a business that has for its sole purpose

opinion of Mr. Justice Holmes, in *Frank* v. *Mangum*, 237 U. S. 309, 345, at 349. Cases are too often tried in news-

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the administration of justice, and it should be carried on without distracting influences.

"Passing from the general to the specific we recommend:

"That attendance in the courtroom during the progress of a criminal trial be limited to the seating capacity of the room.

"That the process of subpoena or any other process of the court should never be used to secure preferential admission of any person or spectator; that such abuse of process be punished as contempt.

"That approaches to the courtroom be kept clear, to the end that free access to the courtroom be maintained.

"That no use of cameras or photographic appliances be permitted in the courtroom, either during the session of the court or otherwise.

"That no sound registering devices for publicity use be permitted to operate in the courtroom at any time.

"That the surreptitious procurement of pictures or sound records be considered contempt of court and be punished as such.

"That the courtroom and the court house be kept free from news distributing devices and equipment.

"That newspaper accounts of criminal proceedings be limited to accounts of occurrences in court without argument of the case to the public.

"That no popular referendum be taken during the pendency of the litigation as to the guilt or innocence of the accused.

"That broadcasting of arguments, giving out of argumentive press bulletins, and every other form of argument or discussion addressed to the public, by lawyers in the case during the progress of the litigation be definitely forbidden.

"That bulletins by the defendant issued to the public during the progress of the trial be definitely forbidden.

"That public criticism of the court or jury by lawyers in the case during the progress of the litigation be not tolerated.

"That featuring in vaudeville of jurors or other court officers, either during or after the trial, be forbidden.

"That the giving of paid interviews or the writing of paid articles by jurors, either during or after the trial, be forbidden.

"That the atmosphere of the courtroom and adjacent premises be maintained as one of dignity and calm." (1936) 22 *A. B. A. Journal* 79–80.

papers before they are tried in court, and the cast of characters in the newspaper trial too often differs greatly from the real persons who appear at the trial in court and who may have to suffer its distorted consequences.[10]

Newspapers and newspaper men themselves have acknowledged these practices, deplored their evils, and urged reform.[11] See The Attorney General's Conference on Crime (1934) 82–111. One of the most zealous claimants of the prerogatives of the press, the Chicago *Tribune,* has even proposed legal means for the correction of these in-

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[10] See, *e. g.,* Gilman, *The Truth Behind the News* (June, 1933) 29 American Mercury 139. "It is idle for such newspapers to claim that they adopt such practices in the public interest. Their motive is the sordid one of increasing their profits, unmindful of the result to the unfortunate wretch who may ultimately have to stand his trial for murder." Mr. Justice Blair, in *Attorney-General* v. *Tonks* [1934] N. Z. L. R. 141, 148, at 150. *Cf.* Pratt, *How the Censors Rigged the News* (Feb., 1946) 192 Harper's Magazine, 97, 105.

[11] A professional defense of crime reporting has this bit of refreshing candor: "I will concede, however, that had it not been for popular feeling developed to fever heat by the newspapers, Hickman might be living today behind the walls of some madhouse instead of having met death in the electric chair." Dewey, *Crime and the Press* (Dec. 30, 1931) 15 Commonweal 231, 233. Compare the statement by one of the most experienced criminal lawyers, Clarence Darrow:

"Trial by jury is rapidly being destroyed in America by the manner in which the newspapers handle all sensational cases. I don't know what should be done about it. The truth is that the courts and the lawyers don't like to proceed against newspapers. They are too powerful. As the law stands today there is no important criminal case where the newspapers are not guilty of contempt of court day after day. All lawyers know it, all judges know it, and all newspapers know it. But nothing is done about it. No new laws are necessary. The court has full jurisdiction to see that no one influences a verdict or a decision. But everyone is afraid to act." Quoted by Perry, in *The Courts, the Press, and the Public* (*Trial by Newspaper*) (1931) 30 Mich. L. Rev. 228, 234; (1932) 66 U. S. Law Rev. 374, 379; (1932) 11 Phil. L. J. 277, 282.

roads upon the province of criminal justice: " 'The Tribune advocates and will accept drastic restriction of this preliminary publicity. The penetration of the police system and the courts by journalists must stop. With such a law there would be no motivation for it. Though such a law will be revolutionary in American journalism, though it is not financially advisable for newspapers, it still is necessary. Restrictions must come.' " [12]

It is not for me to express approval of these views, still less, judgment on the constitutional issues that would arise if they were translated into legislation. But they are relevant to an understanding of the nature of our problem. They serve also to emphasize that the purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. ". . . the liberty of the press is no greater and no less than the liberty of every subject of the Queen," *Regina* v. *Gray*, [1900] 2 Q. B. 36, 40, and, in the United States, it is no greater than the liberty of every citizen of the Republic. The right to undermine proceedings in court is not a special prerogative of the press.

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[12] 30 Mich. L. Rev. at 232; 66 U. S. Law Rev. at 377; 11 Phil. L. J. at 280. In an address before the 1936 meeting of the American Bar Association Delegates, Sir Willmott Lewis, the veteran Washington correspondent of *The Times* (London) expressed these views:

"The point I would make is that neither the tradition of orderly legal procedure, nor the obligation which the press should recognize to the maintenance of that tradition, can, *in themselves,* be enough amid the pressure and vulgarity of the modern world.

"Tradition and obligation must be *buttressed by rules,* and *those rules must be enforced* in the domain of their immediate application, by the court itself. . . .

"I think it intolerable, and I cannot think that it should not be punishable, that a charge lying against any citizen should be irresponsibly tried in the public prints, whose plain duty is the reporting, and not the hearing, of causes. . . ." (1936) 20 J. Am. Jud. Soc. 84, 86.

The press does have the right, which is its professional function, to criticize and to advocate. The whole gamut of public affairs is the domain for fearless and critical comment, and not least the administration of justice. But the public function which belongs to the press makes it an obligation of honor to exercise this function only with the fullest sense of responsibility. Without such a lively sense of responsibility a free press may readily become a powerful instrument of injustice.[13] It should not and may not attempt to influence judges or juries before they have made up their minds on pending controversies. Such a restriction, which merely bars the operation of extraneous influence specifically directed to a concrete case, in no wise curtails the fullest discussion of public issues generally. It is not suggested that generalized discussion of a particular topic should be forbidden, or run

[13] See the skeptical remarks of H. L. Mencken, a stout libertarian, on the efficacy of journalistic self-restraint:

> "Journalistic codes of ethics are all moonshine. Essentially, they are as absurd as would be codes of street-car conductors, barbers or public jobholders. If American journalism is to be purged of its present swinishness and brought up to a decent level of repute—and God knows that such an improvement is needed—it must be accomplished by the devices of morals, not by those of honor. That is to say, it must be accomplished by external forces, and through the medium of penalties exteriorly inflicted." Quoted by LeViness, in *Law and the Press, The Daily Record, Baltimore,* March 11, 1932, p. 3, col. 1, 4.

The author of the article, Mr. LeViness, a Baltimore *Sun* reporter turned lawyer, followed the quotation from Mr. Mencken with this comment:

> "This puts the problem, as far as Court and police news goes, squarely back where it belongs: in the lap of the judiciary. The Courts must set the standards; the better journals will follow joyously and the gumchewers' sheets must be whipped into line. The solution is fearless jurists, not afraid of the double-edged sword of contempt process; intelligent jurists, able to exercise this power in the best, enlightened public interest." *Ibid.*

the hazard of contempt proceedings, merely because some phases of such a general topic may be involved in a pending litigation. It is the focused attempt to influence a particular decision that may have a corroding effect on the process of justice, and it is such comment that justifies the corrective process.

The administration of law, particularly that of the criminal law, normally operates in an environment that is not universal or even general but individual. The distinctive circumstances of a particular case determine whether law is fairly administered in that case, through a disinterested judgment on the basis of what has been formally presented inside the courtroom on explicit considerations, instead of being subjected to extraneous factors psychologically calculated to disturb the exercise of an impartial and equitable judgment.

If men, including judges and journalists, were angels, there would be no problems of contempt of court. Angelic judges would be undisturbed by extraneous influences and angelic journalists would not seek to influence them. The power to punish for contempt, as a means of safeguarding judges in deciding on behalf of the community as impartially as is given to the lot of men to decide, is not a privilege accorded to judges. The power to punish for contempt of court is a safeguard not for judges as persons but for the function which they exercise. It is a condition of that function—indispensable for a free society—that in a particular controversy pending before a court and awaiting judgment, human beings, however strong, should not be torn from their moorings of impartiality by the undertow of extraneous influence. In securing freedom of speech, the Constitution hardly meant to create the right to influence judges or juries. That is no more freedom of speech than stuffing a ballot box is an exercise of the right to vote.

Due regard for these general considerations must dispose of the present controversy. Since at the core of our problem is a proper balance between two basic conditions of our constitutional democracy—freedom of utterance and impartial justice—we cannot escape the exercise of judgment on the particular circumstances of the particular case. And we must always bear in mind that since a judgment from a State court comes here as the voice of the State, it must be accorded every fair intendment that in reason belongs to action by a State.

According to the Florida Supreme Court, the charge against petitioners was that "both the editorials and the cartoon were predicated on inaccurate, distorted, incomplete and biased reports of pending litigation, that the purpose and effect of the editorials and the cartoon were to impute partisanship and favor on the part of the circuit judges to those charged with crime and that such partisanship was so pronounced that they refused to heed the voice of the people's representatives. . . . So the vice in both the editorials was the distorted, inaccurate statement of the facts and with that statement were scrambled false insinuations that amounted to unwarranted charges of partisanship and unfairness on the part of the judges." [14] The tenor of the first editorial was complaint of the technicalities and delays of the law which seem to give excessive protection to defendants. It makes no suggestion which could be construed as an attempt to influence the court's decision in a matter actually pending before it. All the questions discussed in the editorial had been acted on by the trial judges. The editor merely indulged in general criticism of those acts as exemplifying an oversolicitous concern for defendants by the law and by the judges who interpreted it. Nor was the cartoon directed toward a particular pending case. Indeed, it partly serves

[14] *Pennekamp* v. *State*, 156 Fla. 227, 239, 240, 22 So. 2d 875, 881, 882.

to interpret the editorial as one concerned with a general situation. One suspects that only judicial hypersensitiveness would find in it an animus specifically directed. The opinion of the court illustrates the danger of confusing correction of interference with judicial action with concern over a court's dignity. Instead of treating lightly a cartoon indistinguishable in type from scores of such ephemeral products, the court saw in it wholly undeserved significance.

Again, the second editorial referred to a particular case only as an example. In that case, too, the court had made its decision. What the editor criticized was the speed of disposition and other features of procedure which attended the case. His allowable concern was that the people have a chance to give their argument, that the prosecution in criminal cases be treated as fairly as the defense. Inaccurate and even false comment on litigation no longer pending may not be dealt with by punishing for contempt as a means of assuring the just exercise of the judicial process.

The Florida Supreme Court referred to the cases criticized as "pending." But it did not define the scope of "pending" nor did the grounds of its decision have any particular dependence on the requirement that a case be pending. The finding by a State court that a case is "pending" in the sense relevant to the power to punish for contempt does not, of course, bar its review here. Otherwise a State court could foreclose our protection of the constitutional right of free speech by putting forth as a non-federal ground of decision that which is an essential aspect of the federal question. *Union Pacific R. Co.* v. *Public Service Comm'n*, 248 U. S. 67, 69–70; *Ward* v. *Love County*, 253 U. S. 17, 22; *Davis* v. *Wechsler*, 263 U. S. 22.

If it is contemptuous to bring the courts of a State into disrepute and generally to impair their efficiency, then it

can make no difference on what occasion or with reference to what event that effect is achieved or attempted. But when it is understood what is meant by a "pending" case, it becomes plain that for purposes of punishing for contempt as interference, the cases were not actively pending. "Pending" is not used with the technical inclusiveness that it has in the phrase *lis pendens.* In the situations in which that phrase has meaning and applicability, the important considerations are whether any proceedings have been taken to put the issue into court and whether it is still there. Where the power to punish for contempt is asserted, it is not important that the case is technically in court or that further proceedings, such as the possibility of a rehearing, are available. "When a case is pending is not a technical, lawyer's problem, but is to be determined by the substantial realities of the specific situation." *Bridges* v. *California,* 314 U. S. 252, 279, at 303–304 (dissent). The decisive consideration is whether the judge or the jury is, or presently will be, pondering a decision that comment seeks to affect. Forbidden comment is such as will or may throw psychological weight into scales which the court is immediately balancing. *Cf.* L. Hand, J., in *Ex parte Craig,* 282 F. 138, 159–60. In the situation before us, the scales had come to rest. The petitioners offended the trial court by criticizing what the court had already put in the scales, not by attempting themselves to insert weights.

The petitioners here could not have disturbed the trial court in its sense of fairness but only in its sense of perspective. The judgment must, I agree, be reversed.

MR. JUSTICE MURPHY, concurring.

Were we to sanction the judgment rendered by the court below we would be approving, in effect, an unwarranted restriction upon the freedom of the press. That freedom

covers something more than the right to approve and condone insofar as the judiciary and the judicial process are concerned. It also includes the right to criticize and disparage, even though the terms be vitriolic, scurrilous or erroneous. To talk of a clear and present danger arising out of such criticism is idle unless the criticism makes it impossible in a very real sense for a court to carry on the administration of justice. That situation is not even remotely present in this case.

Judges should be foremost in their vigilance to protect the freedom of others to rebuke and castigate the bench and in their refusal to be influenced by unfair or misinformed censure. Otherwise freedom may rest upon the precarious base of judicial sensitiveness and caprice. And a chain reaction may be set up, resulting in countless restrictions and limitations upon liberty.

MR. JUSTICE RUTLEDGE, concurring.

One can have no respect for a newspaper which is careless with facts and with insinuations founded in its carelessness. Such a disregard for the truth not only flouts standards of journalistic activity [1] observed too often by

[1] See the following codes of ethics published in Crawford, The Ethics of Journalism (1924) App. A.: Canons of Journalism, adopted by the American Society of Newspaper Editors in 1923, Art. IV; The Oregon Code of Ethics, adopted by the Oregon State Editorial Association in 1922, Art. I; South Dakota Code of Ethics, adopted by the South Dakota Press Association in 1922, "Truth and Honesty"; Missouri Declaration of Principles and Code of Practice, adopted by the Missouri Press Association in 1921, "Editorial." And see in the same volume the extracts from rules and suggestions prepared by the following newspapers for the guidance of their staffs: The Brooklyn Eagle, The Christian Science Monitor, The Springfield Union, The Detroit News, The Hearst Newspapers (personal instructions given by William Randolph Hearst to his newspapers), The Sacramento Bee, The Kansas City Journal-Post, The Marion Star (written

breach, but in fact tends to bring the courts and those who administer them into undeserved public obloquy.

But if every newspaper which prints critical comment about courts without justifiable basis in fact, or withholds the full truth in reporting their proceedings or decisions, or goes even further and misstates what they have done, were subject on these accounts to punishment for contempt, there would be few not frequently involved in such proceedings. There is perhaps no area of news more inaccurately reported factually, on the whole, though with some notable exceptions, than legal news.

Some part of this is due to carelessness, often induced by the haste with which news is gathered and published, a smaller portion to bias or more blameworthy causes. But a great deal of it must be attributed, in candor, to ignorance which frequently is not at all blameworthy. For newspapers are conducted by men who are laymen to the law. With too rare exceptions their capacity for misunderstanding the significance of legal events and procedures, not to speak of opinions, is great. But this is neither remarkable nor peculiar to newsmen. For the law, as lawyers best know, is full of perplexities.

In view of these facts any standard which would require strict accuracy in reporting legal events factually or in commenting upon them in the press would be an impossible one. Unless the courts and judges are to be put above criticism, no such rule can obtain. There must be

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by President Harding when editing The Star). See also Sharkey, The Ethics of Journalism, An Address Delivered before the Press Conference of the World, Geneva, Switzerland, September 15, 1926, p. 10; Wicks, Ideals and Methods of English Newspapers, published in Journalistic Ethics and World Affairs, Addresses Delivered at the Fifteenth Annual Journalism Week at the University of Missouri, 1924, 25 U. of Mo. Bull. (No. 32) 25, 26; Gibbons, Newspaper Ethics (1926) 16 *et seq.*

some room for misstatement of fact, as well as for misjudgment, if the press and others are to function as critical agencies in our democracy concerning courts as for all other instruments of government.

Courts and judges therefore cannot be put altogether beyond the reach of misrepresentation and misstatement. That is true in any case, but perhaps more obviously where the judiciary is elective, as it is in most of our states, including Florida. See *Storey* v. *Illinois*, 79 Ill. 45, 52; (1927) 41 Harv. L. Rev. 254, 255. The question, and the standard, must be one of degree and effects. It cannot be placed at mere falsity, either in representation or in judgment. The statement, whether of fact or of opinion, must be of such a character, whether true or false, as to obstruct in some clear and substantial way the functioning of the judicial process in pending matters. *Bridges* v. *California*, 314 U. S. 252.[2] It is not enough that the judge's sensibilities are affected or that in some way he is brought generally into obloquy. After all, it is to be remembered that it is judges who apply the law of contempt, and the offender is their critic.

The statements in question are clearly fair comment in large part. Portions exceed that boundary. But the record does not disclose that they tended in any way to block or obstruct the functioning of the judicial process. Accordingly I concur in the Court's opinion and judgment.

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[2] "Nor does the fact that the letter was false, while it greatly affects the moral quality of the act, determine its criminality. It is punishable only if it interferes with justice, and in that respect truth is harder to meet than falsehood." L. Hand, dissenting in *Ex parte Craig*, 282 F. 138, 161, aff'd *sub nom. Craig* v. *Hecht*, 263 U. S. 255. See also the dissenting opinion of Mr. Justice Holmes, 263 U. S. at 281. But cf. *In re Providence Journal Co.*, 28 R. I. 489, 68 A. 428; *In re San Francisco Chronicle*, 1 Cal. 2d 630, 36 P. 2d 369.

Counsel for Parties.

MORGAN *v.* VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 704. Argued March 27, 1946.—Decided June 3, 1946.

1. Provisions of the Virginia Code, 1942, §§ 4097z to 4097dd, which require the separation of white and colored passengers on both interstate and intrastate motor carriers are invalid as applied to interstate passengers in vehicles moving interstate, because they burden interstate commerce contrary to Art. I, § 8, cl. 3 of the Constitution of the United States, even though Congress has enacted no legislation on the subject. Pp. 374, 380, 386.
2. If a state statute unlawfully burdens interstate commerce, the powers reserved to the State by the Tenth Amendment will not validate it. P. 376.
3. An interstate passenger, charged in a criminal proceeding with violation of the statute, is a proper person to challenge its validity as a burden on interstate commerce. P. 376.
4. State legislation is invalid if it unduly burdens interstate commerce where uniformity is necessary in the constitutional sense of useful in accomplishing a permitted purpose. Pp. 377, 380.
5. A State cannot impose undue burdens on interstate commerce by simply invoking the convenient apologetics of the police power. P. 380.
6. Seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel. P. 386.

184 Va. 24, 34 S. E. 2d 491, reversed.

Appellant, an interstate passenger, was convicted of a violation of Virginia Code, 1942, § 4097dd, relating to the segregation of white and colored passengers on motor buses. The Supreme Court of Appeals of Virginia affirmed. 184 Va. 24, 34 S. E. 2d 491. On appeal to this Court, *reversed*, p. 386.

William H. Hastie and *Thurgood Marshall* argued the cause for appellant. With them on the brief was *Leon A. Ransom.*

Abram P. Staples, Attorney General of Virginia, argued the cause and filed a brief for appellee.

Briefs were filed as *amici curiae* by *Gregory Hankin, Osmond K. Fraenkel* and *Arthur Garfield Hays* for the American Civil Liberties Union, and by *Harold A. Stevens* for the Workers Defense League, in support of appellant.

MR. JUSTICE REED delivered the opinion of the Court.

This appeal brings to this Court the question of the constitutionality of an act of Virginia,[1] which requires all passenger motor vehicle carriers, both interstate and intrastate,[2] to separate without discrimination [3] the white and colored passengers in their motor buses so that contiguous seats will not be occupied by persons of different races at the same time. A violation of the requirement of separation by the carrier is a misdemeanor.[4] The driver or other person in charge is directed and required to increase or decrease the space allotted to the respective races as may be necessary or proper and may require passengers to change their seats to comply with the allocation. The operator's failure to enforce the provisions is made a misdemeanor.[5]

These regulations were applied to an interstate passenger, this appellant, on a motor vehicle then making an interstate run or trip. According to the statement of fact by the Supreme Court of Appeals of Virginia, appellant, who is a Negro, was traveling on a motor common car-

[1] Virginia Code of 1942, §§ 4097z to 4097dd inclusive. The sections are derived from an act of General Assembly of Virginia of 1930. Acts of Assembly, Va. 1930, p. 343.

[2] *Id.*, §§ 4097z, 4097m, 4097s; *Morgan* v. *Commonwealth,* 184 Va. 24, 39, 34 S. E. 2d 491.

[3] *Id.*, § 4097aa.

[4] *Id.*, § 4097z; § 4097bb.

[5] *Id.*, § 4097bb.

rier, operating under the above-mentioned statute, from Gloucester County, Virginia, through the District of Columbia, to Baltimore, Maryland, the destination of the bus. There were other passengers, both white and colored. On her refusal to accede to a request of the driver to move to a back seat, which was partly occupied by other colored passengers, so as to permit the seat that she vacated to be used by white passengers, a warrant was obtained and appellant was arrested, tried and convicted of a violation of § 4097dd of the Virginia Code.[6] On a writ of error the conviction was affirmed by the Supreme Court of Appeals of Virginia. 184 Va. 24. The Court of Appeals interpreted the Virginia statute as applicable to appellant since the statute "embraces all motor vehicles and all

[6] "4097dd. Violation by passengers; misdemeanor; ejection.—All persons who fail while on any motor vehicle carrier, to take and occupy the seat or seats or other space assigned to them by the driver, operator or other person in charge of such vehicle, or by the person whose duty it is to take up tickets or collect fares from passengers therein, or who fail to obey the directions of any such driver, operator or other person in charge, as aforesaid, to change their seats from time to time as occasions require, pursuant to any lawful rule, regulation or custom in force by such lines as to assigning separate seats or other space to white and colored persons, respectively, having been first advised of the fact of such regulation and requested to conform thereto, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five dollars nor more than twenty-five dollars for each offense. Furthermore, such persons may be ejected from such vehicle by any driver, operator or person in charge of said vehicle, or by any police officer or other conservator of the peace; and in case such persons ejected shall have paid their fares upon said vehicle, they shall not be entitled to the return of any part of same. For the refusal of any such passenger to abide by the request of the person in charge of said vehicle as aforesaid, and his consequent ejection from said vehicle, neither the driver, operator, person in charge, owner, manager nor bus company operating said vehicle shall be liable for damages in any court."

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passengers, both interstate and intrastate." [7] The Court of Appeals refused to accept appellant's contention that the statute applied was invalid as a delegation of legislative power to the carrier by a concurrent holding "that no power is delegated to the carrier to legislate . . . . The statute itself condemns the defendant's conduct as a violation of law and not the rule of the carrier." *Id.*, at 38. No complaint is made as to these interpretations of the Virginia statute by the Virginia court.[8]

The errors of the Court of Appeals that are assigned and relied upon by appellant are in form only two. The first is that the decision is repugnant to Clause 3, § 8, Article I of the Constitution of the United States,[9] and the second the holding that powers reserved to the states by the Tenth Amendment include the power to require an interstate motor passenger to occupy a seat restricted for the use of his race. Actually, the first question alone needs consideration for, if the statute unlawfully burdens interstate commerce, the reserved powers of the state will not validate it.[10]

We think, as the Court of Appeals apparently did, that the appellant is a proper person to challenge the validity of this statute as a burden on commerce.[11] If it is an invalid burden, the conviction under it would fail. The statute affects appellant as well as the transportation company. Constitutional protection against burdens on com-

[7] *Morgan* v. *Commonwealth, supra,* 37. Cf. *Smith* v. *State,* 100 Tenn. 494, 46 S. W. 566; *Alabama & Vicksburg R. Co.* v. *Morris,* 103 Miss. 511, 60 So. 11; *Southern R. Co.* v. *Norton,* 112 Miss. 302, 73 So. 1.

[8] Compare *Hebert* v. *Louisiana,* 272 U. S. 312, 317; *General Trading Co.* v. *Tax Comm'n,* 322 U. S. 335, 337.

[9] "Section 8. The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . ."

[10] *Case* v. *Bowles,* 327 U. S. 92, 101–102.

[11] Cf. *Edwards* v. *California,* 314 U. S. 160, 172, n. 1.

merce is for her benefit on a criminal trial for violation of the challenged statute. *Hatch* v. *Reardon*, 204 U. S. 152, 160; *Federation of Labor* v. *McAdory*, 325 U. S. 450, 463.

This Court frequently must determine the validity of state statutes that are attacked as unconstitutional interferences with the national power over interstate commerce. This appeal presents that question as to a statute that compels racial segregation of interstate passengers in vehicles moving interstate.[12]

The precise degree of a permissible restriction on state power cannot be fixed generally or indeed not even for one kind of state legislation, such as taxation or health or safety.[13] There is a recognized abstract principle, however, that may be taken as a postulate for testing whether particular state legislation in the absence of action by Congress is beyond state power. This is that the state legislation is invalid if it unduly burdens that commerce in matters where uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted purpose.[14] Where uniformity is essential for the functioning of commerce, a state may not interpose its local regulation.[15] Too true it is that the principle lacks in precision. Although the quality of such a principle is abstract, its application to the facts of a situation created by the attempted enforcement of a statute brings about a specific determination as to whether or not the statute

[12] When passing upon a rule of a carrier that required segregation of an interstate passenger, this Court said, "And we must keep in mind that we are not dealing with the law of a State attempting a regulation of interstate commerce beyond its power to make." *Chiles* v. *Chesapeake & Ohio R. Co.*, 218 U. S. 71, 75.

[13] Cf. *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434, 439; *Mintz* v. *Baldwin*, 289 U. S. 346, 352; *Welch Co.* v. *New Hampshire*, 306 U. S. 79, 84.

[14] *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 766–71.

[15] *Cooley* v. *Board of Wardens*, 12 How. 299, 319; *Minnesota Rate Cases*, 230 U. S. 352, 402; *Kelly* v. *Washington*, 302 U. S. 1, 10.

in question is a burden on commerce. Within the broad limits of the principle, the cases turn on their own facts.

In the field of transportation, there has been a series of decisions which hold that where Congress has not acted and although the state statute affects interstate commerce, a state may validly enact legislation which has predominantly only a local influence on the course of commerce.[16] It is equally well settled that, even where Con-

[16] *Statutes or orders dealing with safety of operations: Smith* v. *Alabama,* 124 U. S. 465 (Alabama statute requiring an examination and license of train engineers before operating in the state); *Nashville, C. & St. L. R. Co.* v. *Alabama,* 128 U. S. 96 (statute requiring examination of railroad employees as to vision and color blindness); *New York, N. H. & H. R. Co.* v. *New York,* 165 U. S. 628 (New York statute forbidding the use of furnaces or stoves in passenger cars and requiring guard-posts on railroad bridges); *Erb* v. *Morasch,* 177 U. S. 584 (municipal ordinance limiting speed of trains in city to 6 miles an hour); *Atlantic Coast Line R. Co.* v. *Georgia,* 234 U. S. 280 (Georgia statute requiring electric headlights on locomotives); *Morris* v. *Duby,* 274 U. S. 135 (weight restrictions on motor carriers imposed by order of Oregon highway commission); *Sproles* v. *Binford,* 286 U. S. 374 (size and weight restrictions on trucks imposed by Texas statute); *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177 (statute restricting weight and size of motor carriers); *Maurer* v. *Hamilton,* 309 U. S. 598 (Pennsylvania statute forbidding the use of its highways to any vehicle carrying any other vehicle over the head of the operator of the vehicle); *Terminal Assn.* v. *Trainmen,* 318 U. S. 1 (Illinois statute requiring cabooses on freight trains).

Statutes or orders requiring local train service: Gladson v. *Minnesota,* 166 U. S. 427 (state statute requiring intrastate train to stop at county seat to take on and discharge passengers); *Lake Shore & Michigan Southern R. Co.* v. *Ohio,* 173 U. S. 285 (statute requiring three trains daily, if so many are run, to stop at each city containing over 3,000 inhabitants as applied to interstate trains); *Atlantic Coast Line R. Co.* v. *North Carolina Corporation Comm'n,* 206 U. S. 1 (order regulating train service, particularly requiring train to permit connection with through trains at junction point); *Missouri Pacific R. Co.*

gress has not acted, state legislation or a final court order is invalid which materially affects interstate commerce.[17]

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v. *Kansas*, 216 U. S. 262 (order directing the operation of intrastate passenger train service over specified route).

Statutes dealing with employment of labor—full crew laws: Chicago, R. I. & P. R. Co. v. *Arkansas*, 219 U. S. 453 (Arkansas full crew law applied to interstate trains); *St. Louis, I. M. & S. R. Co.* v. *Arkansas*, 240 U. S. 518 (Arkansas full crew laws applied to switching crews); *Missouri Pacific R. Co.* v. *Norwood*, 283 U. S. 249 (Arkansas full crew laws applied to freight and switching crews).

[17] *Statutes or orders dealing with safety of operations: Kansas City Southern R. Co.* v. *Kaw Valley Dist.*, 233 U. S. 75 (order requiring railroad to remove its bridges over river for flood control purposes); *South Covington & Cincinnati R. Co.* v. *Covington*, 235 U. S. 537 (ordinances regulating the number of passengers to be carried in, the number of cars to be run and the temperature of an interstate street railway car invalid; those requiring rails on front and rear platform, ventilation and cleaning valid); *Seaboard Air Line R. Co.* v. *Blackwell*, 244 U. S. 310 (Georgia Blow Post Law requiring train to blow whistle and slow down almost to a stop at each grade crossing where numerous grade crossings were involved. Cf. *Southern R. Co.* v. *King*, 217 U. S. 524, where answer held insufficient to permit proof of burden of the statute on interstate commerce); *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761 (statute limiting number of cars in freight train to 70 and passenger cars to 14).

Statutes or orders requiring local train service: Illinois Central R. Co. v. *Illinois*, 163 U. S. 142 (statute applied to require fast mail train to detour from main line in order to stop at station for the taking on and discharge of passengers); *Cleveland, C., C. & St. L. R. Co.* v. *Illinois*, 177 U. S. 514 (Illinois statute requiring interstate train to stop at each station); *Mississippi Railroad Comm'n* v. *Illinois Central R. Co.*, 203 U. S. 335 (order of commission requiring interstate train to stop at small town); *Atlantic Coast Line* v. *Wharton*, 207 U. S. 328 (South Carolina statute and railroad commission order requiring interstate train to stop at small town); *St. Louis Southwestern R. Co.* v. *Arkansas*, 217 U. S. 136 (statute and order requiring delivery of freight cars to local shippers); *Herndon* v. *Chicago, R. I. & P. R. Co.*, 218 U. S. 135 (statute requiring interstate train to stop at junction point); *Chicago, B. & Q. R. Co.* v. *Wisconsin Railroad Comm'n*, 237 U. S. 220

Because the Constitution puts the ultimate power to regulate commerce in Congress, rather than the states, the degree of state legislation's interference with that commerce may be weighed by federal courts to determine whether the burden makes the statute unconstitutional.[18] The courts could not invalidate federal legislation for the same reason because Congress, within the limits of the Fifth Amendment, has authority to burden commerce if that seems to it a desirable means of accomplishing a permitted end.[19]

This statute is attacked on the ground that it imposes undue burdens on interstate commerce. It is said by the Court of Appeals to have been passed in the exercise of the state's police power to avoid friction between the races. But this Court pointed out years ago "that a State cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power." [20] Burdens upon commerce are those actions of a state which directly "impair the usefulness of its facilities for such traffic." [21] That impairment, we think, may arise from other causes than costs or long delays. A burden may arise from a state statute which requires interstate passengers to order

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(Wisconsin statute requiring interstate train to stop at villages containing 200 or more inhabitants); *Missouri, K. & T. R. Co.* v. *Texas,* 245 U. S. 484 (order requiring trains to start on time and fixing time allowed for stops at junctions en route); *St. Louis & S. F. R. Co.* v. *Public Service Comm'n,* 254 U. S. 535 (order requiring through trains to detour through a small town); *St. Louis-San Francisco R. Co.* v. *Public Service Comm'n,* 261 U. S. 369 (order requiring that interstate trains be stopped at small town).

[18] See *Southern Pacific Co.* v. *Arizona,* 325 U. S. at 770.

[19] Compare *United States* v. *Carolene Products Co.,* 304 U. S. 144, 146.

[20] *Kansas City Southern R. Co.* v. *Kaw Valley Dist.,* 233 U. S. 75, 79.

[21] *Illinois Central R. Co.* v. *Illinois,* 163 U. S. 142, 154.

their movements on the vehicle in accordance with local rather than national requirements.

On appellant's journey, this statute required that she sit in designated seats in Virginia.[22] Changes in seat designation might be made "at any time" during the journey when "necessary or proper for the comfort and convenience of passengers." This occurred in this instance. Upon such change of designation, the statute authorizes the operator of the vehicle to require, as he did here, "any passenger to change his or her seat as it may be necessary or proper." [23] An interstate passenger must if necessary repeatedly shift seats while moving in Virginia to meet the seating requirements of the changing passenger group. On arrival at the District of Columbia line, the appellant would have had freedom to occupy any available seat and so to the end of her journey.

Interstate passengers traveling via motor buses between the north and south or the east and west may pass through Virginia on through lines in the day or in the night. The large buses approach the comfort of pullmans and have seats convenient for rest. On such interstate journeys the enforcement of the requirements for reseating would be disturbing.

Appellant's argument, properly we think, includes facts bearing on interstate motor transportation beyond those immediately involved in this journey under the Virginia statutory regulations. To appraise the weight of the burden of the Virginia statute on interstate commerce, related statutes of other states are important to show whether there are cumulative effects which may make

[22] The Virginia Code of 1942, § 67, defines a colored person, for the purpose of the Code, as follows: "Every person in whom there is ascertainable any negro blood shall be deemed and taken to be a colored person . . . ." Provisions for vital statistics make a record of the racial lines of Virginia inhabitants. §§ 1574 and 5099a.

[23] § 4097bb.

local regulation impracticable. Eighteen states, it appears, prohibit racial separation on public carriers.[24] Ten require separation on motor carriers.[25] Of these, Alabama applies specifically to interstate passengers with an exception for interstate passengers with through tickets from states without laws on separation of passengers.[26] The language of the other acts, like this Virginia statute before the Court of Appeals' decision in this case, may be said to be susceptible to an interpretation that they do or do not apply to interstate passengers.

In states where separation of races is required in motor vehicles, a method of identification as white or colored must be employed. This may be done by definition. Any ascertainable Negro blood identifies a person as colored for purposes of separation in some states.[27] In the other states which require the separation of the races in

[24] Cal. Civ. Code (Deering), 1941, §§ 51–54; Colo. Stat. Ann., 1935, Ch. 35, §§ 1–10; Conn. Gen. Stat. (Supp. 1933), § 1160b; Ill. Rev. Stat., 1945, Ch. 38, §§ 125–128g; Ind. Stat. (Burns), 1933, §§ 10–901, 10–902; Iowa Code, 1939, §§ 13251–13252; Kan. Gen. Stat., 1935, § 21–2424; Mass. Laws (Michie), 1933, Ch. 272, § 98, as amended 1934; Mich. Stat. Ann., 1938, §§ 28.343, 28.344; Minn. Stat. (Mason), 1927, § 7321; Neb. Comp. Stat., 1929, § 23–101; N. J. Rev. Stat., 1937, §§ 10:1–2 to 10:1–7; N. Y. Civil Rights Law (McKinney), §§ 40–41; Ohio Code (Throckmorton), 1940, §§ 12940–12942; Pa. Stat. (Purdon), Tit. 18, §§ 4654 to 4655; R. I. Gen. Laws, 1938, Ch. 606, §§ 28–29; Wash. Rev. Stat. (Remington), 1932, § 2686 (semble); Wis. Stat., 1943, § 340.75.

[25] Ala. Code, 1940, Tit. 48, § 268; Ark. Stat., 1937 (Pope), §§ 6921–6927, Acts 1943, p. 379; Ga. Code, 1933, § 68–616; La. Gen. Stat. (Dart), 1939, §§ 5307–5309; Miss. Code, 1942, § 7785; N. C. Gen. Stat., 1943, § 62–109; Okla. Stat. Ann., 1941, Tit. 47, §§ 201–210; S. C. Code, 1942, § 8530–1; Tex. Pen. Code (Vernon), 1936, Art. 1659; Va. Code, 1942, §§ 4097z–4097dd.

[26] Ala. Code 1940, Tit. 48, § 268.

[27] Ala. Code, 1940, Tit. 1, § 2; Ark. Stat. (Pope), 1937, § 1200 (separate coach law); Ga. Code (Michie Supp.), 1928, § 2177; Okla. Const., Art. XXIII, § 11; Va. Code (Michie), 1942, § 67.

motor carriers, apparently no definition generally applicable or made for the purposes of the statute is given. Court definition or further legislative enactments would be required to clarify the line between the races. Obviously there may be changes by legislation in the definition.[28]

The interferences to interstate commerce which arise from state regulation of racial association on interstate vehicles has long been recognized. Such regulation hampers freedom of choice in selecting accommodations. The recent changes in transportation brought about by the coming of automobiles does not seem of great significance in the problem. People of all races travel today more extensively than in 1878 when this Court first passed upon state regulation of racial segregation in commerce. The factual situation set out in preceding paragraphs emphasizes the soundness of this Court's early conclusion in *Hall* v. *DeCuir*, 95 U. S. 485.

The *DeCuir* case arose under a statute of Louisiana interpreted by the courts of that state and this Court to require public carriers "to give all persons travelling in that State, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color." Page 487. Damages were awarded against Hall, the representative of the operator of a Mississippi river steamboat that traversed that river interstate from New Orleans to Vicksburg, for excluding in Louisiana the defendant in error, a colored person, from a cabin reserved for whites. This Court reversed for reasons well

[28] Compare Va. Code, 1887, § 49, providing that those who had one-fourth or more Negro blood were to be considered colored. This was changed in 1910 (Acts, 1910, p. 581) to read one-sixteenth or more. It was again changed in 1930 by Acts, 1930, p. 97, to its present form, i. e., any ascertainable Negro blood. See note 22, *supra*.

stated in the words of Mr. Chief Justice Waite.[29] As our previous discussion demonstrates, the transportation diffi-

[29] 95 U. S. at 489:

> "It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be. If this statute can be enforced against those engaged in inter-state commerce, it may be as well against those engaged in foreign; and the master of a ship clearing from New Orleans for Liverpool, having passengers on board, would be compelled to carry all, white and colored, in the same cabin during his passage down the river, or be subject to an action for damages, 'exemplary as well as actual,' by any one who felt himself aggrieved because he had been excluded on account of his color."

See *Louisville, N. O. & T. R. Co.* v. *Mississippi,* 133 U. S. 587, 590–91.

A regulation of the number of passengers on interstate street cars was held invalid in *South Covington & Cincinnati R. Co.* v. *Covington,* 235 U. S. 537, 547. This Court said at 547–48:

> "If Covington can regulate these matters, certainly Cincinnati can, and interstate business might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply. On one side of the river one set of regulations might be enforced, and on the other side quite a different set, and both seeking to control a practically continuous movement of cars. As was said in *Hall* v. *DeCuir,* 95 U. S. 485, 489, 'commerce cannot flourish in the midst of such embarrassments.' "

culties arising from a statute that requires commingling of the races, as in the *DeCuir* case, are increased by one that requires separation, as here.[30] Other federal courts have looked upon racial separation statutes as applied to interstate passengers as burdens upon commerce.[31]

In weighing the factors that enter into our conclusion as to whether this statute so burdens interstate commerce or so infringes the requirements of national uniformity as to be invalid, we are mindful of the fact that conditions

[30] *South Covington & Cincinnati R. Co.* v. *Kentucky*, 252 U. S. 399, relied upon by appellee, does not decide to the contrary of the holding in *Hall* v. *DeCuir*. In that case a carrier corporation was convicted in the Kentucky courts of violation of a state statute that required it to furnish cars with separate compartments for white and colored. It operated street cars interstate over the lines of another corporation that owned tracks that were wholly intrastate. The Court of Appeals of Kentucky held the conviction good on the ground that the offending act was the operation of the intrastate railroad in violation of the state statute. It was said that the statute did not apply to an interstate passenger. *South Covington & Cincinnati Street R. Co.* v. *Commonwealth*, 181 Ky. 449, 454, 205 S. W. 603. The Court of Appeals referred, with continual approval, at that point to *Chiles* v. *Chesapeake & Ohio R. Co.*, 125 Ky. 299, 304: "It is admitted that sections 795–801 of the Kentucky Statutes, requiring all railroad companies to furnish separate coaches for transportation of white and colored passengers, and imposing upon the company and conductors a penalty for refusing or failing to carry out the provisions of the law, does not apply to appellant, who was an interstate passenger; it being conceded that the statute is only operative within the territorial limits of this State, and effective as to passengers who travel from one point within the State to another place within its border." This Court accepted this application of the state statute and said it "is not a regulation of interstate commerce." Page 403. Probably what was meant by the opinions was that under the Kentucky act the company with wholly intrastate mileage must operate cars with separate compartments for intrastate passengers.

[31] *Anderson* v. *Louisville & N. R. Co.*, 62 F. 46, 48; *Washington, B. & A. R. Co.* v. *Waller*, 53 App. D. C. 200, 289 F. 598. See also *Hart* v. *State*, 100 Md. 595, 60 A. 457; *Carrey* v. *Spencer*, 36 N. Y. Supp. 886.

vary between northern or western states such as Maine or Montana, with practically no colored population; industrial states such as Illinois, Ohio, New Jersey and Pennsylvania with a small, although appreciable, percentage of colored citizens; and the states of the deep south with percentages of from twenty-five to nearly fifty per cent colored, all with varying densities of the white and colored races in certain localities. Local efforts to promote amicable relations in difficult areas by legislative segregation in interstate transportation emerge from the latter racial distribution. As no state law can reach beyond its own border nor bar transportation of passengers across its boundaries, diverse seating requirements for the races in interstate journeys result. As there is no federal act dealing with the separation of races in interstate transportation, we must decide the validity of this Virginia statute on the challenge that it interferes with commerce, as a matter of balance between the exercise of the local police power and the need for national uniformity in the regulations for interstate travel. It seems clear to us that seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel. Consequently, we hold the Virginia statute in controversy invalid.

Reversed.

MR. JUSTICE RUTLEDGE concurs in the result.

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

MR. JUSTICE BLACK, concurring.

The Commerce Clause of the Constitution provides that "Congress shall have power . . . to regulate commerce . . . among the several States." I have believed, and still believe, that this provision means that Congress

can regulate commerce and that the courts cannot. But in a series of cases decided in recent years this Court over my protest has held that the Commerce Clause justifies this Court in nullifying state legislation which this Court concludes imposes an "undue burden" on interstate commerce.[1] I think that whether state legislation imposes an "undue burden" on interstate commerce raises pure questions of policy, which the Constitution intended should be resolved by the Congress.

Very recently a majority of this Court reasserted its power to invalidate state laws on the ground that such legislation put an undue burden on commerce. *Nippert* v. *Richmond, supra; Southern Pacific Co.* v. *Arizona, supra.* I thought then, and still believe, that in these cases the Court was assuming the role of a "super-legislature" in determining matters of governmental policy. *Id.*, at 788, n. 4.

But the Court, at least for the present, seems committed to this interpretation of the Commerce Clause. In the *Southern Pacific Company* case, the Court, as I understand its opinion, found an "undue burden" because a State's requirement for shorter trains increased the cost of railroad operations and thereby delayed interstate commerce and impaired its efficiency. In the *Nippert* case a small tax imposed on a sales solicitor employed by concerns located outside of Virginia was found to be an "undue burden" even though a solicitor for Virginia concerns engaged in the same business would have been required to pay the same tax.

So long as the Court remains committed to the "undue burden on commerce formula," I must make decisions under it. The "burden on commerce" imposed by the

[1] *Nippert* v. *Richmond,* 327 U. S. 416; *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761; *McCarroll* v. *Dixie Greyhound Lines,* 309 U. S. 176; *Gwin, White & Prince* v. *Henneford,* 305 U. S. 434; *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307.

Virginia law here under consideration seems to me to be of a far more serious nature than those of the *Nippert* or *Southern Pacific Company* cases. The *Southern Pacific Company* opinion, moreover, relied in part on the rule announced in *Hall* v. *DeCuir*, 95 U. S. 485, which case held that the Commerce Clause prohibits a state from passing laws which require that "on one side of a State line . . . passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate." The Court further said that "uniformity in the regulations by which . . . [a carrier] is to be governed from one end to the other of his route is a necessity in his business" and that it was the responsibility of Congress, not the states, to determine "what such regulations shall be." The "undue burden on commerce formula" consequently requires the majority's decision. In view of the Court's present disposition to apply that formula, I acquiesce.

MR. JUSTICE FRANKFURTER, concurring.

My brother Burton has stated with great force reasons for not invalidating the Virginia statute. But for me *Hall* v. *DeCuir*, 95 U. S. 485, is controlling. Since it was decided nearly seventy years ago, that case on several occasions has been approvingly cited and has never been questioned. Chiefly for this reason I concur in the opinion of the Court.

The imposition upon national systems of transportation of a crazy-quilt of State laws would operate to burden commerce unreasonably, whether such contradictory and confusing State laws concern racial commingling or racial segregation. This does not imply the necessity for a nationally uniform regulation of arrangements for passengers on interstate carriers. Unlike other powers of Congress (see Art. I, § 8, cl. 1, concerning "Duties, Imposts

and Excises"; Art. I, § 8, cl. 4, concerning "Naturalization"; Art. I, § 8, cl. 4, concerning "Bankruptcies"), the power to regulate commerce does not require geographic uniformity. Congress may devise a national policy with due regard to varying interests of different regions. *E. g.*, 37 Stat. 699, 27 U. S. C. § 122; *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311; 45 Stat. 1084, 49 U. S. C. § 60; *Whitfield* v. *Ohio*, 297 U. S. 431. The States cannot impose diversity of treatment when such diverse treatment would result in unreasonable burdens on commerce. But Congress may effectively exercise its power under the Commerce Clause without the necessity of a blanket rule for the country.

MR. JUSTICE BURTON, dissenting.

On the application of the interstate commerce clause of the Federal Constitution to this case, I find myself obliged to differ from the majority of the Court. I would sustain the Virginia statute against that clause. The issue is neither the desirability of the statute nor the constitutionality of racial segregation as such. The opinion of the Court does not claim that the Virginia statute, regulating seating arrangements for interstate passengers in motor vehicles, violates the Fourteenth Amendment or is in conflict with a federal statute. The Court holds this statute unconstitutional for but one reason. It holds that the burden imposed by the statute upon the nation's interest in interstate commerce so greatly outweighs the contribution made by the statute to the State's interest in its public welfare as to make it unconstitutional.

The undue burden upon interstate commerce thus relied upon by the Court is not complained of by the Federal Government, by any state, or by any carrier. This statute has been in effect since 1930. The carrier concerned is operating under regulations of its own which conform

to the statute. The statute conforms to the policy adopted by Virginia as to steamboats (1900), electric or street cars and railroads (1902–1904).[1] Its validity has been unanimously upheld by the Supreme Court of Appeals of Virginia. The argument relied upon by the majority of this Court to establish the undue burden of this statute on interstate commerce is the lack of uniformity between its provisions and those of the laws of other states on the subject of the racial separation of interstate passengers on motor vehicles.

If the mere diversity between the Virginia statute and comparable statutes of other states is so serious as to render the Virginia statute invalid, it probably means that the comparable statutes of those other states, being diverse from it and from each other, are equally invalid. This is especially true under that assumption of the majority which disregards sectional interstate travel between neighboring states having similar laws, to hold "that seating arrangements for the different races in interstate motor travel require a *single, uniform rule to promote and protect national travel.*" (Italics supplied.) More specifically, the opinion of the Court indicates that the laws of the 10 contiguous states of Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Louisiana, Arkansas, Texas and Oklahoma require racial separation of passengers on motor carriers, while those of 18 other states prohibit racial separation of passengers on public carriers. On the precedent of this case, the laws of the 10 states requiring racial separation apparently can be invalidated because of their sharp diversity from the laws in the rest of the Union, or, in a lesser degree, because of their diversity from one another. Such invalidation, on the ground

[1] Steamboats: Acts of 1900, p. 340; electric or street cars: Acts of 1902–1904, p. 990; railroads: Acts of 1902–1904, p. 987. Va. Code Ann., 1942, §§ 4022–4025; 3978–3983; 3962–3969.

of lack of nation-wide uniformity, may lead to questioning the validity of the laws of the 18 states now prohibiting racial separation of passengers, for those laws likewise differ sharply from laws on the same subject in other parts of the Union and, in a lesser degree, from one another. In the absence of federal law, this may eliminate state regulation of racial separation in the seating of interstate passengers on motor vehicles and leave the regulation of the subject to the respective carriers.

The present decision will lead to the questioning of the validity of statutory regulation of the seating of intrastate passengers in the same motor vehicles with interstate passengers. The decision may also result in increased lack of uniformity between regulations as to seating arrangements on motor vehicles limited to intrastate passengers in a given state and those on motor vehicles engaged in interstate business in the same state or on connecting routes.

The basic weakness in the appellant's case is the lack of facts and findings essential to demonstrate the existence of such a serious and major burden upon the national interest in interstate commerce as to outweigh whatever state or local benefits are attributable to the statute and which would be lost by its invalidation. The Court recognizes that it serves as "the final arbiter of the competing demands of state and national interests" [2] and that it must fairly determine, in the absence of congressional action, whether the state statute actually imposes such an undue burden upon interstate commerce as to invalidate that statute. In weighing these competing demands, if this Court is to justify the invalidation of this statute, it must, first of all, be satisfied that the many years of experience of the state and the carrier that are reflected in this

[2] *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 769.

state law should be set aside. It represents the tested public policy of Virginia regularly enacted, long maintained and currently observed. The officially declared state interests, even when affecting interstate commerce, should not be laid aside summarily by this Court in the absence of congressional action. It is only Congress that can supply affirmative national uniformity of action.

In *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 768–769, 770, this Court speaking through the late Chief Justice said:

> "In the application of these principles some enactments may be found to be plainly within and others plainly without state power. But between these extremes lies the infinite variety of cases, in which regulation of local matters may also operate as a regulation of commerce, in which reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved.[3]
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> . . . . . .
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> "But in general Congress has left it to the courts to formulate the rules thus interpreting the commerce clause in its application, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their [i. e. the courts'] protection were withdrawn, . . . and has been aware that in their application *state laws will not be invalidated without the support of relevant factual material which will 'afford a sure basis' for an informed judgment.*[4] . . . Meanwhile, Congress has accommodated its legislation, as have the states, to these rules as an established feature of our constitutional system. There has thus been left to the states wide scope for

[3] See *Parker* v. *Brown,* 317 U. S. 341, 362; *Di Santo* v. *Pennsylvania,* 273 U. S. 34, 44.

[4] *Terminal Assn.* v. *Trainmen,* 318 U. S. 1, 8.

> the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern." (Italics supplied.)

The above-quoted requirement of a factual establishment of "a sure basis" for an informed judgment by this Court calls for a firm and demonstrable basis of action on the part of this Court. In the record of this case there are no findings of fact that demonstrate adequately the excessiveness of the burden, if any, which the Virginia statute has imposed upon interstate commerce, during the many years since its enactment, in comparison with the resulting effect in Virginia of the invalidation of this statute.[5] The Court relies largely upon the recital of a nation-wide diversity among state statutes on this subject without a demonstration of the factual situation in those states, and especially in Virginia. The Court therefore is not able in this case to make that necessary "appraisal and accommodation of the competing demands of the state and national interests involved" which should be the foundation for passing upon the validity of a state statute of long standing and of important local significance in the exercise of the state police power.

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[5] *Hall* v. *DeCuir*, 95 U. S. 485, does not require the conclusion reached by the Court in this case. The Louisiana statute in the *DeCuir* case could have been invalidated, at that time and place, as an undue burden on interstate commerce under the rules clearly stated by Chief Justice Stone in *Southern Pacific Co.* v. *Arizona, supra,* and as applied in this dissenting opinion. If the *DeCuir* case is followed without weighing the surrounding facts, it would invalidate today statutes in New England states prohibiting racial separation in seating arrangements on carriers, which would not be invalidated under the doctrine stated in the *Arizona* case.

The Court makes its own further assumption that the question of racial separation of interstate passengers in motor vehicle carriers requires national uniformity of treatment rather than diversity of treatment at this time. The inaction of Congress is an important indication that, in the opinion of Congress, this issue is better met without nationally uniform affirmative regulation than with it. Legislation raising the issue long has been, and is now, pending before Congress but has not reached the floor of either House.[6] The fact that 18 states have prohibited in some degree racial separation in public carriers is important progress in the direction of uniformity. The fact, however, that 10 contiguous states in some degree require, by state law, some racial separation of passengers on motor carriers indicates a different appraisal by them of the needs and conditions in those areas than in others. The remaining 20 states have not gone equally far in either direction. This recital of existing legislative diversity is evidence against the validity of the assumption by this Court that there exists today a requirement of a single uniform national rule on the subject.

It is a fundamental concept of our Constitution that where conditions are diverse the solution of problems arising out of them may well come through the application of diversified treatment matching the diversified needs as determined by our local governments. Uniformity of treatment is appropriate where a substantial uniformity of conditions exists.

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[6] See H. R. 8821, 75th Cong., 3d Sess., 83 Cong. Rec. 74; H. R. 182, 76th Cong., 1st Sess., 84 Cong. Rec. 27; H. R. 112, 77th Cong., 1st Sess., 87 Cong. Rec. 13.

PORTER, PRICE ADMINISTRATOR, *v.* WARNER HOLDING CO.

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

No. 793. Argued May 2, 3, 1946.—Decided June 3, 1946.

1. In an enforcement proceeding under § 205 (a) of the Emergency Price Control Act of 1942, a Federal District Court has power to order restitution of rents collected by a landlord in excess of maximums established by regulations issued under the Act. Pp. 398–399.
2. Under the provision of § 205 (a) authorizing the District Court, upon a proper showing, to grant "a permanent or temporary injunction, restraining order, or other order," an order for the recovery and restitution of illegal rents may be considered a proper "other order" either (1) as an equitable adjunct to an injunction decree, or (2) as an order appropriate and necessary to enforce compliance with the Act. Pp. 399, 400.
3. The legislative background of § 205 (a) supports the conclusion that the traditional equity powers of a court remain unimpaired in a proceeding under that section so that an order of restitution may be made. P. 400.
4. The provision of § 205 (e) authorizing an aggrieved tenant, and in certain circumstances the Price Administrator, to sue for damages does not conflict, except as to an award of damages, with the jurisdiction of equity courts under § 205 (a) to issue whatever "other order" may be necessary to vindicate the public interest, to compel compliance with the Act, and to prevent and undo inflationary tendencies. Pp. 401–402.
5. In considering a restitution order where there are conflicting claims between tenants and landlord as to the amounts due, the District Court has inherent power to bring in all interested parties and settle the controversies or to retain the case until the matters are otherwise litigated. P. 403.

151 F. 2d 529, reversed.

The Price Administrator brought suit under § 205 (a) of the Emergency Price Control Act of 1942 to enjoin respondent from violating the Act and to require respond-

ent to make restitution of rents collected in excess of maximums established by regulations issued under the Act. The District Court enjoined respondent from violating the Act but denied a restitution order. 60 F. Supp. 513. The Circuit Court of Appeals affirmed. 151 F. 2d 529. This Court granted certiorari. 327 U. S. 773. *Reversed*, p. 403.

Milton Klein argued the cause for petitioner. With him on the brief were *Solicitor General McGrath, Ralph F. Fuchs* and *David London.*

G. W. Townsend argued the cause for respondent. With him on the brief was *F. H. Fryberger.*

MR. JUSTICE MURPHY delivered the opinion of the Court.

In this case we are concerned with the power of a federal court, in an enforcement proceeding under § 205 (a) of the Emergency Price Control Act of 1942,[1] to order restitution of rents collected by a landlord in excess of the permissible maximums.

The Warner Holding Company, the respondent, owns eight apartment houses in Minneapolis, Minnesota, containing approximately 280 dwelling units. Between November 1, 1942, and June 29, 1943, it demanded and received rents in excess of those permitted by the applicable maximum rent regulations issued under the Act. The Administrator of the Office of Price Administration then brought this action in the District Court to restrain the respondent from continuing to exceed the rent ceilings. The complaint was later amended to seek, in addition, a decree requiring the respondent "to tender to such persons as are entitled thereto a refund of all amounts collected

[1] 56 Stat. 23, 33; 50 U. S. C. App. § 925 (a).

by defendant from tenants as rent for the use and occupancy of housing accommodations in excess of the maximum rents established by said Regulation, provided, however, that defendant shall not be required to make such tender to any person who has commenced an action against defendant under Section 205 (e) of the Emergency Price Control Act of 1942 alleging the collection by defendant of rent in excess of the maximum rents established by said Regulation."

The District Court enjoined respondent from continuing to collect rents in excess of the legal maximums but declined to order restitution. 60 F. Supp. 513. The Eighth Circuit Court of Appeals affirmed the judgment. 151 F. 2d 529. Both courts held that there was no jurisdiction under the statute to order restitution. We granted certiorari because the result was in conflict with that reached by the Sixth Circuit Court of Appeals in *Bowles* v. *Skaggs*, 151 F. 2d 817, and because of the obvious importance of the issue in the administration and enforcement of the Emergency Price Control Act.

This proceeding was instituted by the Administrator under § 205 (a) of the Act, which provides: "Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond."

Thus the Administrator invoked the jurisdiction of the District Court to enjoin acts and practices made illegal

by the Act and to enforce compliance with the Act. Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. *Virginian R. Co.* v. *System Federation,* 300 U. S. 515, 552. Power is thereby resident in the District Court, in exercising this jurisdiction, "to do equity and to mould each decree to the necessities of the particular case." *Hecht Co.* v. *Bowles,* 321 U. S. 321, 329. It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice. *Camp* v. *Boyd,* 229 U. S. 530, 551–552.

Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Brown* v. *Swann,* 10 Pet. 497, 503. See also *Hecht Co.* v. *Bowles, supra,* 330.

It is readily apparent from the foregoing that a decree compelling one to disgorge profits, rents or property ac-

quired in violation of the Emergency Price Control Act may properly be entered by a District Court once its equity jurisdiction has been invoked under § 205 (a). Indeed, the language of § 205 (a) admits of no other conclusion. It expressly envisages applications by the Administrator for orders enjoining violations of the Act and for orders enforcing compliance with the Act; and it expressly authorizes the District Court, upon a proper showing, to grant "a permanent or temporary injunction, restraining order, or other order." As recognized in *Hecht Co.* v. *Bowles, supra,* 328, the term "other order" contemplates a remedy other than that of an injunction or restraining order, a remedy entered in the exercise of the District Court's equitable discretion. An order for the recovery and restitution of illegal rents may be considered a proper "other order" on either of two theories:

(1) It may be considered as an equitable adjunct to an injunction decree. Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief. To be sure, such a recovery could not be obtained through an independent suit in equity if an adequate legal remedy were available.[2] *White* v. *Sparkill Realty Corp.,* 280 U. S. 500; *Lacassagne* v. *Chapuis,* 144 U. S. 119. But where, as here, the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law. *Alexander* v. *Hillman,* 296 U. S. 222, 241–242.

[2] But if a defendant with notice of a pending injunction proceeding completes the acts sought to be enjoined, the court of equity may restore the status quo by means of a mandatory injunction. *Texas & N. O. R. Co.* v. *Northside Belt R. Co.,* 276 U. S. 475; *Porter* v. *Lee,* 328 U. S. 246.

(2) It may be considered as an order appropriate and necessary to enforce compliance with the Act. Section 205 (a) anticipates orders of that character, although it makes no attempt to catalogue the infinite forms and variations which such orders might take. The problem of formulating these orders has been left to the judicial process of adapting appropriate equitable remedies to specific situations. Cf. *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 194. In framing such remedies under § 205 (a), courts must act primarily to effectuate the policy of the Emergency Price Control Act and to protect the public interest while giving necessary respect to the private interests involved. The inherent equitable jurisdiction which is thus called into play clearly authorizes a court, in its discretion, to decree restitution of excessive charges in order to give effect to the policy of Congress. *Clark* v. *Smith,* 13 Pet. 195, 203. And it is not unreasonable for a court to conclude that such a restitution order is appropriate and necessary to enforce compliance with the Act and to give effect to its purposes. Future compliance may be more definitely assured if one is compelled to restore one's illegal gains; and the statutory policy of preventing inflation is plainly advanced if prices or rents which have been collected in the past are reduced to their legal maximums.

The legislative background of § 205 (a) confirms our conclusion that the traditional equity powers of a court remain unimpaired in a proceeding under that section so that an order of restitution may be made. The Senate Committee on Banking and Currency, in reporting upon the bill which became the Emergency Price Control Act, stated in regard to § 205 (a): "In common with substantially all regulatory statutes, the bill authorizes the official charged with the duty of administering the act to apply to any appropriate court, State or Federal, for an order

enjoining any person who has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of the bill. Such courts are given jurisdiction to issue whatever order to enforce compliance is proper in the circumstances of each particular case." S. Rep. No. 931, 77th Cong., 2d Sess., p. 10.[3] The last sentence is an unmistakable acknowledgement that courts of equity are free to act under § 205 (a) in such a way as to be most responsive to the statutory policy of preventing inflation.

It is true that § 205 (e) authorizes an aggrieved purchaser or tenant to sue for damages on his own behalf; and if that person has not sued within the statutory period, or for any reason is not entitled to sue, the Administrator may institute an action for damages on behalf of the United States.[4] To the extent that damages might properly be awarded by a court of equity in the exercise of its jurisdiction under § 205 (a), see *Veazie* v. *Williams,* 8 How. 134, 160, § 205 (e) supersedes that possibility and provides an exclusive remedy relative to damages. It establishes the sole means whereby individuals may assert their private right to damages and whereby the Administrator on behalf of the United States may seek damages in the na-

[3] The same report, at p. 25, also states: "Section 205 (a) authorizes the Administrator to enforce compliance with the provisions of section 4 of the bill, whenever in his judgment, any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4, by making application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision. Upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices, a temporary or permanent injunction, restraining order or other order is to be granted without bond."

[4] § 205 (e) as amended by the Stabilization Extension Act of 1944, 58 Stat. 632, 640–641; 50 U. S. C. App. § 925 (e).

ture of penalties.[5] Moreover, a court giving relief under § 205 (e) acts as a court of law rather than as a court of equity. But with the exception of damages, § 205 (e) in no way conflicts with the jurisdiction of equity courts under § 205 (a) to issue whatever "other order" may be necessary to vindicate the public interest, to compel compliance with the Act and to prevent and undo inflationary tendencies.

Restitution, which lies within that equitable jurisdiction, is consistent with and differs greatly from the damages and penalties which may be awarded under § 205 (e). *Bowles* v. *Skaggs, supra,* 821. When the Administrator seeks restitution under § 205 (a), he does not request the court to award statutory damages to the purchaser or tenant or to pay to such person part of the penalties which go to the United States Treasury in a suit by the Administrator under § 205 (e). Rather he asks the court to act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant. Such action is within the recognized power and within the highest tradition of a court of equity. Thus it is plainly unaffected by the provisions of § 205 (e).

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[5] Congress has recognized that this provision for damage actions affords "a remedy at law to persons damaged by having had to pay unlawfully high prices." S. Rep. No. 931, 77th Cong., 2d Sess., p. 9. It has also been stated that "This action is the people's remedy against inflation. It was written into the statute because the Congress recognized the practical need of this aid to enforcement." S. Rep. No. 922, 78th Cong., 2d Sess., p. 14. The amendment to § 205 (e), whereby the Administrator was allowed to sue for damages under prescribed conditions, was said to "close an important gap in the present system of enforcement sanctions." *Id.* Nowhere, however, was there any indication that § 205 (e) was intended to whittle down the equitable jurisdiction recognized by § 205 (a) so as to preclude a suit for restitution.

Nor do we find any other provision of the Act that expressly or impliedly precludes a court from ordering restitution in the exercise of its equity jurisdiction under § 205 (a). This is not a situation where a statute has created a right and has provided a special and exclusive remedy, thereby negativing any jurisdiction that might otherwise be asserted. *United States* v. *Babcock,* 250 U. S. 328. And it clearly is not an instance where equity jurisdiction is lacking because of a failure to exhaust prescribed administrative remedies. *Myers* v. *Bethlehem Corp.,* 303 U. S. 41. Rather it is an occasion where Congress has utilized, save in one aspect, the broad equitable jurisdiction that inheres in courts and where the proposed exercise of that jurisdiction is consistent with the statutory language and policy, the legislative background and the public interest.

It follows that the District Court erred in declining, for jurisdictional reasons, to consider whether a restitution order was necessary or proper under the circumstances here present. The case must therefore be remanded to that court so that it may exercise the discretion that belongs to it. Should the court decide to issue a restitution order and should there appear to be conflicting claims and counterclaims between tenants and landlord as to the amounts due, the court has inherent power to bring in all the interested parties and settle the controversies or to retain the case until the matters are otherwise litigated. *Mallow* v. *Hinde,* 12 Wheat. 193.

Reversed.

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

MR. JUSTICE RUTLEDGE, dissenting.

In the Emergency Price Control legislation Congress was as much concerned with remedies as with substantive

prohibitions.[1] It knew that effectiveness of the latter depended altogether upon the scheme for enforcement. Accordingly, both in the original Act [2] and in later amendments,[3] it covered the matter of remedies in the greatest detail and precision. Those provisions were both jurisdictional and procedural. The general scheme was to confine as narrowly as the Constitution allows the rights of regulated persons to challenge provisions of the Act and regulations; and at the same time to create broad powers for enforcement, by various civil and criminal sanctions. *Yakus* v. *United States,* 321 U. S. 414, dissenting opinion, 463. Congress did not take chances, in either respect, with inference or construction. It is not excessive to say that perhaps no other legislation in our history has equalled the Price Control Act in the wealth, detail, precision and completeness of its jurisdictional, procedural and remedial provisions. *Yakus* v. *United States, supra.*

The scheme of enforcement was highly integrated, with the parts precisely tooled and minutely geared. Legal, equitable and criminal sanctions were included. Injured persons' remedies were dovetailed with and guarded against overlapping those given the Administrator. He can sue for damages and penalties, after the injured party has failed to do so in the time allowed; [4] to enjoin viola-

[1] See H. Rep. No. 1409, 77th Cong., 1st Sess., 12–13; S. Rep. No. 931, 77th Cong., 2d Sess., 8–9, 25–28; H. Rep. No. 1658, 77th Cong., 2d Sess., 26–27. "Price control which cannot be made effective is at least as bad as no price control at all. It will not stop inflation, and enables those who defy regulation to profit at the expense of the buyers and sellers who unselfishly cooperate in the interests of the emergency." S. Rep. No. 931, *supra,* p. 8.

[2] § 205, 56 Stat. 23, 33–35.

[3] 58 Stat. 632, 640–641, amending subsections (c), (e), and (f) of § 205 as it was in the original Act and adding subsection (g).

[4] § 205 (e), 50 U. S. C. § 925 (e). See note 9.

tion or secure an order for compliance, with temporary and permanent relief; [5] cause institution of criminal proceedings; [6] and require licensing of dealers with power to suspend the license and thus drive out of business.[7] This powerful battery of weapons does not call for reinforcement with armor not provided in the Act. It was equal to all tasks of enforcement which conceivably could arise.

Congress could not have been ignorant of the remedy of restitution. It knew how to give remedies it wished to confer. There was no need to add this one. Nor do I think it did so. It did not give it expressly. I do not think "other order" in the context of § 205 (a) includes it. For to have conferred it would have put the statutory scheme out of joint.

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[5] § 205 (a): "Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond." 50 U. S. C. § 925 (a).

[6] § 205 (b): "Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought." 50 U. S. C. § 925 (b). § 205 (c), 50 U. S. C. § 925 (c). See *Kraus & Bros.* v. *United States*, 327 U. S. 614, 620, note 4.

[7] § 205 (f), 50 U. S. C. § 925 (f).

Section 205 (e) gives the overcharged person his remedy, for damages with penalty, for a limited time. Thereafter the exclusive right to sue is the Administrator's, and what he recovers goes into the Federal Treasury, not to the overcharged person. This includes the amount of the overcharge, which is sued for here. These provisions taken together are a statute of limitations on the private right of recovery. Once the time goes by, it is cut off and the Government's right takes its place, in vindication of the public interest.[8]

Restitution, as here sought, is inconsistent with both rights. It contemplates return of the unjustly taken enrichment to him from whom it was taken. It is that right the Administrator now seeks to assert. But he does so, I think, in the teeth of the statute. What he recovers is what the Act makes part of a sum it says shall be paid into the Treasury whenever recovered by the Administrator; or into the overcharged person's pocket when recovered by him. And these are mutually exclusive, not alternative, rights of recovery. If the Administrator pays over to the tenants what he recovers in this suit, he will be paying them money which the Act says shall go into the Treasury.[9] Their time for suit has passed and with it their right

[8] Under § 205 (e) in the original Act, 56 Stat. 34, the Administrator was entitled to bring a suit for damages and penalties only when the buyer was not entitled to bring such an action. See, e. g., *Bowles* v. *Glick Bros. Lumber Co.*, 146 F. 2d 566. The Act was subsequently amended to provide, as set out in the text, that the Administrator could bring a suit for damages and penalties also when the injured party had not brought such an action within thirty days from the date of the occurrence of the violation. 58 Stat. 640. See note 9. The suit at bar was brought before the passage of the amendment, but that fact is of no significance, since § 205 (e), whether taken in its original or amended form, is inconsistent with the remedy of restitution sought by the Government.

[9] § 205 (e): "If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum

to recover these amounts. Whether or not the Administrator can sue for these amounts, on behalf of the Government, foregoing the penalties, we are not asked to decide. But we are asked, in effect, to decide that he can take money the Act says shall go into the Treasury and

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prices, *the person who buys* such commodity for use or consumption other than in the course of trade or business *may, within one year* from the date of the occurrence of the violation, except as hereinafter provided, *bring an action* against the seller *on account of the overcharge. In such action, the seller shall be liable for* reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) *Such amount not more than three times the amount of the overcharge, or the overcharges,* upon which the action is based as the court in its discretion may determine, *or* (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull [*sic*] nor the result of failure to take practicable precautions against the occurrence of the violation. *For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity,* as the case may be; *and the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price. If* any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and *the buyer either fails to institute an action under this subsection within thirty days* from the date of the occurrence of the violation *or is not entitled* for any reason *to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period.* If such action is instituted by the Administrator, *the buyer shall thereafter be barred from bringing an action* for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered." 50 U. S. C. § 925 (e). (Emphasis added.)

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give it to persons whose right to recover it the Act has cut off.

I think the remedy now sought is inconsistent with the remedies expressly given by the statute and contrary to the substantive rights it creates. I think too this is why Congress failed to provide for restitution, indeed cut off that remedy.

This does not imply any restriction upon the creative resources of a court of equity. When Congress is silent in formulating remedies for rights which it has created, courts of equity are free to use these creative resources. But where Congress is explicit in the remedies it affords, and especially where Congress after it has given limited remedies enlarges the scope of such remedies but particularizes them so far as remedies for overcharges are afforded, even courts of equity may not grant relief in disregard of the remedies specifically defined by Congress.

MR. JUSTICE REED and MR. JUSTICE FRANKFURTER join in this opinion.

PRUDENTIAL INSURANCE CO. *v.* BENJAMIN, INSURANCE COMMISSIONER.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA.

No. 707. Argued March 8, 11, 1946.—Decided June 3, 1946.

1. A Statute of South Carolina imposed on foreign insurance companies as a condition on their doing business within the State an annual tax of three percent of premiums from business done within the State, without reference to the character of the transactions as interstate or local. No similar tax was imposed on South Carolina corporations. *Held*, in view of the provisions of the Act of Congress of March 9, 1945, 59 Stat. 33, authorizing state regulation and taxation of the business of insurance, that the tax was not in violation of the Commerce Clause of the Federal Constitution, notwithstanding this Court's ruling in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944). Pp. 410–411, 422.

2. A state tax or regulation discriminating against interstate commerce, which would be invalid under the Commerce Clause in absence of action by Congress, may be validated by the affirmative action of Congress consenting thereto. Pp. 421–427.
3. The Commerce Clause is not a limitation upon the power of Congress over interstate and foreign commerce but a grant to Congress of plenary and supreme authority over those subjects. P. 423.
4. The state tax here involved is clearly sustained by the Act of March 9, 1945, the purpose of which was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. Pp. 427–433.
5. The power of Congress over commerce is not restricted, except as the Constitution expressly provides, by any limitation which forbids it to discriminate against interstate commerce and in favor of local trade. P. 434.
6. If authority over interstate commerce is exercised by Congress in conjunction with the States, their joint action is limited only by those provisions in the Constitution which forbid action altogether by any power or combination of powers in our governmental system. P. 434.
7. In validating the state tax here involved, the Act of March 9, 1945, is not in violation of the due process clause of the Fifth Amendment; nor of the first clause of Art. I, § 8, requiring that "all Duties, Imposts and Excises shall be uniform throughout the United States"; nor of Art. I, § 1, conferring the legislative power on Congress; nor of the Tenth Amendment. Pp. 437–439.
8. As here construed, the Act of March 9, 1945, does not involve an unconstitutional delegation by Congress of its power to the States. P. 439.

207 S. C. 324, 35 S. E. 2d 586, affirmed.

By an original proceeding in the Supreme Court of South Carolina, appellant challenged the validity under the Federal Constitution of a state statute which imposed a tax upon foreign insurance companies. The state court upheld the tax, 207 S. C. 324, 35 S. E. 2d 586, and an appeal was taken to this Court. *Affirmed*, p. 440.

Joseph W. Henderson argued the cause for appellant. With him on the brief was *Douglas McKay*.

T. C. Callison, Assistant Attorney General of South Carolina, and *David W. Robinson* argued the cause for respondent. With them on the brief was *John M. Daniel,* Attorney General.

By special leave of Court, *C. H. Foust* argued the cause for the State of Indiana and other States, in support of appellee. The Attorneys General of Alabama, Indiana, Kansas, Massachusetts, Michigan, Nebraska, New York, Ohio, Oklahoma and Texas filed a brief on behalf of those States, as *amici curiae,* in support of appellee.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

This case and *Robertson* v. *California, post,* p. 440, bring not unexpected sequels to *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533. In cycle reminiscent conversely of views advanced there and in *Paul* v. *Virginia,* 8 Wall. 168, claims are put forward on the basis of the *South-Eastern* decision to sustain immunity from state taxation and, in the *Robertson* case, from state regulation of the business of insurance.

The specific effect asserted in this case is that South Carolina no longer can collect taxes from Prudential, a New Jersey corporation, which for years prior to 1945 the state had levied and the company had paid. The tax is laid on foreign insurance companies and must be paid annually as a condition of receiving a certificate of authority to carry on the business of insurance within the state. The exaction amounts to three per cent of the aggregate of premiums received from business done in South Carolina, without reference to its interstate or local char-

acter.[1] No similar tax is required of South Carolina corporations.[2]

Prudential insists that the tax discriminates against interstate commerce and in favor of local business, since it is laid only on foreign corporations and is measured by their gross receipts from premiums derived from business done in the state, regardless of its interstate or local character. Accordingly it says the tax cannot stand consistently with many decisions of this Court outlawing state taxes which discriminate against interstate commerce.[3] South Carolina denies that the tax is discriminatory [4] or

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[1] The statutes imposing the tax are §§ 7948 and 7949, South Carolina Code of 1942. Each section in fact imposes a separate tax, the former of two per cent, the latter of one per cent, on gross premium returns "from the State," with provisions under § 7948 for reduction in the amount of the tax scaled to specified investments in South Carolina securities or property. Both taxes are laid "in addition to the annual license fees now provided by law," and are stated in terms to be required "as an additional and graded license fee" (§ 7948) or as "a graduated license fee." § 7949. The two taxes have been treated in combination, for purposes of this litigation, as being in effect a single tax of three per cent.

[2] Sections 7948 and 7949 expressly exempt South Carolina corporations from payment of the tax. They however are subject to other taxes, which Prudential maintains have no bearing upon the issues, other than possibly to demonstrate the discriminatory character and effects of the exaction in issue. See note 36. These are chiefly taxes on real and personal property, incidence of which Prudential largely escapes by the location of its property in other states.

[3] Extending from *Welton* v. *Missouri*, 91 U. S. 275, to *Nippert* v. *Richmond*, 327 U. S. 416. See the collection of authorities in *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 56, n. 11.

[4] In apparent reliance not only upon decisions rendered prior to the *South-Eastern* decision or made without reference to its ruling, e. g., *Lincoln National Ins. Co.* v. *Read*, 325 U. S. 673; *Bethlehem*

has been affected by the *South-Eastern* decision. But in any event it maintains that the tax is valid, more particularly in view of the McCarran Act,[5] by which it is claimed Congress has consented to continuance of this form of taxation and thus has removed any possible constitutional objection which otherwise might exist. This Prudential asserts Congress has not done and could not do.

The State Supreme Court has held the continued exaction of the tax not to be in violation of the commerce clause or affected by the ruling made in the *South-Eastern* case. 207 S. C. 324, 35 S. E. 2d 586. That holding presents the principal basis for this appeal.

I.

The versatility with which argument inverts state and national power, each in alternation to ward off the other's incidence,[6] is not simply a product of protective self-interest. It is a recurring manifestation of the continuing necessity in our federal system for accommodating the two great basic powers it comprehends. For this Court's

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Motors Corp. v. *Flynt*, 256 U. S. 421; but indeed also *Paul* v. *Virginia*, 8 Wall. 168; *Hooper* v. *California*, 155 U. S. 648; and like authorities.

The state also maintains that Prudential's South Carolina business is not altogether interstate commerce but consists, in substantial part, of local transactions, the aggregate of which measures the tax, for which view it relies upon such diverse decisions as *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33; *International Shoe Co.* v. *Shartel*, 279 U. S. 429; *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250; and *Polish National Alliance* v. *Labor Board*, 322 U. S. 643. See note 36 and text.

[5] The pertinent portions of the Act are set forth in the text, Part III at note 37.

[6] Cf. *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, at notes 9 and 23; but see also note 33 for an early and highly authoritative but less mutually exclusive view of the possible alternatives.

part, from *Gibbons* v. *Ogden*, 9 Wheat. 1, no phase of that process has been more continuous or at times perplexing than reconciling the paramount national authority over commerce, created by Article I, § 8 of the Constitution, with appropriate exercise of the states' reserved powers touching the same or related subject matter.[7]

The continuing adjustment has filled many of the great constitutional gaps of Marshall's time and later.[8] But not all of the filling has been lasting. Great emphases of national policy swinging between nation and states in historic conflicts have been reflected, variously and from time to time, in premise and therefore in conclusion of particular dispositions.[9] In turn, their sum has shifted and reshifted the general balance of authority, inevitably producing some anomaly of logic and of result in the decisions.

No phase has had a more atypical history than regulation of the business of insurance. This fact is important for the problems now presented. They have origin in that history. Their solution cannot escape its influence. Moreover, in law as in other phases of living, reconcilia-

[7] Among the volumes which have been written, special reference may be made to Frankfurter, The Commerce Clause (1937); Ribble, State and National Power over Commerce (1937); Gavit, The Commerce Clause (1932); and see Dowling, Interstate Commerce and State Power (1940) 27 Va. L. Rev. 1. For thoughtful comment since the *South-Eastern* decision, see Patterson, The Future of State Supervision of Insurance (1944) 23 Tex. L. Rev. 18; Note, Congressional Consent to Discriminatory State Legislation (1945) 45 Col. L. Rev. 927.

[8] "Judges legislate interstitially and the interstices were great in Marshall's time." Ribble, State and National Power over Commerce (1937) 47.

[9] "Lines of demarcation are drawn largely according to the pull of the Court at one period towards the interests of local self-government, and at another in the direction of a nation-wide rule." Frankfurter, The Commerce Clause (1937) 97.

tion of anomalous behavior, long continued, with more normal attitudes is not always easy, when the time for that adjustment comes.

Essentially the problems these cases tender are of that character. It is not necessary to renew the controversy presented in *South-Eastern*. Whether or not that decision properly has been characterized as "precedent-smashing," [10] there was a reorientation of attitudes toward federal power in its relation to the business of insurance conducted across state lines. Necessarily this worked in two directions. As the opinion was at pains to note, 322 U. S. 533, 545 ff., no decision previously had held invalid an Act of Congress on the ground that such business was beyond reach of its power, because previously no attempted exercise of that authority had been brought here in litigation. But from *Paul* v. *Virginia* to *New York Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495, negative implication from the commerce clause was held not to place any limitation upon state power over the business, however conducted with reference to state lines. And correlatively this was taken widely, although not universally, to nullify federal authority until the question was squarely presented and answered otherwise in the *South-Eastern* case.

Whether *Paul* v. *Virginia* represented in its day an accommodation with or a departure from the preexisting evolution of commerce clause law and whether its ruling, together with later ones adhering to it, remained consonant with the subsequent general development of that law, may still be debated. But all may concede that the *Paul* case created for the business of insurance a special, if not a wholly unique, way of thinking and acting in the regulation of business done across state lines. See Ribble, State and National Power over Commerce (1937) 89, 186–187.

[10] S. Rep. No. 1112, 78th Cong., 2d Sess. 2.

The aegis of federal commerce power continued to spread over and enfold other business so conducted, in both general and specific legislative exertions. Usually this was with judicial approval; and, despite notable instances of initial hostility, the history of judicial limitation of congressional power over commerce, when exercised affirmatively, has been more largely one of retreat than of ultimate victory.[11] The plain words of the grant have made courts cautious, except possibly in some of the instances noted, about nullifying positive exertions of Congress' power over this broad and hard to define field. At the same time, physical and economic change in the way commerce is carried on has called forth a constantly increasing volume of legislation exercising that power.[12]

Concurrently with this general expansion, however, from *Paul* to *South-Eastern* the states took over exclusively the function of regulating the insurance business in its specific legislative manifestations. Congress legislated only in terms applicable to commerce generally, without particularized reference to insurance. At the same time, on the rationalization that insurance was not commerce, yet was business affected with a vast public

[11] E. g., *Hammer* v. *Dagenhart*, 247 U. S. 251, overruled by *United States* v. *Darby*, 312 U. S. 100; compare *United States* v. *E. C. Knight Co.*, 156 U. S. 1, with *United States* v. *American Tobacco Co.*, 221 U. S. 106; *Schechter Corp.* v. *United States*, 295 U. S. 495, with *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1. See also discussion in *Wickard* v. *Filburn*, 317 U. S. 111, 118 ff.

See Ribble, State and National Power over Commerce (1937) 63, n. 39, for listing of the decisions invalidating Acts of Congress prior to 1879, noting that Mr. Justice Miller was "but slightly in error" in the statement, in *Trade-Mark Cases*, 100 U. S. 82, 96, that one then might count "on his fingers" those decisions.

[12] Beginning in modern phase with enactment of Interstate Commerce Commission and Anti-Trust legislation near the beginning of the present century. The catalogue is now too long to repeat here.

interest,[13] the states developed comprehensive regulatory and taxing systems. And litigation of their validity came to be freed of commerce clause objections, at any rate from *Deer Lodge* on to *South-Eastern*. Due process in its jurisdictional aspects remained to confine the reach of state power in relation to business affecting other states.[14] But the negative implications of the commerce clause became irrelevant, as such, for the valid exercise of state regulatory and taxing authority.

Meanwhile the business of insurance experienced a nation-wide expansion graphically depicted not only in the facts of the situation presented in the *South-Eastern* case but also in the operations of Prudential as described by its advocates in this cause.[15] These divergent facts,

[13] See *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 414, 415; *La Tourette* v. *McMaster*, 248 U. S. 465, 467; *National Union Fire Ins. Co.* v. *Wanberg*, 260 U. S. 71, 74; cf. *Osborn* v. *Ozlin*, 310 U. S. 53, 65: "Government has always had a special relation to insurance." See also *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, dissenting opinion at 585.

[14] See *Allgeyer* v. *Louisiana*, 165 U. S. 578; *New York Life Ins. Co.* v. *Head*, 234 U. S. 149; *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426; *St. Louis Compress Co.* v. *Arkansas*, 260 U. S. 346; *Hoopeston Co.* v. *Cullen*, 318 U. S. 313; Powell, The Supreme Court and State Police Power, 1922–1930 (1932) 18 Va. L. Rev. 1, 140 *et seq.*; also *St. Louis Southwestern R. Co.* v. *Alexander*, 227 U. S. 218, with which compare Henderson, The Position of Foreign Corporations in American Constitutional Law (1918) c. V. Cf. *Harvester Co.* v. *Dept. of Treasury*, 322 U. S. 340, concurring opinion, 349, at 353 ff.; and see *International Shoe Co.* v. *Washington*, 326 U. S. 310.

[15] According to Prudential's brief, it transacts business in all forty-eight states and on December 31, 1944, "had in force 33,933,077 policies, insuring approximately 22,900,000 persons, for a total amount of $22,741,134,075; and 36,733 annuity contracts operative during the lives of approximately 300,000 persons and providing for an annual income of approximately $63,200,000 on such lives. During the year 1944 the Appellant issued 2,412,150 policies, insuring the lives of approximately 2,170,000 persons, in the total amount of $2,668,714,022; and entered into 451 annuity contracts operative during the lives of

legal and economic, necessarily were reflected in state legislation. States grappling with nation-wide, but nationally unregulated, business inevitably exerted their powers to limits and in ways not sought generally to be applied to other business held to be within the reach of the commerce clause's implied prohibition. Obvious and widespread examples are furnished in broad and detailed licensing provisions, for the doing of business within the states, and in connected or distinct taxing measures drawn in apparent reliance upon freedom from commerce clause limitations.[16]

Now we are told many of these statutes no longer can stand. The process of readjustment began affirmatively with *South-Eastern*. Since the commerce clause is a two-edged instrument, the indicated next step, indeed the constitutionally required one, as the argument runs, is to apply its negatively cutting edge. Conceptions so developed with reference to other commerce must now be extended to the commerce of insurance in completion of the readjustment. This, it is confidently asserted, will require striking down much of the state legislation enacted

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approximately 600 persons and providing for an annual income of approximately $150,000 on such lives. During the year 1944 the Appellant collected as premiums on insurance policies $681,052,095.07, and paid out as claims on policies $246,776,197.45; and it paid out $13,690,781.93 on annuity contracts."

For South Carolina, the company "had in force 26,373 policies insuring the lives of approximately 20,000 persons resident in said State for a total amount of $30,827,184.00. During the year ending December 31, 1944, 1,439 policies insuring the lives of approximately 1,000 persons resident in said State for a total amount of $1,475,062.00 were issued, and $457,602.28 in claims were paid on policies covering the lives of residents." The South Carolina premium tax for 1943 amounted to $18,496.87; for 1944, $19,676.94. All other state or local taxes paid in 1944 amounted to $3,103.92, making a total for the year for all taxes of $22,780.86.

[16] 322 U. S. 533, dissenting opinion at 590; see note 40, *infra;* cf. *Robertson* v. *California, post,* p. 440.

and effective prior to the *South-Eastern* decision. Particularly will this be true of all discriminatory state taxes, of which it is said South Carolina's is one. Moreover, those results must follow regardless of the McCarran Act's provisions. For by that Act, in Prudential's assessment, Congress neither intended to, nor could, validate such taxes.

It is not surprising that the attack is thus broad. When a decision is conceived as precedent-smashing, rightly or wrongly, the conception's invitation may be to greater backtracking than is justified, in spite of warning to proceed with care. 322 U. S. 533, 547 ff.

Prudential's misconception relates not to the necessity for applying, but to the nature and scope of the negative function of the commerce clause. It is not the simple, clean-cutting tool supposed. Nor is its swath always correlative with that cut by the affirmative edge, as seems to be assumed. For cleanly as the commerce clause has worked affirmatively on the whole, its implied negative operation on state power has been uneven, at times highly variable. More often than not, in matters more governable by logic and less by experience, the business of negative implication is slippery. Into what is thus left open for inference to fill, divergent ideas of meaning may be read much more readily than into what has been made explicit by affirmation. That possibility is broadened immeasurably when not logic alone, but large choices of policy, affected in this instance by evolving experience of federalism, control in giving content to the implied negation. In all our constitutional history this has become no more apparent than in commerce clause dispositions.

That the clause imposes some restraint upon state power has never been doubted. For otherwise the grant of power to Congress would be wholly ineffective. But the limitation not only is implied. It is open to different implications of meaning. And this accounts largely for

variations in this field continuing almost from the beginning until now.[17] They started with Marshall and Taney,

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[17] That the question was discussed but not settled in the Constitutional Convention itself, appears from debate on September 15, 1787, two days before submission of the proposed Constitution to Congress, a portion of which bears quotation:

"Mr. Mc.Henry & Mr. Carrol moved that 'no State shall be restrained from laying duties of tonnage for the purpose of clearing harbours and erecting light-houses.'

"Col. Mason in support of this explained and urged the situation of the Chesapeak which peculiarly required expences of this sort.

"Mr. Govr. Morris. The States are not restrained from laying tonnage as the Constitution now Stands. The exception proposed will imply the Contrary, and will put the States in a worse condition than the gentleman (Col Mason) wishes.

"Mr. Madison. Whether the States are now restrained from laying tonnage duties depends on the extent of the power 'to regulate commerce.' These terms are vague but seem to exclude this power of the States— They may certainly be restrained by Treaty. He observed that there were other objects for tonnage Duties as the support of Seamen &c. He was more & more convinced that the regulation of Commerce was in its nature indivisible and ought to be wholly under one authority.

"Mr. Sherman. The power of the U. States to regulate trade being supreme can controul interferences of the State regulations [when] such interferences happen; so that there is no danger to be apprehended from a concurrent jurisdiction.

"Mr. Langdon insisted that the regulation of tonnage was an essential part of the regulation of trade, and that the States ought to have nothing to do with it. On motion 'that no State shall lay any duty on tonnage without the Consent of Congress'

"N. H— ay—Mas. ay. Ct. divd. N. J. ay. Pa. no. Del. ay. Md. ay. Va. no. N— C. no S— C. ay. Geo. no. [Ayes — 6; noes — 4; divided — 1.]" Farrand, Records of the Federal Constitutional Convention of 1787 (1937), Vol. II, 625–626.

See Note, Congressional Consent to Discriminatory State Legislation (1945) 45 Col. L. Rev. 927, 946 ff., for a short summary of views expressed in the debates and later by members of the Convention. See also Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment (1941) 25 Minn. L. Rev. 432; Hamilton and Adair, The Power to Govern (1937).

went forward from Waite to Fuller, and have been projected in later differences perhaps less broad, but hardly less controversial.[18] Consequently in its prohibitive, as in its affirmative or enabling, effects the history of the commerce clause has been one of very considerable judicial oscillation.

Moreover, the parallel encompasses the latest turn in the long-run trend. For, concurrently with the broadening of the scope for permissible application of federal authority,[19] the tendency also has run toward sustaining state regulatory and taxing measures formerly regarded as inconsonant with Congress' unexercised power over commerce,[20] and to doing so by a new, or renewed, emphasis on facts and practical considerations rather than dogmatic logistic.[21] These facts are of great importance for dispos-

[18] "The categories of 'burdens' on interstate commerce, of state laws 'directly affecting' interstate commerce, etc., are natural concomitants of Marshall's doctrine. The theories as to the silence of Congress are the outgrowth of Taney's. When diverse theories cohabit, the miscegenation may produce strange progeny." Ribble, 204. For tracings of all but the latest of the various trends, see the summaries cited in note 7; see also Biklé, The Silence of Congress (1927) 41 Harv. L. Rev. 200. More recent diversities are discussed in Dowling, Interstate Commerce and State Power, 27 Va. L. Rev. 1, 8 ff. See also e. g., the different views expressed in *Nippert* v. *Richmond,* 327 U. S. 416; *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761; *McLeod* v. *Dilworth Co.,* 322 U. S. 327; *Northwest Airlines* v. *Minnesota,* 322 U. S. 292; and the opinions in *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652. And compare *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459, with *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307.

[19] See note 11 and text.

[20] Cf., e. g., *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177; *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250; *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33; *Nelson* v. *Sears, Roebuck & Co.,* 312 U. S. 359; *California* v. *Thompson,* 313 U. S. 109; *Duckworth* v. *Arkansas,* 314 U. S. 390; *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202, 209 ff.

[21] Cf. *Nippert* v. *Richmond,* 327 U. S. 416, 424, 431, notes 9 and 23, and authorities cited.

ing of such controversies. For in effect they have transferred the general problem of adjustment to a level more tolerant of both state and federal legislative action.

II.

We are not required however to consider whether, on that level, the authorities on which Prudential chiefly relies would require invalidation of South Carolina's tax. For they are not in point.

As has been stated, they are the cases which from *Welton* v. *Missouri*, 91 U. S. 275, until now have outlawed state taxes found to discriminate against interstate commerce.[22] No one of them involved a situation like that now here. In each the question of validity of the state taxing statute arose when Congress' power lay dormant. In none had Congress acted or purported to act, either by way of consenting to the state's tax or otherwise. Those cases therefore presented no question of the validity of such a tax where Congress had taken affirmative action consenting to it or purporting to give it validity. Nor, consequently, could they stand as controlling precedents for such a case.

This would seem so obvious as hardly to require further comment, except for the fact that Prudential has argued

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[22] See note 3, and compare: ". . . state laws are not invalid under the Commerce Clause unless they actually discriminate against interstate commerce or conflict with a regulation enacted by Congress." *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434, dissenting opinion at 446.

". . . except for state acts designed to impose discriminatory burdens on interstate commerce because it *is* interstate—Congress alone must 'determine how far [interstate commerce] . . . shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited.'" *Id.* at 455.

See also, for essentially the same position, *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, dissenting opinion; *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, dissenting opinion at 795.

so earnestly to the contrary. Its position puts the McCarran Act to one side, either as not intended to have effect toward validating this sort of tax or, if construed otherwise, as constitutionally ineffective to do so. Those questions present the controlling issues in this case. But before we turn to them it will be helpful to note the exact effects of Prudential's argument.

Fundamentally it maintains that the commerce clause "of its own force" and without reference to any action by Congress, whether through its silence [23] or otherwise, forbids discriminatory state taxation of interstate commerce. This is to say, in effect, that neither Congress acting affirmatively nor Congress and the states thus acting coordinately can validly impose any regulation which the Court has found or would find to be forbidden by the commerce clause, if laid only by state action taken while Congress' power lies dormant. In this view the limits of state power to regulate commerce in the absence of affirmative action by Congress are also the limits of Congress' permissible action in this respect, whether taken alone or in coordination with state legislation.

Merely to state the position in this way compels its rejection. So conceived, Congress' power over commerce would be nullified to a very large extent.[24] For in all the variations of commerce clause theory it has never been the law that what the states may do in the regulation of commerce, Congress being silent, is the full measure of its power. Much less has this boundary been thought to

[23] See note 18.

[24] Thus, for instance, the limitations upon the length of trains imposed by the Arizona Train Limit Law, and held to be in violation of the commerce clause in *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, would be beyond the power of Congress, perhaps also of Congress and the states acting together, to impose; and on commerce clause grounds, thus nullifying the very power conferred in order to regulate such matters. The argument is reminiscent of that of Mr. Justice McLean in the second *Wheeling Bridge* case, cf. note 34.

confine what Congress and the states acting together may accomplish. So to regard the matter would invert the constitutional grant into a limitation upon the very power it confers.

The commerce clause is in no sense a limitation upon the power of Congress over interstate and foreign commerce. On the contrary, it is, as Marshall declared in *Gibbons* v. *Ogden,* a grant to Congress of plenary and supreme authority over those subjects. The only limitation it places upon Congress' power is in respect to what constitutes commerce, including whatever rightly may be found to affect it sufficiently to make congressional regulation necessary or appropriate.[25] This limitation, of course, is entirely distinct from the implied prohibition of the commerce clause. The one is concerned with defining commerce, with fixing the outer boundary of the field over which the authority granted shall govern. The other relates only to matters within the field of commerce, once this is defined, including whatever may fall within the "affectation" doctrine. The one limitation bounds the power of Congress. The other confines only the powers of the states. And the two areas are not coextensive. The distinction is not always clearly observed, for both questions may and indeed at times do arise in the same case and in close relationship.[26] But to blur them and thereby equate the implied prohibition with the affirmative endowment is altogether fallacious. There is no such equivalence.

This appears most obviously perhaps in the cases most important for the decision in this cause. They are the ones involving situations where the silence of Congress or the dormancy of its power has been taken judicially,

[25] Cf. note 11 and text.

[26] See the argument for the plaintiff in error in *Paul* v. *Virginia,* 8 Wall. 168, 172, 173, as a classic instance.

on one view or another of its constitutional effects,[27] as forbidding state action, only to have Congress later disclaim the prohibition or undertake to nullify it.[28] Not yet has this Court held such a disclaimer invalid or that state action supported by it could not stand. On the contrary, in each instance it has given effect to the congressional judgment contradicting its own previous one.[29]

It is true that rationalizations have differed concerning those decisions,[30] indeed also that the judges participating in them differed in this respect.[31] But the results have been lasting and are at least as important, for the direction given to the process of accommodating federal and state authority, as the reasons stated for reaching them. None

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[27] Cf. note 18. See also the discussions cited in note 7.

[28] Legislation which, typically, has presented the problem is found in a variety of measures, of which the Wilson Act, 26 Stat. 313, is the prototype. Earlier legislation presenting the difficulty was that involved in the second of the *Wheeling Bridge* cases, *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421. See note 43 for further citations.

[29] *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. 518, with which compare *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421, and *The Clinton Bridge*, 10 Wall. 454; *Leisy* v. *Hardin*, 135 U. S. 100, with which compare *In re Rahrer*, 140 U. S. 545; *Bowman* v. *Chicago & Northwestern R. Co.*, 125 U. S. 465, with which compare *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311.

[30] See, e. g., Ribble, at 62, 106, and other materials cited above in note 7.

[31] For the modern record it is interesting to note that in the first *Bridge* case Justice McLean spoke for the Court, Chief Justice Taney and Justice Daniel dissenting in separate opinions, and the same division prevailed in the further opinions filed upon consideration of the master's report and entry of the decree. In the second *Bridge* case Justice Nelson spoke for the Court, with Justices McLean, Grier, Wayne and Daniel each filing separate opinions dissenting on one or more of the issues presented.

of the decisions conceded, because none involved any question of, the power of Congress to make conclusive its own mandate concerning what is commerce. But apart from that function of defining the outer boundary of its power, whenever Congress' judgment has been uttered affirmatively to contradict the Court's previously expressed view that specific action taken by the states in Congress' silence was forbidden by the commerce clause, this body has accommodated its previous judgment to Congress' expressed approval.

Some part of this readjustment may be explained in ways acceptable on any theory of the commerce clause and the relations of Congress and the courts toward its functioning.[32] Such explanations, however, hardly go to the root of the matter. For the fact remains that, in these instances, the sustaining of Congress' overriding action has involved something beyond correction of erroneous factual judgment in deference to Congress' presumably better-informed view of the facts,[33] and also beyond giving due

[32] Thus, in some instances conceivably the reversal might be rationalized as only one of factual judgment, made in deference to the contrary finding of like character made by a body better able to make such a determination. Moreover, Congress' supporting action deprives the Court's adverse view concerning state legislation of any strength which may have been derived from the inference that Congress, by its silence, had impliedly forbidden it. Hence insofar as its judgment may be taken, not as conclusive, but as being entitled to deference here on questions relating to its power (and historically the scope of that deference has been great, cf. note 11), Congress' explicit repudiation of the attitude inferentially attributed to it from its silence, compels reversal of the Court's earlier pronounced view.

[33] In the first *Wheeling Bridge* case the Court itself made the finding, upon evidence taken by a master, that the bridge in fact obstructed navigation, to which it added the legal conclusion that it was a public nuisance, and went on to specify the height to which it must be raised to avoid this effect. Not only this finding of fact, therefore, but also the legal conclusion drawn from it was, in effect, overturned by the Act

deference to its conception of the scope of its powers, when it repudiates, just as when its silence is thought to support, the inference that it has forbidden state action.[34]

Prudential has not squarely met this fact. Fixed with the sense of applicability of the *Welton* or *Shelby County* line of cases, it rather has posed an enigma for the bearing of the bridge and liquor cases upon the decision to be made. It is, if the commerce clause "by its own force" forbids discriminatory state taxation, or other measures, how is it that Congress by expressly consenting can give that action validity?

The answer need not be labored. Prudential in this case makes no contention that commerce is not involved. Its argument is exactly the opposite. Its contention

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of Congress. See note 34. The finding of obstruction in fact depended in no sense upon previous determination by Congress. But the Court found in Congress' prior legislation a policy of freedom for navigation which it applied to outlaw the bridge.

[34] See note 33. "So far, therefore, as this bridge created an obstruction to the free navigation of the river, in view of the previous acts of congress, they are to be regarded as modified by this subsequent legislation; and, although it still may be an obstruction in fact, is not so in the contemplation of law. . . . The regulation of commerce includes intercourse and navigation, and, of course, the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation . . . ." Mr. Justice Nelson, speaking for the Court, in the second *Wheeling Bridge* case, 18 How. 421, 430, 431.

Compare the dissenting opinion of Mr. Justice McLean, who wrote for the majority in the first *Wheeling Bridge* case, going not only on the ground, among others, that the Act of Congress invaded the judicial function, but also that the Act, apart from this effect, was unconstitutional: "It [Congress] may, under this power, declare that no bridge shall be built which shall be an obstruction to the use of a navigable water. And this, it would seem, is as far as the commercial power by congress can be exercised." 18 How. at 442. Thus was the grant of authority to Congress upon which he relied in the first decision, in part, to outlaw the bridge, converted into a limitation. Cf. text Part II, at note 24 ff.

founded on the commerce clause is one wholly of implied prohibition within the field of commerce.

This it regards as operative not only in Congress' silence, but in the face of its positive expression by the McCarran Act that the continued regulation and taxation by the states of the business of insurance is in accord with Congress' policy. That expression raises questions concerning its own validity and also concerning whether the policy stated extends to the kind of state legislation which is immediately in issue. But those questions are not answered, as Prudential seeks to have them answered, by any conception that Congress' declaration of policy adds nothing to the validity of what the states have done within the area covered by the declaration or, in other words, that it is mere *brutum fulmen*. For to do this not only would produce intolerable consequences for restricting Congress' power. It would ignore the very basis on which the second *Wheeling Bridge* case and indeed the *Clark Distilling* case have set the pattern of the law for governing situations like that now presented.[35] Accordingly we turn to the issues which are more alive and significant for the future.

III.

In considering the issues raised by the McCarran Act and the question of its applicability, ground may be cleared by putting aside some matters strenuously argued in the State Supreme Court and here. First, it follows from what has been said that we are not required to determine whether South Carolina's tax would be valid in the dormancy of Congress' power. For Congress has expressly stated its intent and policy in the Act. And, for reasons to be stated, we think that the declaration's effect is clearly to sustain the exaction and that this can be done without violating any constitutional provision.

[35] Cf. note 29 and text. And see Part IV.

By the same token, we need not consider whether the tax, if operative in Congress' unilluminated silence, would be discriminatory in the sense of an exaction forbidden by the commerce clause, as Prudential categorically asserts, or not so, as South Carolina maintains with equal certitude. Much attention has been given both here and in the state court to these questions. But in the view we take of the case the controlling issues undercut them. Nor do we determine, as Prudential's argument seems to subsume, whether all of its business done in South Carolina and affected by the tax should be regarded as constituting interstate commerce so as to fall within the "in commerce" classification or, on the other hand, some of it may properly be considered as being only local or intrastate business.[36] These questions we put to one side.

[36] Whether within or without the "affectation" doctrine. Cf. *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 548, and authorities cited.

In making these assumptions, however, it is not improper to note that the record, as made in the state court, does not purport to deal factually with the latter question as a matter of proof. It is simply alleged that all of Prudential's South Carolina business is done interstate, an allegation which is denied; and there are supporting allegations concerning the extent of the business and manner of conducting it.

Nor is the case in much better shape factually on the question of discrimination. While the briefs include tables of figures designed to show that Prudential pays more proportionately under the tax than South Carolina corporations pay under other taxes levied against them, cf. note 2, these figures were not made part of the record in the state court until the petition for rehearing was filed, and Prudential has insisted both there and here that they have no proper place in consideration of the questions presented. Its position is that the tax is discriminatory on the face of the statute and without reference to other taxes South Carolina corporations may pay. Cf. note 4.

We express no opinion concerning whether such a showing, in either respect, would be sufficient to require determination of the issues to which it is directed, tendered in the absence of action by Congress.

And for present purposes we assume that the tax would be discriminatory in the sense of Prudential's contention and that all of its business done in South Carolina and affected by the tax is done "in" or as a part of interstate commerce.

It is not necessary to spend much time with interpreting the McCarran Act. Pertinently it is as follows:

> ". . . the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> "SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> "(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . ." 59 Stat. 33, 34; 15 U. S. C. §§ 1011–1015.[37]

Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly pro-

[37] The remainder of the statute, including a proviso to § 2 (b), relates to applicability of the Sherman Act and other related federal statutes to the business of insurance before and after January 1, 1948; provides that the McCarran Act shall not affect in any manner the application to that business of the National Labor Relations Act, the Fair Labor Standards Act or the Merchant Marine Act of 1920; extends the term "State" as used in the Act to include specified territories and the District of Columbia; and provides for severability.

vided in the Act itself or in future legislation.[38] The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it "shall be subject to" the laws of the several states in these respects.

Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations.

It would serve no useful purpose now to inquire whether or how far this effort was necessary, in view of the explicit reservations made in the majority opinion in the *South-Eastern* case. Nor is it necessary to conclude that Congress, by enacting the McCarran Act, sought to validate every existing state regulation or tax. For in all that mass of legislation must have lain some provisions which may have been subject to serious question on the score of other constitutional limitations in addition to commerce clause objections arising in the dormancy of Congress' power. And we agree with Prudential that there can be no inference that Congress intended to circumvent constitutional limitations upon its own power.

But, though Congress had no purpose to validate unconstitutional provisions of state laws, except in so far as the Constitution itself gives Congress the power to do this by removing obstacles to state action arising from its own

[38] See note 37.

action or by consenting to such laws, H. Rep. No. 143, 79th Cong., 1st Sess., p. 3, it clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for.

Two conclusions, corollary in character and important for this case, must be drawn from Congress' action and the circumstances in which it was taken. One is that Congress intended to declare, and in effect declared, that uniformity of regulation, and of state taxation,[39] are not required in reference to the business of insurance by the national public interest, except in the specific respects otherwise expressly provided for. This necessarily was a determination by Congress that state taxes, which in its silence might be held invalid as discriminatory, do not place on interstate insurance business a burden which it is unable generally to bear or should not bear in the competition with local business. Such taxes were not uncommon among the states,[40] and the statute clearly included South Carolina's tax now in issue.

[39] There is, of course, no constitutional requirement that state taxes must be uniform, in the sense of that requirement as laid upon the federal taxing power by the first clause of Article I, § 8. Nor has it ever been held that such a requirement is made by the commerce clause or any other constitutional provision. This is a different thing entirely from the strictures against discrimination within or by a state laid under the equal protection and commerce clauses.

The McCarran Act is, in effect, a determination by Congress that the business of insurance, though done in interstate commerce, is not of such a character as to require uniformity of treatment within the distinction taken in the doctrine of *Cooley* v. *Board of Wardens,* 12 How. 299, except as otherwise expressly declared.

[40] As of the effective date of the McCarran Act, sixteen states had imposed on "foreign" life insurance companies taxes substantially similar to the South Carolina tax in issue. Ala. Code (1940) tit. 51,

That judgment was one of policy and reflected long and clear experience. For, notwithstanding the long incidence of the tax and its payment by Prudential without question prior to the *South-Eastern* decision, the record of Prudential's continuous success in South Carolina over decades [41] refutes any idea that payment of the tax handicapped it in any way tending to exclude it from competition with local business or with domestic insurance companies. Indeed Prudential makes no contrary contention on any factual basis, nor could it well do so. For the *South-Eastern* decision did not, and could not, wipe out all this experience or its weight for bearing, as a matter of the practical consequences resulting from operation of the tax, upon that question. *Robertson* v. *California, post*, p. 440.

Consequently Prudential's case for discrimination must rest upon the idea either that the commerce clause forbids the state to exact more from it in taxes than from purely local business; or that the tax is somehow technically of an inherently discriminatory character or possibly of a type which would exclude or seriously handicap new en-

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§§ 816, 819; Fla. Stat. (1941) § 205.43 (1), (6); Ill. Rev. Stat. (1943) c. 73, § 1021; Ind. Stat. Ann. (Burns, 1940) § 39–4802; Kan. Gen. Stat. Ann. (Corrick, 1935) § 40–252; Ky. Rev. Stat. (1944) § 136.330; La. Gen. Stat. (Dart, 1939) § 8369; Mich. Comp. Laws (1929) § 12387; Mo. Rev. Stat. (1939) § 6094; Neb. Rev. Stat. (1943) § 77–902; N. M. Stat. Ann. (1941) § 60–401; N. D. Comp. Laws (1913) § 4924; Ohio Code Ann. (Throckmorton, 1940) § 5433; Pa. Stat. Ann. (Purdon, 1930) tit. 72, § 2261; S. C. Code (1942) §§ 7948, 7949; Tex. Civ. Stat. (Vernon, 1925) Art. 4769.

We express no opinion concerning the validity of any feature of these statutes not substantially identical with those of the South Carolina tax dealt with herein.

[41] Prudential was first authorized to do business in South Carolina in 1897 and since that time it has received annual renewals of its license. As to the present scope of its business in South Carolina and in all the states, see note 15.

trants seeking to establish themselves in South Carolina. As to each of these grounds, moreover, the argument subsumes that Congress' contrary judgment, as a matter of policy relating to the regulation of interstate commerce, cannot be effective, either "of its own force" alone or as operative in conjunction with and to sustain the state's policy.

IV.

In view of all these considerations, we would be going very far to rule that South Carolina no longer may collect her tax. To do so would flout the expressly declared policies of both Congress and the state. Moreover it would establish a ruling never heretofore made and in doing this would depart from the whole trend of decision in a great variety of situations most analogous to the one now presented. For, as we have already emphasized, the authorities most closely in point upon the problem are not, as appellant insists, those relating to discriminatory state taxes laid in the dormancy of Congress' power. They are rather the decisions which, in every instance thus far not later overturned,[42] have sustained coordinated action taken by Congress and the states in the regulation of commerce.[43]

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[42] Cf. *Ashton* v. *Cameron County District,* 298 U. S. 513, which may be said in effect to have been overruled by *United States* v. *Bekins,* 304 U. S. 27. See Jackson, The Struggle for Judicial Supremacy (1941) 240–241.

[43] See *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495; *Steward Machine Co.* v. *Davis,* 301 U. S. 548; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.,* 299 U. S. 334; *Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U. S. 311; *Whitfield* v. *Ohio,* 297 U. S. 431; *In re Rahrer,* 140 U. S. 545; *Perkins* v. *Pennsylvania,* 314 U. S. 586; *Standard Dredging Co.* v. *Murphy,* 319 U. S. 306, 308; *International Shoe Co.* v. *Washington,* 326 U. S. 310, 315; cf. *Parker* v. *Richard,* 250 U. S. 235, 238–239. See generally Koenig, Federal and State Cooperation under the Constitution (1938) 36 Mich. L. Rev. 752.

The power of Congress over commerce exercised entirely without reference to coordinated action of the states is not restricted, except as the Constitution expressly provides,[44] by any limitation which forbids it to discriminate against interstate commerce and in favor of local trade. Its plenary scope enables Congress not only to promote but also to prohibit interstate commerce, as it has done frequently and for a great variety of reasons.[45] That power does not run down a one-way street or one of narrowly fixed dimensions. Congress may keep the way open, confine it broadly or closely, or close it entirely, subject only to the restrictions placed upon its authority by other constitutional provisions and the requirement that it shall not invade the domains of action reserved exclusively for the states.

This broad authority Congress may exercise alone, subject to those limitations, or in conjunction with coordinated action by the states,[46] in which case limitations imposed for the preservation of their powers become inoperative and only those designed to forbid action altogether by any power or combination of powers in our govern-

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[44] *North American Co.* v. *Securities & Exchange Commission,* 327 U. S. 686, 704–705; *United States* v. *Darby,* 312 U. S. 100, 114–115; *Gibbons* v. *Ogden,* 9 Wheat. 1, 196. For example, the provisions of Article I, § 9, forbidding the giving of preferences "by any Regulation of Commerce or Revenue to the Ports of one State over those of another"; and commanding that "No Tax or Duty shall be laid on Articles exported from any State," held applicable only to foreign commerce in *Dooley* v. *United States,* 183 U. S. 151.

But compare the further provision of Article I, § 10, empowering Congress to consent to laying of duties or imposts on exports by the states. See also note 47.

[45] E. g., *Reid* v. *Colorado,* 187 U. S. 137; *Champion* v. *Ames,* 188 U. S. 321; *Hipolite Egg Co.* v. *United States,* 220 U. S. 45; *Hoke* v. *United States,* 227 U. S. 308; *United States* v. *Darby,* 312 U. S. 100, overruling *Hammer* v. *Dagenhart,* 247 U. S. 251.

[46] See cases cited in notes 29 and 43.

mental system remain effective.[47] Here both Congress and South Carolina have acted, and in complete coordination, to sustain the tax. It is therefore reinforced by

[47] It is perhaps impossible to point with certainty to any such explicit limitation among the various commerce clauses of the Constitution, for decision in the application of such provisions to such a combined exercise of powers is sparse. See, however, the discussion in *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421, 433 *et seq.*, relating to the clause of Article I, § 9, providing: "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another."

There can be no doubt that the combined exercise of state and federal authority is limited, to some but largely undefined extent, by other constitutional prohibitions or the combined effects of more than one. Cf. text herein at note 49 *et seq.* But apart from the provision of Article I, § 9, above quoted as a possible exception, the specific limitations placed upon the commerce power or state power in relation to commerce expressly provide for joint action to be effective. Thus, this is true with reference to laying of duties on exports by the states with the consent of Congress, Art. I, § 10, notwithstanding the prohibition of such action by congressional action alone, Art. I, § 9, and of course by state action alone. Art. I, § 10. And note the further provision that: "No State shall, without the Consent of Congress, lay any Duty of Tonnage," as to which see also note 17 above.

It was thus expressly contemplated, in some instances, that the combined exercise of the powers of Congress and the states should be free from restrictions expressly applicable to each when exerted in isolation. It is true that some of these provisions have been held applicable only to foreign commerce, e. g., the prohibition of Article I, § 10, against levy of duties on imports or exports without Congress' consent. *Woodruff* v. *Parham*, 8 Wall. 123; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 519, *et seq.*; but see *Brown* v. *Maryland*, 12 Wheat. 419. But others apply to coastwise trade, indeed to trade between towns in the same state, in other words to intrastate commerce. *State Tonnage Tax Cases*, 12 Wall. 204, 219; and see *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, *supra*; *Louisiana Public Service Comm'n* v. *Texas & N. O. R. Co.*, 284 U. S. 125; cf. *Williams*

the exercise of all the power of government residing in our scheme.[48] Clear and gross must be the evil which would nullify such an exertion, one which could arise only by exceeding beyond cavil some explicit and compelling limitation imposed by a constitutional provision or provisions designed and intended to outlaw the action taken entirely from our constitutional framework.

In this light the argument that the degree of discrimination which South Carolina's tax has involved, if any, puts it beyond the power of government to continue must fall of its own weight. No conceivable violation of the commerce clause, in letter or spirit, is presented. Nor is contravention of any other limitation.

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v. *United States*, 255 U. S. 336; and see also *United States* v. *The William*, 28 Fed. Cas. No. 16,700.

All these provisions are intimately and expressly related to the commerce power. Notwithstanding their diversities, in application to interstate and foreign commerce or both, and also to federal and state power or their combined operation, no conclusion can be drawn from them that our constitutional policy was, or is, to give Congress and the states acting together broad powers, in some instances denied to each acting alone, in relation to foreign commerce, but to deny such authority altogether in reference to interstate commerce. Indeed the opposite conclusion is clearly indicated, both by virtue of express provision where applicable and by strong inference where not expressly forbidden.

[48] The ruling is not new or only recent. "We have already said, and the principle is undoubted, that the act of the legislature of Virginia conferred full authority to erect and maintain the bridge, subject to the exercise of the power of congress to regulate the navigation of the river. That body having in the exercise of this power, regulated the navigation consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, state and federal, which, if not sufficient, certainly none can be found in our system of government." *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421, 430. Compare this with Mr. Justice McLean's dissenting view, note 34 above.

A word should be added in the latter respect. Prudential has not urged grounds founded upon other constitutional provisions than the commerce clause, except in relation to the McCarran Act and then only in the event it should be construed as having effect to validate continued exaction of the tax. As has been said, it regards the statute as neither intended nor effective to "validate, authorize, or sanction state statutes which discriminate against interstate commerce." But, against the event that the Act should be taken as intended to have such an effect, it puts forward the somewhat novel contentions that the statute would be in violation of the due process clause of the Fifth Amendment; of the first clause of Article I, § 8, requiring that "all Duties, Imposts and Excises shall be uniform throughout the United States"; of Article I, § 1, "which requires legislation to be enacted by Congress"; and, apparently, of the Tenth Amendment, "as a violation of the states' power to tax for purposes of raising revenue *for their own use,* which power is vested exclusively in the states." [49]

These arguments may be summarily disposed of. As for the due process contention, it was settled by a long line of authorities prior to the *South-Eastern* decision, that the similar provision of the Fourteenth Amendment,

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[49] The contentions are stated in appellant's brief as follows: "If it be assumed that the McCarran-Ferguson Act is an adoption by Congress of legislation of the states, then the Act is unconstitutional (1) as a violation of the due process clause of Fifth Amendment to the Constitution, (2) as a violation of Article I, Section 8, Clause 1 of the Constitution which requires that excises shall be uniform throughout the United States in the exercise by Congress of its taxing power, (3) as a violation of Article I, Section 1 of the Constitution which requires legislation to be enacted by Congress, and (4) as a violation of the states' power to tax for purposes of raising revenue *for their own use,* which power is vested exclusively in the states."

as well as that requiring equal protection of the laws, does not forbid the states to lay and collect such a tax as South Carolina's.[50] Certainly the Fifth Amendment does not more narrowly confine the power of Congress; nor do it and the Fourteenth taken together accomplish such a restriction upon the coordinated exercise of power by the Congress and the states.

The argument grounded upon the first clause of Article I, § 8, requiring that excises shall be uniform throughout the United States, identifies the state exaction with the laying of an excise by Congress, to which alone the limitation applies. This is done on the theory that no more has occurred than that Congress has "adopted" the tax as its own, a conception which obviously ignores the state's exertion of its own power and, furthermore, seeks to restrict the coordinated exercise of federal and state authority by a limitation applicable only to the federal taxing power when it is exerted without reference to any state action.[51] The same observation applies also to the contention based on Article I, § 1.

The final contention that to sustain the Act, and thus the tax, would be an invasion of the state's own power of

[50] ". . . It has never been held that a State may not exact from a foreign corporation as a condition to admission to do business the payment of a tax measured by the business done within its borders." *Lincoln National Life Ins. Co.* v. *Read,* 325 U. S. 673, 677. See *Ducat* v. *Chicago,* 10 Wall. 410; *Philadelphia Fire Assn.* v. *New York,* 119 U. S. 110; *Hanover Fire Ins. Co.* v. *Harding,* 272 U. S. 494; *Continental Assurance Co.* v. *Tennessee,* 311 U. S. 5. See discussion in Henderson, The Position of Foreign Corporations in American Constitutional Law (1918) 101 ff.

[51] The related contention that Congress' "adoption" of South Carolina's statute amounts to an unconstitutional delegation of Congress' legislative power to the states obviously confuses Congress' power to legislate with its power to consent to state legislation. They are not identical, though exercised in the same formal manner. See *Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U. S. 311, 327.

taxation is so clearly lacking in merit as to call for no comment other than to point out that, by juxtaposition with the contentions discussed in the preceding paragraph, the effect would be at one stroke to bring the Act into collision with limitations operative only upon the federal power and at the same time to nullify state authority.

No such anomalous consequence follows from the division of legislative power into the respective spheres of federal and state authority. There are limitations applicable to each of these separately and some to their coordinated exercise. But neither the former nor the latter are to be found merely in the fact that the authority is thus divided. Such a conception would reduce the joint exercise of power by Congress and the states to achieve common ends in the regulation of our society below the effective range of either power separately exerted, without basis in specific constitutional limitation or otherwise than in the division itself.[52] We know of no grounding, in either constitutional experience or spirit, for such a restriction. For great reasons of policy and history not now necessary to restate, these great powers were separated. They were not forbidden to cooperate or by doing so to achieve legislative consequences, particularly in the great fields of regulating commerce and taxation, which, to some extent at least, neither could accomplish in isolated exertion.[53]

We have considered appellant's other contentions, including the suggestion that the McCarran Act, construed as we have interpreted it and thus given effect, would involve an unconstitutional delegation by Congress of its

[52] "It would be a shocking thing, if state and federal governments acting together were prevented from achieving the end desired by both, simply because of the division of power between them." Ribble, 211. And see note 48.

[53] Cf. note 47.

power to the states. For reasons already set forth and others, including the fact that no instance of delegation is involved on the facts, we find them without merit.

The judgment accordingly is

Affirmed.

MR. JUSTICE BLACK concurs in the result.

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

ROBERTSON *v.* CALIFORNIA.

APPEAL FROM THE SUPERIOR COURT OF VENTURA COUNTY, CALIFORNIA.

No. 274. Argued January 8, 9, 1946.—Decided June 3, 1946.

Section 703 (a) of the California Insurance Code makes it a misdemeanor for any person, except one licensed as a "surplus line broker," to act "as agent for a nonadmitted insurer in the transaction of insurance business" within the State. Section 1642 provides that "A person shall not act as an insurance agent, broker, or solicitor until a license is obtained from the commissioner, authorizing such person so to act." Appellant was convicted in a state court for violations of §§ 703 (a) and 1642 committed subsequently to the decision of this Court in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (holding that the business of insurance conducted across state lines is interstate commerce), but prior to the enactment of the Act of Congress of March 9, 1945, 59 Stat. 33 (authorizing state taxation and regulation of the business of insurance). The evidence showed that appellant, without a license of any kind, had acted within the State as agent of a nonadmitted foreign insurer conducting a mutual benefit type of insurance business. *Held:*

1. Section 1642, considered with other requirements of the state law, being designed and reasonably adapted to protect the public and applicable without discrimination to agents of local and foreign companies acting in California, was not in violation of the Commerce Clause of the Federal Constitution, since it neither discrimi-

nates against nor substantially obstructs interstate commerce. *California* v. *Thompson*, 313 U. S. 109. P. 447.

2. Considered apart from other provisions of the Code, the requirements for issuance of a surplus line broker's license—that the Commissioner shall find the applicant to be trustworthy and competent to transact an insurance brokerage business in such manner as to safeguard the interest of the insured; payment of a $50 filing fee; and posting of a $5,000 fidelity bond—were not in violation of the Commerce Clause of the Federal Constitution. P. 450.

3. Even though the Code provisions regulating the admission of foreign insurance companies to do business within the State, together with provisions regulating activities of surplus line brokers, operated to forbid either foreign or domestic companies to do within the State a life insurance business on other than a legal reserve basis, except as to companies engaged in doing such business there prior to January 1, 1940, no unconstitutional discrimination against interstate commerce was involved, and the result is not precluded by the *South-Eastern* decision. P. 455.

(a) The conditions prescribed apply alike to domestic and foreign corporations. P. 456.

(b) The provision differentiating between companies organized or admitted to do business within the State prior to January 1, 1940, and others, does not involve any discrimination as between domestic and foreign or interstate and intrastate insurers. P. 456.

(c) The distinction does not become discriminatory, in any sense now pertinent, merely because the preexisting companies are allowed to continue their business under somewhat less burdensome reserve requirements than those under which new companies are permitted to enter. P. 456.

4. For failure to meet its reserve requirements, a State may exclude foreign insurance companies, or their agents, from doing business within the State. P. 458.

(a) State regulation of interstate business done within the State's borders is not rendered invalid by the mere fact that the regulation is in form a "license." P. 458.

(b) The Commerce Clause is not a guaranty of the right to import into a State whatever one may please, absent a prohibition by Congress, regardless of the effects of the importation upon the local community. P. 458.

(c) The reserve requirements of the State can not be deemed, either on the face of the statute or by any showing that has been made in this case, to be excessive for the protection of the local

interest affected; nor designed or effective either to discriminate against foreign or interstate insurers or to forbid or exclude their activities. P. 459.

5. Appellant's objections founded on the provisions relating to the placing of surplus line insurance with nonadmitted insurers lack merit, in view of the power of the State, through its reserve requirements for admission and related prohibitions, to forbid entirely the placing of insurance of the sort here involved, whether with domestic, admitted or nonadmitted companies. P. 460.

6. The requirements of the state law do not operate to regulate activities of the appellant or the foreign insurer beyond the borders of the State, and do not on this score violate the due process or equal protection clause of the Fourteenth Amendment. P. 461.

7. The result in this case is reached independently of the Act of March 9, 1945; wherefore no question as to possible *ex post facto* operation of that Act is involved. P. 461.

Affirmed.

Appellant was convicted in a state court of violating certain provisions of the California Insurance Code, which he challenged as being contrary to the Commerce Clause and the Fourteenth Amendment. The conviction was affirmed by an intermediate state court, which was the highest state court to which an appeal could be taken. Ins. L. J., May, 1945, p. 273. Appellant appealed to this Court. *Affirmed*, p. 462.

Robert R. Weaver and *Earl Blodgett* argued the cause for appellant. With *Mr. Weaver* on the brief was *Allen K. Perry.*

T. A. Westphal, Jr., Deputy Attorney General of California, and *M. Arthur Waite* argued the cause for appellee. With them on the brief were *Robert W. Kenny*, Attorney General, *Julien G. Hathaway* and *H. F. Orr.*

Briefs were filed as *amici curiae* by *Nathaniel L. Goldstein*, Attorney General of New York, *Orrin G. Judd*, Solicitor General, and *Saul A. Shames*, Assistant Attorney General, for the State of New York, and by *Francis V.*

Keesling, Sr. and *Francis V. Keesling, Jr.* for the California Association of Insurance Agents et al., in support of appellee.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

This case differs from *Prudential Insurance Co.* v. *Benjamin, ante,* p. 408, in three respects. It is a criminal cause; the statutes involved regulate, rather than simply tax, the business of insurance; and appellant's acts held to violate them were done before the McCarran Act's [1] effective date.

Appellant was convicted in a state court for violating §§ 703 (a) and 1642 of the California Insurance Code and the conviction was sustained on appeal to the Superior Court of Ventura County.[2] Appellant now urges here primarily that the application which has been made of those sections is a regulation of interstate commerce forbidden by the commerce clause of the Constitution, Article I, § 8, in view of *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533. He also puts forward due process and equal protection arguments, resting on his conception of the applicability of those provisions of the Fourteenth Amendment.[3]

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[1] Act of March 9, 1945, 59 Stat. 33; 15 U. S. C. §§ 1011–1015. See text *infra,* following note 32.

[2] The conviction was obtained in the Justice's Court of Ventura Township, California. The Superior Court of Ventura County was the highest court of the state to which appeal could be taken. Its opinion is not reported. The penalty was a fine of $100 imposed for violating each count.

[3] In the Statement of Appeal filed in the Superior Court the grounds relied upon, apart from commerce clause and local law objections, were only that appellant's acts "were, if true, done by him in accordance with the provisions of the Fourteenth Amendment to the Constitution of the United States . . ." and that §§ 703 (a) and 1642 "are unconstitutional and in violation of . . . the Fourteenth Amendment . . . ."

The California Insurance Code provisions are as follows:

> "703. Except when performed by a surplus line broker, the following acts are misdemeanors when done in this State:
>
> "(a) Acting as agent for a nonadmitted insurer in the transaction of insurance business in this State."
>
> "1642. A person shall not act as an insurance agent, broker, or solicitor until a license is obtained from the commissioner, authorizing such person so to act." [4]

The complaint charged in two counts that appellant had (1) acted without a license as an agent for a nonadmitted insurer in soliciting and selling a policy contrary to § 703 (a), and (2) solicited and sold a policy of insurance without being licensed as required by § 1642.

The evidence, which is undisputed, disclosed the following facts. The First National Benefit Society is an Arizona corporation, conducting from Phoenix a mutual benefit type of insurance business. Its method of operation must be inferred from the facts of record, in the absence of other evidence. One O'Lein, then an elderly resident of Ventura, California, had difficulty in securing insurance on account of his age. Prior to August 28, 1944, he had learned of the Society's "Gold Seal" policy, by radio and through "literature." This apparently was mailed from the home office and included a printed form of return postal card marked, presumably pursuant to postal permit, "Postage will be Paid by Addressee," the Society. O'Lein filled in and returned the card to the

[4] Deering's California Codes, Insurance Code of California, §§ 703, 1642. These sections are part of California's comprehensive regulatory scheme for the business of insurance; and are directly related, in the case of § 703, to the requirements laid by other sections for acting as surplus line broker, see text *infra;* and in that of § 1642 to such requirements for securing a license to act in the specified representative capacities, see text *infra.*

Society in Phoenix, asking it to "send me, without obligation, details of 'GOLD SEAL' POLICIES." A few days later, on August 28, 1944, appellant called at O'Lein's home with the card, stating he represented the First National Benefit Society. Thereupon he explained to O'Lein the terms of the policy, its benefits, and costs, soliciting and persuading the prospect to take out a policy for himself and one also for his wife. No medical examination was required. Appellant filled in the application forms, procured the signatures, accepted from O'Lein a check made out in appellant's name in payment of the first quarterly premiums, gave receipts, later cashed the check at a local bank, and received the proceeds. A few days later the O'Leins received policies by mail from the Society's office in Phoenix.

The evidence further showed that the Society was not admitted to do business in California and that appellant had no license of any kind to act as an insurance agent, broker or solicitor there.

We may deal first exclusively with the objections founded on the commerce clause, since each of the others would be obviously without merit but for the supposed effects of the *South-Eastern* decision [5] not only in relation to the prohibitory consequences of that clause but also, apparently, to resurrect other limitations upon state power long since settled adversely to such claims in reference to the business of insurance.[6]

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[5] But see 322 U. S. 533, 547 ff.

[6] Thus, it was long settled, under the doctrine of *Paul* v. *Virginia*, 8 Wall. 168, that neither due process nor equal protection of the laws forbids the kind of state regulation of the business of insurance imposed by §§ 703 (a) and 1642. *Hooper* v. *California*, 155 U. S. 648; *Nutting* v. *Massachusetts*, 183 U. S. 553. See also *Hoopeston Co.* v. *Cullen*, 318 U. S. 313, and text *infra* at note 32.

As to the dangers of blurring the due process and equal protection limitations with commerce clause ideas, and the consequent necessity for separate treatment in disposing of these problems, see Ribble,

I.

Little need be said in relation to the general license requirement of § 1642, except to state more fully its effects by virtue of its relation to other provisions of the California Insurance Code, which prescribe the conditions for securing the license. Those requirements, in summary, are that an application must be made upon a prescribed form setting forth the kinds of insurance the applicant desires to transact (§ 1643); he must be a citizen of the United States or one who has applied for citizenship; and must have attained his majority (§ 1648.5); he must pass a written examination as to his qualifications (§ 1674) and pay two fees, one a filing fee of $4, the other an examination fee of $5 (§ 1678). On his fulfilling these conditions the license is issued if the state commissioner of insurance is satisfied that he is qualified and intends in good faith to carry on the business (§ 1649).

Section 1639 declares that the purpose of these and other provisions of the Code is "to protect the public by requiring and maintaining professional standards of conduct on the part of all insurance agents and insurance brokers acting as such within this State." The statutory requirements apply to all agents, without discrimination, whether they represent California or out-of-state insurance companies and whether the business done is interstate or local in character. They apply only to agents acting in California, not to acts done outside the state.

Appellant has not sought to obtain a license under the Code provisions, has not been denied one, and has not attacked any particular requirement. His charge is

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State and National Power over Commerce (1937) 98; *Nippert* v. *Richmond*, 327 U. S. 416, 423–425; *McLeod* v. *Dilworth Co.*, 322 U. S. 327, dissenting opinion at 357. Cf. also *Bethlehem Motors Corp.* v. *Flynt*, 256 U. S. 421; Henderson, The Position of Foreign Corporations in American Constitutional Law (1918) 122; and see c. IX.

wholesale, not particular. It is, in effect, that since the entire series of acts done by him was directed to the conclusion of an interstate transaction, within the *South-Eastern* ruling, those acts though taking place altogether within California were inseparably a part of the interstate transaction and therefore beyond reach of the state's licensing or regulatory power. The contention appears to contemplate not only that appellant's acts were interstate commerce, but also that the state cannot impose any licensing requirement upon them or, it would seem, upon any phase of conducting an interstate insurance business through agents acting in person.

To state the argument in this way is in effect to answer it. We accept the regulation for what it purports to be on its face and by the statute's express declaration, namely, a series of regulations designed and reasonably adapted to protect the public from fraud, misrepresentation, incompetence and sharp practice which falls short of minimum standards of decency in the selling of insurance by personal solicitation and salesmanship. That such dangers may exist, may even be widely prevalent in the absence of such controls, is a matter of common knowledge and experience. And no argument is needed to show that these evils are most apt to arise in connection with the activities of the less reliable and responsible insurers, as well as insurance brokers or salesmen, and vitally affect the public interest.[7]

Such being the purpose and effect of § 1642, there can be no substantial question concerning its validity on com-

[7] See *Hartford Accident & Indemnity Co.* v. *Nelson Co.*, 291 U. S. 352, 360; *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, 412–415; *Osborn* v. *Ozlin*, 310 U. S. 53, 65, 66; *National Union Fire Ins. Co.* v. *Wanberg*, 260 U. S. 71, 76–77. And see also *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 539 ff.; *Prudential Insurance Co.* v. *Benjamin*, *ante*, p. 408.

merce clause grounds. That is true whether appellant's acts are taken, in their setting, as being "in" commerce or only as "affecting" it. For the case is ruled, so far as § 1642 is concerned, by decisions such as *California* v. *Thompson,* 313 U. S. 109; *Hartford Indemnity Co.* v. *Illinois,* 298 U. S. 155; *Smith* v. *Alabama,* 124 U. S. 465; *Nashville, C. & St. L. R. Co.* v. *Alabama,* 128 U. S. 96; and *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202.[8]

If, in the absence of contrary action by Congress, a state may license agents or brokers for the sale of interstate transportation in order to prevent fraud, *California* v. *Thompson, supra;* trainmen engaged in interstate commerce to secure their competence, *Smith* v. *Alabama, supra; Nashville, C. & St. L. R. Co.* v. *Alabama, supra;* the sale on commission of interstate consignments of farm produce to secure honest dealing and financial responsibility, *Hartford Indemnity Co.* v. *Illinois, supra;* and the activities of customs brokers to secure responsibility in the state courts on claims arising locally, *Union Brokerage Co.* v. *Jensen, supra,* by the sorts of conditions imposed through the respective licensing provisions, there can be no valid reason for outlawing § 1642 here.

That appellant's activities were of a kind which vitally affect the welfare and security of the local community, the state and their residents could not be denied. Cf. *Hoopeston Co.* v. *Cullen,* 318 U. S. 313, 316 ff. They had in fact a highly "special interest" in his localized pursuit

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[8] In some of these cases, e. g., *Hartford Indemnity Co.* v. *Illinois,* 298 U. S. 155, and *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202, there were also federal licensing statutes which the Court found neither inconsistent with nor, therefore, effective to exclude the state licensing regulation. The *Union Brokerage* case involved an instance of state regulation of foreign commerce.

In addition to the cited authorities, see also the decisions cited and relied upon in each of the opinions.

of this phase of the comprehensive process of conducting an interstate insurance business. Cf. *Union Brokerage Co.* v. *Jensen, supra,* at 212. Here, as in each of the instances cited, appellant's activities called in question were concentrated in the regulating state, although affecting or constituting interstate commerce. Moreover the licensing provision of § 1642 is regulatory, not exclusory in character; is not discriminatory; is not in conflict with any policy or action of Congress but rather accords with its expressed views in so far as the McCarran Act may be taken to be applicable; [9] and is designed appropriately to secure the public from those evils of uncontrolled insurance solicitation to which it is directed. In view of these facts the regulation "neither discriminates against nor substantially obstructs the commerce." *California* v. *Thompson, supra,* at 114.

Furthermore, here as in the cited cases, "unless some measure of local control is permissible," the activities and their attendant evils "must go largely unregulated," unless or until Congress undertakes that function. *California* v. *Thompson, supra,* at 115. And in view of the well-known conditions of competition in this field, such a result not only would free out-of-state insurance companies and their representatives of the regulation's effect, thus giving them advantage over local competitors, but by so doing would tend to break down the system of regulation in its purely local operation.

II.

Section 703 (a) is interwoven with different conditions and therefore has somewhat different effects than does § 1642. Unlike the latter, which applies to acting as agent for all insurers, it forbids acting as agent for non-

[9] See text *infra* following note 32.

admitted insurers alone, unless the person so acting is a "surplus line broker." [10] To become a surplus line broker one must procure a special license pursuant to the requirements of § 1765. This license also is issued upon application, if the commissioner of insurance finds that the applicant is "trustworthy and competent to transact an insurance brokerage business in such manner as to safeguard the interest of the insured . . . ." The applicant also must file with the commissioner a faithful performance bond in the amount of $5000 and pay a filing fee of $50.

So far as concerns these requirements of § 1765 for procuring the surplus line broker's license, if they are considered without reference to any of the other Code provisions, the same conclusion is required concerning the validity of § 703 (a) as for that of § 1642, by the authorities above cited and discussed. Indeed the filing fee of $50 is larger than the combined fees required by § 1642, but not more than the fee involved in the *Union Brokerage* case, *supra*. And the bond provision is substantially identical with that sustained in *California* v. *Thompson*, *supra*. In the absence of any showing that it is administered arbitrarily, the requirement that the license shall issue only after a finding of trustworthiness and competence by the commissioner cannot be taken to be other than an appropriate means of safeguarding the public against the obvious evils arising from the lack of those qualifications. *California* v. *Thompson*, *supra*. Considered separately from any relationship to other sections of the Code, therefore, the prescribed conditions for securing

[10] See note 14, as to "surplus line insurance." In general this is insurance involving special risks or for some other reason not falling within the usual lines of authorized business.

the surplus line broker's license are no more invalid than those which must be fulfilled to secure the general agent's license under § 1642.[11]

This, the state contends, is all that needs to be considered, since appellant neither possessed nor, so far as appears, had applied for or been denied a surplus line broker's license. Consequently, in its view, the validity of other provisions of the Code is not involved, either directly or by necessary relationship to § 703 (a).[12]

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[11] Appellant also points out that by § 1775.5 an annual tax equal to three per cent of the gross premiums upon business done during each calendar year is imposed upon each surplus line broker. Apart from the facts that appellant has not applied for such a license and that no effort has been made to collect this tax from appellant, so far as appears, it may be noted that the tax applies alike to all surplus line brokers, whether acting for domestic or admitted foreign insurers or for nonadmitted ones. No question as to the validity of this tax is presented by this record.

[12] Indeed the state argues that no question is raised concerning the validity of the requirements of § 1765 for procuring the surplus line broker's license since, "so far as this record shows, the life insurance sought to be effected in this case might or might not have been procurable from admitted insurers."

However, on the alternative basis of accepting appellant's view that the insurance would not have been so obtainable, California concedes the insurance would fall within the surplus line exception, but asserts that appellant, if he had obtained the license, could have acted as agent in the transaction. Hence, since he did not apply for the license, the state argues that § 1765 has not been applied to him and its validity is not involved.

Appellant, however, maintains that even if he had secured the license, the combined effects of § 703 (a) and other sections relating to surplus line insurance would have forbidden him to act in this transaction. See text *infra*, Part III. California maintains that the validity of other Code sections, apart from §§ 703 (a) and 1642, was not in issue in the state courts and, though raised here in the briefs, is not necessarily involved.

III.

Appellant insists, however, that § 703 (a), taken in conjunction with § 1765, is more than a licensing requirement for regulating the qualifications of agents acting in California in the transaction of the business covered by its terms. It is rather, he maintains, a prohibition of the writing of such insurance there by nonadmitted insurers and their agents. And this, he says, the state cannot do, both because it cannot exclude interstate commerce in California and because it cannot discriminate against out-of-state insurers in such a manner.

These conclusions are based on the view that § 703 (a) is related inseparably by its terms and in fact to other Code provisions in addition to § 1765, namely, those regulating the admission of foreign insurance corporations to do business in California [13] and the interwoven provisions regulating activities of surplus line brokers.[14] Section

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[13] See California Insurance Code §§ 1560–1607, 10818. Appellant relies particularly upon § 10818, prohibiting the organization or admission of new insurers after January 1, 1940, to operate as so-called "Chapter 9" companies, that is, among others, as mutual companies having less than the reserve requirements specified for such insurers operating on the assessment plan, but permitting previously organized or admitted companies to continue under specially imposed requirements. See text *infra* at notes 16, 21.

Pertinent also is § 700 of the Code providing: "A person shall not transact any class of insurance business in this State without first being admitted for such class," through securing a certificate of authority from the commissioner on compliance with the Code's requirements.

[14] California Insurance Code, Chapter 6. Surplus Line Brokers. §§ 1760–1779.

Section 1761 reads: "Except as provided in sections 1760 and 1760.5, a person within this State shall not transact any insurance on property located . . . within, or on the lives or persons of residents of this State with nonadmitted insurers, except by and through

703 (a) on its face forbids acting as agent for nonadmitted insurers, except in the case of a surplus line broker. And the combined effects of the provisions relating to such brokers and of those governing the admission of foreign corporations are said to be to "absolutely prohibit" the writing of or aiding in procuring the type of insurance issued here or indeed of any insurance issued by the Society.[15]

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a surplus line broker licensed under this chapter and upon the terms and conditions prescribed in this chapter."

Section 1760 provides: "Any citizen of this State may negotiate and effect insurance on his own property with any nonadmitted insurer," cf. note 20, and § 1760.5 requires specified kinds of insurance, e. g., marine and aircraft risks, to be placed with nonadmitted insurers only through a "special lines' surplus line broker."

By § 1763 a surplus line broker "may solicit and place insurance, other than as excepted in section 1761, with nonadmitted insurers only if such insurance can not be procured from a majority of the insurers admitted for the particular class or classes of insurance. Such part of the insurance as can not be so procured may be procured from nonadmitted insurers," if it is not so placed to secure a lower rate than the lowest any admitted insurer will accept. Stringent provisions for supervising the section's requirements by the commissioner are included.

Other sections require maintaining an office in the state (§ 1767), keeping records and making reports (§§ 1768, 1769, 1774), and provide criminal sanctions for violating the chapter's provisions, § 1776.

See as to surplus line brokers, Patterson, The Insurance Commissioner in the United States (1927) 188–190.

[15] The argument is not only various but somewhat devious. Appellant disclaims intention to maintain that the state cannot "regulate [the] insurance business" and goes on to rest on the general proposition that it cannot prohibit interstate commerce entirely and that the effect of the statutory provisions, particularly § 10818, see note 13 *supra*, is to do this. As will appear, the argument really comes down to maintaining that California cannot require foreign companies or their agents to comply with her minimum requirements for issuing the type of insurance issued here.

California in effect concedes this, alternatively to maintaining that no question concerning the validity of those provisions is presented. The short effect of the admission provisions, for purposes now pertinent, the state admits, is to forbid either foreign or domestic companies to do a life insurance business in California other than on a legal reserve basis,[16] except as to companies engaged in doing such business there prior to January 1, 1940.[17] The policy underlying this exclusion is said to be founded in the state's experience showing that a mutual company doing business "on the stipulated premium plan with right of assessment,[18] without a sufficient surplus and full reserves,

[16] By § 10510 of the Code, "An incorporated life insurer issuing policies on the reserve basis shall not transact life insurance in this State unless it has a paid-in capital of at least $200,000." Section 36 defines "paid-in capital" as including the surplus of a mutual insurer. The effect of the two sections, it is conceded in the state's brief, "is to require that a stock company have a capital stock aggregating at least $200,000 and that a mutual company have a surplus of at least $200,000 in order to do business in California." Both requirements apply to domestic and foreign companies alike, with the exceptions noted below in note 17.

[17] The exception was the result of a series of amendments to the Code, made from 1935 to 1939, designed gradually to restrict the operations in the state of companies operating without reserves, to enable such companies already engaged in business to build up reserves, and to forbid the organization or admission of new companies operating without them or with reserves below the minimum requirement. See Calif. Stat. 1935, cs. 282, 283, pp. 1002, 657, 667, 678; Stat. 1937, c. 726, p. 2024; Stat. 1939, c. 321, p. 1609. And see also the Annual Reports of the Insurance Commissioner, State of California, as follows: Sixty-sixth, 10–11; Sixty-eighth, XX; Sixty-ninth, XVII; Seventieth, XVIII; Seventy-first, XXIX; Seventy-third, XVII, XXII-XXIII.

[18] The policy issued in this case contained the following provision in small type on the reverse side of the sheet: "The lawfully required portion of Premiums paid on this Certificate shall be set aside into the Mortuary Fund. Premiums necessary to maintain this Certificate in force are not fixed amounts and in event of Premium insuffi-

is not adequately safeguarded to insure that money will be available to pay death benefits." In support of this statement of California's policy and the experience on which it is founded, counsel point to the Annual Reports of the Insurance Commissioner covering a period of some six years, from 1934 to 1940,[19] which resulted in some of the legislation now called in question. See also X Report of Joint Insurance Investigation Committee (N. Y.) 364–365 (1906); *Hoopeston Co.* v. *Cullen,* 318 U. S. 313, 321.

Furthermore, the state apparently concedes, as appellant contends, not only that the Society is excluded from transacting insurance business by the admission requirements and its failure to comply with them, but also that appellant would be forbidden to place insurance with it by the provisions relating to surplus line insurance, even if he had secured the surplus line broker's license.[20]

As we understand it, therefore, appellant's argument in this phase comes in substance to two things: (1) That the admission requirements and the surplus line broker provisions, as they relate to nonadmitted insurers and their agents, are invalid for discrimination against out-of-state insurers and in favor of domestic ones; (2) that California, as a result of the *South-Eastern* decision, no

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ciency may be adjusted, with the written approval of the Corporation Commission, for the purpose of payment of claims and general operating expenses. In the event of any emergency caused by excessive mortality the Corporation may, with the written consent or at the direction of the Corporation Commission, levy Assessments on Members to be placed in the Mortuary Fund."

[19] See note 17.

[20] See § 1763, quoted in part in note 14, *supra,* and text *infra* at note 30. The type of insurance issued here is not within the exceptions specified in § 1763, which in turn relate to §§ 1760 and 1760.5. The former, it is to be noted, relates on its face only to property insurance; the latter to various special risks, not including mutual assessment insurance, which can be placed only by a "special lines' surplus line broker." See note 14.

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longer can require foreign insurance corporations seeking to do business there to maintain minimum reserves for protection of policyholders in the state or compel agents or brokers to refrain from representing them there notwithstanding such noncompliance.

The discrimination argument is without substance in so far as it maintains that the statutes permit domestic companies to operate without meeting these requirements, but forbid out-of-state insurers to do likewise. For, as has been noted,[21] the conditions apply alike to domestic and foreign corporations, excepting only those organized or admitted to do business in California before January 1, 1940. As to them different standards are applicable, but they too apply equally and alike to domestic and foreign insurers.[22]

That the state has seen fit to draw a line as of that date between new companies seeking to enter the field and established companies, differentiating the two classes by different standards in the minimum reserve requirements, in order to permit the latter to continue in business and build up reserves,[23] does not involve any discrimination as between domestic and foreign or interstate and intrastate insurers. For each may be authorized to enter, and each to continue, on identical terms. Such a distinction does not become discriminatory, in any sense now pertinent, merely because the preexisting companies are allowed to continue their business under somewhat less burdensome reserve requirements than those under which new companies are permitted to enter. See X Report of Joint Insurance Investigation Committee (N. Y.) p. 365 (1906). Otherwise the state, having authorized either domestic or foreign companies to engage in the business, would be greatly restricted, perhaps foreclosed, in raising the reserve

[21] See note 13.

[22] *Ibid.*

[23] See the Reports of the Insurance Commissioner, cited in note 17.

requirements as experience and the public interest might make necessary.[24]

Apart from this classification, which is clearly within the state's power, the discrimination argument becomes identical with the contention that the state cannot exclude foreign companies, such as the First National Benefit Society, or their agents, from carrying on their business in California for failure to meet her reserve requirements.

This is the crucial contention. It too is without merit. The evils flowing from irresponsible insurers and insurance certainly are not less than those arising from the activities of irresponsible, incompetent or dishonest insurance agents. The two things are concomitant, being merely different facades of the same sepulchre for the investments and security of the public. Cf. Study of Legal Reserve Life Insurance Companies, T. N. E. C. Monograph No. 28, § XV. It would be idle to require licensing of insurance agents, in order to secure honesty and competence, yet to place no restraint upon the kind of insurance to be sold or the kinds of companies allowed to sell it, and then to cover their representatives with their immunity. This could only result in placing domestic and complying foreign insurers at great disadvantage and eventually in nullifying all controls unless or until Congress should take over the regulation.

No such consequence has followed from the *South-Eastern* decision. It did not wipe out the experience of the states in the regulation of the business of insurance or its effects for the continued validity of that regulation. Much of this was concerned with the activities of so-called foreign insurance companies and, in particular, with re-

[24] Cf. *Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80; *Chicago & Alton R. Co.* v. *Tranbarger*, 238 U. S. 67; *Chicago, B. & Q. R. Co.* v. *Nebraska ex rel. Omaha*, 170 U. S. 57.

quirements designed to secure minimum guaranties of solvency and ability to pay claims as they mature. Essentially the protection sought was against fly-by-night operators and the grosser forms of profiteering and financial mismanagement all too common in unregulated insurance activity. See generally Patterson, The Insurance Commissioner in the United States (1927).

It is true that California imposes her reserve standards, for both domestic and foreign insurers, by requiring them to secure a certificate of authority to do business issued upon compliance with those conditions, in other words, by a form of licensing. But we are far beyond the time when, if ever, the word "license" *per se* was a condemnation of state regulation of interstate business done within the state's borders.[25] The commerce involved here is not transportation. Nor is it of a sort which touches the state and its people so lightly that local regulation is inappropriate or interferes unreasonably with the commerce of other states.[26] Not the mere fact or form of licensing, but what the license stands for by way of regulation is important.[27] So also, it is not simply the fact of prohibition, but what is forbidden and for the protection of what interest, that is determinative. For the commerce clause is not a guaranty of the right to import into a state whatever one may please, absent a prohibition by Congress, regardless of the effects of the importation upon the local community. That is true whether what is brought in

[25] See *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202; *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583; *Bradley* v. *Public Utilities Comm'n*, 289 U. S. 92; *Hendrick* v. *Maryland*, 235 U. S. 610; *Clark* v. *Poor*, 274 U. S. 554; *New Mexico ex rel. McLean* v. *Denver & Rio Grande R. Co.*, 203 U. S. 38.

[26] Cf. *Hale* v. *Bimco Trading Co.*, 306 U. S. 375; *Baldwin* v. *Seelig*, 294 U. S. 511; *Hoopeston Co.* v. *Cullen*, 318 U. S. 313.

[27] Cf. authorities cited in note 25.

consists of diseased cattle [28] or fraudulent or unsound insurance.

Here California's reserve requirements for securing authority to do business cannot be held, either on the face of the statute or by any showing that has been made, to be excessive for the protection of the local interest affected; or designed or effective either to discriminate against foreign or interstate insurers or to forbid or exclude their activities, by all who are able and willing to maintain reasonable minimum reserve standards for the protection of policyholders. Exclusion there is, but it is exclusion of what the state has the power to keep out, until Congress speaks otherwise. Every consideration which supports the licensing of agents and brokers, and the authorities we have cited giving effect to those considerations,[29] sustain the state's requirements in this respect, as do also the decisions which have sustained various measures of exclusion in protection of the public health, safety and security not only from physical harm but from various forms of fraud and imposition.[30]

It is quite obvious, to repeat only one of those considerations, that if appellant's contentions were accepted and foreign insurers were to be held free to disregard California's reserve requirements and then to clothe their agents or others acting for them with their immunity, not

[28] See, as to state exclusions of and prohibitions on interstate commerce, *Rasmussen* v. *Idaho,* 181 U. S. 198; *Smith* v. *St. Louis & S. W. R. Co.,* 181 U. S. 248; *Compagnie Francaise* v. *State Board of Health,* 186 U. S. 380; *Reid* v. *Colorado,* 187 U. S. 137; *Oregon-Washington R. & N. Co.* v. *Washington,* 270 U. S. 87; *Mintz* v. *Baldwin,* 289 U. S. 346; *Crossman* v. *Lurman,* 192 U. S. 189; *Plumley* v. *Massachusetts,* 155 U. S. 461; *Hennington* v. *Georgia,* 163 U. S. 299. See also *Kimmish* v. *Ball,* 129 U. S. 217; *Missouri-K.-T. R. Co.* v. *Haber,* 169 U. S. 613; *Carter* v. *Virginia,* 321 U. S. 131.

[29] See Part I, text.

[30] See note 28.

only would the state be made helpless to protect her people against the grossest forms of unregulated or loosely regulated foreign insurance, but the result would be inevitably to break down also the system for control of purely local insurance business. In short, the result would be ultimately to force all of the states to accept the lowest standard for conducting the business permitted by one of them or, perhaps, by foreign countries. Inevitably this would mean that Congress would be forced to intervene and displace the states in regulating the business of insurance. Neither the commerce clause nor the *South-Eastern* decision dictates such a result.

We do not intimate that this particular Society's insurance is unsound or fraudulent. As to that no showing has been made. We only say that California has imposed its reserve requirements as allowable standards for securing minimum assurance to the state's policyholders in respect to performance of their policies by the insurer, not as a mere exclusionary measure in exercise of the power to bar foreign corporations altogether; and that in the absence of compliance the state can exclude the company and its representatives as it did, until Congress makes contrary command. Their remedy is not to destroy the regulatory reserve conditions, but to comply with them.

It follows also that appellant's objections founded on the provisions relating to the placing of surplus line insurance with nonadmitted insurers are without merit. Apart from the phase relating to the requirements for obtaining the surplus line broker's license, the objection is two-fold. One is that, even if licensed, appellant would be forbidden to place the insurance with a nonadmitted insurer, unless there were no admitted one with which the risk could be written. The other, that in any event the risk could not be placed with the nonadmitted insurer for a less premium than would be accepted by any admitted insurer. The short answer would seem to be that, by the reserve

requirements for admission and related prohibitions, the state forbids entirely the placing of insurance of the sort issued here, whether with domestic, admitted or nonadmitted companies.[31]

It remains to say a word concerning the effect of the McCarran Act for this case and the contentions founded on the Fourteenth Amendment.

As for the latter, with respect to due process, the only objection advanced which is independent of commerce clause considerations is that to sustain the state's requirements, particularly in so far as they exclude the Society from interstate operations in California and thus also appellant's activities in aid of its business, will be in effect to project California's laws into other states, here presumably Arizona, and regulate the Society's activities there. The contention is obviously without merit. Nothing which California requires touches or affects anything the Society or appellant may do or wish to do in Arizona or elsewhere than in California. *Hoopeston Co.* v. *Cullen, supra.*

Likewise the equal protection contention is wholly without substance.[32]

Our determination has been made without specific reliance upon the McCarran Act for two reasons. One is that this was not necessary. The other arises from the facts that this is a criminal proceeding, the appellant's acts held to violate the California statutes were committed in August following rendition of the *South-Eastern* decision in June of 1944, and the McCarran Act was not approved until March 9, 1945. The effect of that statute we have considered in the *Prudential* case, *ante,* p. 408. But that case involved no criminal or penal phase and therefore no conceivable *ex post facto* effect. It is doubtful that more than the semblance of such an effect would be in-

[31] See note 20 and text.

[32] See note 6 and text *infra.*

volved by reliance upon the Act in this case. For it hardly could be maintained that the *South-Eastern* decision had the effect to convert Congress' preexisting silence concerning a matter which prior to the decision had been held not to be commerce into an expression by Congress of disapproval of these provisions of the California Code during the short period intervening between the decision and the date on which appellant acted. The indicated inference, if any, would be to the contrary, wholly without regard to the McCarran Act. Its effect might reasonably be taken as merely declaring or confirming expressly the inference which would be indicated from Congress' silence entirely without reference to the Act's provisions. But the declaration was made, as we have said, after appellant's acts were done. And to avoid any semblance of retroactive effect in a criminal matter, we have refrained from explicit reliance upon the Act in this case. It does not detract from our decision on other grounds that the McCarran Act, if applied, would dictate the same result.

The judgment is

Affirmed.

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

MR. JUSTICE DOUGLAS, dissenting in part.

I agree with the Court that the general license requirements which California provides for the insurance agents were constitutional under the decisions of the Court, even prior to the McCarran Act. But prior to that Act California could not under our decisions under the commerce clause exclude an interstate business, at least in absence of a showing that it was a fraudulent enterprise or in an unsound condition. No such showing is made here. The McCarran Act changes that rule; but it should not be allowed to make unlawful what was lawful when done.

Counsel for Parties.

FISHER *v.* UNITED STATES.

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

No. 122. Argued December 5, 1945.—Decided June 10, 1946.

1. In a trial in the District of Columbia for murder in the first degree, as defined in D. C. Code, 1940, Title 22, § 2401, which makes deliberation and premeditation essential elements of the crime, it was not error for the court to refuse to instruct the jury that they should consider evidence of the defendant's mental deficiency, concededly not amounting to legal insanity, to determine whether he was guilty of murder in the first or second degree. Pp. 464, 470, 473.
2. This Court may notice material error in the instructions in a criminal case even though the error is not specifically challenged; and the Court should do so when life is at stake, even in cases from the District of Columbia. Pp. 467, 468.
3. Matters relating to law enforcement in the District of Columbia being entrusted to the courts of the District, the policy of this Court is not to interfere with the local rules of law which they fashion, save in exceptional situations where egregious error has been committed. P. 476.

80 U. S. App. D. C. 96, 149 F. 2d 28, affirmed.

Petitioner was convicted of murder in the first degree and sentenced to death. The United States Court of Appeals for the District of Columbia affirmed. 80 U. S. App. D. C. 96, 149 F. 2d 28. This Court granted certiorari. 326 U. S. 705. *Affirmed*, p. 477.

Charles H. Houston argued the cause and filed a brief for petitioner.

Charles B. Murray argued the cause for the United States. *Solicitor General McGrath, W. Marvin Smith, Robert S. Erdahl* and *Leon Ulman* were on the brief.

MR. JUSTICE REED delivered the opinion of the Court.

This writ of certiorari brings here for review the sentence of death imposed upon petitioner by the District Court of the United States for the District of Columbia after a verdict of guilty on the first count of an indictment which charged petitioner with killing by choking and strangling Catherine Cooper Reardon, with deliberate and premeditated malice. The United States Court of Appeals for the District of Columbia affirmed the judgment and sentence of the District Court. 80 U. S. App. D. C. 96, 149 F. 2d 28.

The errors presented by the petition for certiorari and urged at our bar were, in substance, that the trial court refused to instruct the jurors that they should consider the evidence of the accused's psychopathic aggressive tendencies, low emotional response and borderline mental deficiency to determine whether he was guilty of murder in the first or in the second degree. The aggregate of these factors admittedly was not enough to support a finding of not guilty by reason of insanity.[1] Deliberation and

[1] The Code of Law for the District of Columbia (1940 Ed.) provides as follows:

Title 22, § 2401, "Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22–401 or 22–402 of this Code, rape, mayhem, robbery, or kidnapping, or in perpetrating or in attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree."

Title 22, § 2403, "Whoever with malice aforethought, except as provided in sections 22–2401, 22–2402, kills another, is guilty of murder in the second degree."

Title 22, § 2404, "The punishment of murder in the first degree shall be death by electrocution. The punishment of murder in the second degree shall be imprisonment for life, or for not less than twenty years."

premeditation are necessary elements of first degree murder.

Considerations as to the exercise of authority by this Court over the courts of the District of Columbia in the interpretation of local criminal statutes induced us to grant the writ in view of the issue presented. Judicial Code, § 240 (a).

The homicide took place in the library building on the grounds of the Cathedral of Saint Peter and Saint Paul, Washington, D. C., between eight and nine o'clock, a. m., on March 1, 1944. The victim was the librarian. She had complained to the verger a few days before about petitioner's care of the premises. The petitioner was the janitor. The verger had told him of the complaint. Miss Reardon and Fisher were alone in the library at the time of the homicide. The petitioner testified that Miss Reardon was killed by him immediately following insulting words from her over his care of the premises. After slapping her impulsively, petitioner ran up a flight of steps to reach an exit on a higher level but turned back down, after seizing a convenient stick of firewood, to stop her screaming. He struck her with the stick and when it broke choked her to silence. He then dragged her to a lavatory and left the body to clean up some spots of blood on the floor outside. While Fisher was doing this cleaning up, the victim "started hollering again." Fisher then took out his knife and stuck her in the throat. She was silent. After that he dragged her body down into an adjoining pump pit, where it was found the next morning. The above facts made up petitioner's story to the jury of the killing.

It may or may not have been accepted as a whole by the jury. Other evidence furnishes facts which may have led the jury to disbelieve some of the details of accused's version of the tragedy. In his original confession, the

accused made no reference to Miss Reardon's use of insulting words. In his written confession, they were mentioned. In his testimony their effect upon him was amplified. There are minor variations between Fisher's written confession and his testimony. In the written confession Fisher admitted that his main reason for assaulting Miss Reardon was because she reported him for not cleaning the library floor. The Deputy Coroner said the knife wound was not deep, "just went through the skin."

The effort of the defense is to show that the murder was not deliberate and premeditated; that it was not first but second degree murder. A reading of petitioner's own testimony, summarized above, shows clearly to us that there was sufficient evidence to support a verdict of murder in the first degree, if petitioner was a normal man in his mental and emotional characteristics. Cf. *Bostic* v. *United States,* 68 App. D. C. 167, 94 F. 2d 636, 638. But the defense takes the position that the petitioner is fairly entitled to be judged as to deliberation and premeditation, not by a theoretical normality but by his own personal traits. In view of the status of the defense of partial responsibility in the District and the nation no contention is or could be made of the denial of due process. It is the contention of the defense that the mental and emotional qualities of petitioner were of such a level at the time of the crime that he was incapable of deliberation and premeditation although he was then sane in the usual legal sense. He knew right from wrong. See *M'Naghten's Case,* 10 Cl. & Fin. 200, 210. His will was capable of controlling his impulses. *Smith* v. *United States,* 59 App. D. C. 144, 36 F. 2d 548. Testimony of psychiatrists to support petitioner's contention was introduced. An instruction charging the jury to consider the personality of the petitioner in determining intent, premeditation and deliberation was sought and refused.

From the evidence of the psychiatrists for the defense, the jury might have concluded the petitioner was mentally somewhat below the average with minor stigmata of mental subnormalcy. An expert testified that he was a psychopathic personality [2] of a predominantly aggressive type. There was evidence that petitioner was unable by reason of a deranged mental condition to resist the impulse to kill Miss Reardon. All evidence offered by the defense was accepted by the trial court. The prosecution had competent evidence that petitioner was capable of understanding the nature and quality of his acts. Instructions in the usual form were given by the court submitting to the jury the issues of insanity, irresistible impulse, malice, deliberation and premeditation. Under these instructions, set out below, the jury could have determined from the evidence that the homicide was not the result of premeditation and deliberation.[3]

Although no objection as to the form of these instructions is urged here by counsel for petitioner, this Court in a criminal case may notice material error within its power

[2] "The only conclusion that seems warrantable is that, at some time or other and by some reputable authority, the term psychopathic personality has been used to designate every conceivable type of abnormal character." Curran and Mallinson, Psychopathic Personality (1944), 90 J. Ment. Sci. 278.

[3] These instructions were given:

Insanity. "In behalf of the defendant, it is contended that he was insane, and therefore not legally responsible, hence should be acquitted by reason of insanity.

"It is further contended that even if sane and responsible, there was no deliberate intent to kill, nor in fact any actual intent to kill. Therefore if not guilty by reason of insanity, the defendant at most is guilty only of second degree murder or manslaughter, according as you may find he acted with or without malice.

. . . . . .

"Insanity, according to the criminal law, is a disease or defect of the mind which renders one incapable to understand the nature and quality of his act, to know that it is wrong, to refrain from doing the

to correct, even though that error is not specifically challenged, and certainly should do so, even in cases from the District of Columbia, where life is at stake. *Brasfield* v. *United States,* 272 U. S. 448; compare Rules 54 (a) (1), 59, 52 (b), Rules of Criminal Procedure. It is suggested

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wrongful act. There must be actual disease or defect of the mental faculties, so far impairing the reason or will that this test of sanity cannot be met, before one is relieved of his criminal act.

"The fatal actions must be traceable back to a diseased or deranged mentality."

Irresistible impulse. "Here it is contended that although the defendant may have understood what he was doing when he assaulted Miss Reardon, and may have known it was wrong, yet he was impelled by an irresistible impulse to do the violent acts which caused her death.

"If the defendant was suffering from a diseased condition of his mental faculties, which so far destroyed his will, the governing power of the mind, that his actions were not subject to the will, but beyond its control, then in legal contemplation, he was insane and not responsible, though he may have understood the nature of those acts, and have been conscious of their wrong.

"If, as I have said, there was such lack of willpower and control it must have been the result of a disease or disorder of the mental faculties. Mere loss of moral restraints leading to a surrender to criminal thoughts and passions is not enough."

Malice; Deliberation; Premeditation. "I have stated that the indictment presents within its terms the three degrees of unlawful homicide—murder in the first degree, murder in the second degree, and manslaughter.

"I shall explain them in that order.

"Murder in the first degree is the killing of a human being purposely and with deliberate and premeditated malice. The crime involves these elements:

"First, the fatal act purposely done. Of that, nothing more need be said.

"Second, malice.

"Third, premeditation.

"Fourth, deliberation.

"All these are elements which go to constitute the crime of murder

by a dissent that these instructions, just quoted in note 3, did not bring "sharply and vividly to the jury's mind" the issue of premeditation; that they "consisted of threadbare generalities, a jumble of empty abstractions." We think the contention advanced is that the district judge should

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in the first degree. Therefore, each and all must be established by the evidence beyond a reasonable doubt.

"Malice is a basic element of murder in both the first and the second degrees.

"In common parlance, the word signifies feelings of anger, hatred, or illwill. Such feelings, may, of course, actuate the killing of a human being, and often do.

"However, the law has given to the term 'malice' a special meaning. It is the intentional doing of a wrongful act to the injury of another under circumstances which do not legally justify or palliate the act.

"As applied to the crime of murder, malice is the intentional striking of a deadly blow in execution of an evil purpose springing from a heart regardless of social duty and fatally bent on mischief.

"Then, there is the element of premeditation. That is, giving thought, before acting, to the idea of taking a human life and reaching a definite decision to kill. In short, premeditation is the formation of a specific intent to kill.

"Deliberation, that term of which you have heard much in the arguments and one of the elements of murder in the first degree, is consideration and reflection upon the preconceived design to kill; turning it over in the mind; giving it second thought.

"Although formation of a design to kill may be instantaneous, as quick as thought itself, the mental process of deliberating upon such a design does require that an appreciable time elapse between formation of the design and the fatal act within which there is, in fact, deliberation.

"The law prescribes no particular period of time. It necessarily varies according to the peculiar circumstances of each case. Consideration of a matter may continue over a prolonged period—hours, days, or even longer. Then again, it may cover but a brief span of minutes. If one forming an intent to kill does not act instantly, but pauses and actually gives second thought and consideration to the intended act, he has, in fact deliberated. It is the fact of deliberation that is important, rather than the length of time it may have continued."

have specifically referred to the words of insult or have elaborated upon the details of the evidence in his charge with respect to premeditation. With such a requirement for instructions we do not agree. The evidence furnishes the factual basis for a jury's conclusion as to guilt and its degree, guided by the instructions of the court as to the law.[4] Premeditation and deliberation were defined carefully by the instructions. The contention of the accused that there was no deliberation or premeditation was called distinctly to the jury's attention. The necessary time element was emphasized and the jury was told that premeditation required a preconceived design to kill, a "second thought." With the evidence and the law before them the jury reached its verdict. The instructions, we think, were clear, definite, understandable and applicable to the facts developed by the testimony. We see no error in them.

The error claimed by the petitioner is limited to the refusal of one instruction. The jury might not have reached the result it did if the theory of partial responsibility[5] for his acts which the petitioner urges had been submitted. Petitioner sought an instruction from the trial court which would permit the jury to weigh the evidence of his mental deficiencies, which were short of insanity in the legal sense, in determining the fact of and the accused's capacity for premeditation and deliberation.[6]

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[4] *Stilson* v. *United States*, 250 U. S. 583, 588; *Starr* v. *United States*, 153 U. S. 614, 625; *Arwood* v. *United States*, 134 F. 2d 1007, 1011.

[5] The phrase is used herein to indicate responsibility for a lesser grade of offense. See Glueck, Mental Disorder and the Criminal Law (1925) 310, n. 1.

[6] The instruction requested reads as follows:

> "The jury is instructed that in considering the question of intent or lack of intent to kill on the part of the defendant, the question of premeditation or no premeditation, deliberation or no deliberation, whether or not the defendant at the time of the fatal acts

The appellate court approved the refusal upon the alternate ground that an accused is not entitled to an instruction upon petitioner's theory.[7] This has long been the law of the District of Columbia.[8] This is made abundantly clear by *United States* v. *Lee,* 4 Mackey 489, 495. This also was a murder case in which there was evidence of mental defects which did not amount to insanity. An instruction was asked and denied in the language copied in the margin.[9]

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was of sound memory and discretion, it should consider the entire personality of the defendant, his mental, nervous, emotional and physical characteristics as developed by the evidence in the case."

Our conclusion does not require that we pass upon whether the instruction was correct if petitioner's theory is sound, or whether if incorrect, the judge should have recast the instruction in proper form. See the case below, 80 U. S. App. D. C. 96, 97, 149 F. 2d 28, 29 r. c. Compare *Freihage* v. *United States,* 56 F. 2d 127, 133, with *George* v. *United States,* 75 U. S. App. D. C. 197, 125 F. 2d 559, 563.

[7] *Fisher* v. *United States,* 80 U. S. App. D. C. 96, 97, 149 F. 2d 28, 29 l. c.

The Court of Appeals spoke of an acquittal under the proposed instruction. The other language of the opinion and the refusal of the petition for rehearing, which pointed out the misuse of the word, shows clearly that a reduction in degree was meant, not an acquittal.

[8] Cf. *Guiteau's Case,* 10 F. 161, 168, 182; *Bolden* v. *United States,* 63 App. D. C. 45, 69 F. 2d 121; *Owens* v. *United States,* 66 App. D. C. 104, 85 F. 2d 270, 272.

[9] 4 Mackey 495–96:

The instruction requested was: "If the jury are not satisfied from the evidence that the defendant, at the time he committed the act, was so mentally unsound as to render him incapable of judging between right and wrong; yet if the jury find from the evidence that there was such a degree of mental unsoundness existing at the time of the homicide as to render the defendant incapable of premeditation and of forming such an intent as the jury believe the circumstances of this case would reasonably impute to a man of sound mind, they may consider such degree of mental unsoundness in determining the question whether the act was murder or manslaughter."

The court said: "It rests upon the idea that there is a grade of

It is suggested that the *Lee* case was decided when murder under the District law was not divided into degrees and that therefore it was not proper to instruct as to the accused's mental capacity to premeditate and deliberate while now it would be. We do not agree. The separation of the crime of murder into the present two degrees by the Code of Law for the District of Columbia, March 3, 1901, 31 Stat. 1189, 1321, is not significant in analyzing the necessity for the proposed submission of the evidence concerning petitioner's mental and emotional characteristics to the jury by specific instruction. The reason for the change, doubtless, lay in the wide range of atrocity with which the crime of murder might be committed so that Congress deemed it desirable to establish grades of punishment. Cf. *Davis* v. *Utah Territory*, 151 U. S. 262, 267, 270. Homicide, at common law, the rules of which were applicable in the District of Columbia, had degrees. Murder was "with malice aforethought, either express or implied." Blackstone, Book IV (Lewis ed.,

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insanity not sufficient to acquit the party of the crime of manslaughter and yet sufficient to acquit him of the crime of murder.

"The law does not recognize any such distinction as that in the forms of insanity. The rule of law is very plain that in order that the plea of insanity shall prevail, there must have been that mental condition of the party which disabled him from distinguishing between right and wrong in respect of the act committed.

"Now if the prisoner was so far capable of distinguishing between right and wrong as to be guilty of the crime of manslaughter, he surely was capable of distinguishing between right and wrong in respect of the crime of murder of the identical party. There can be no recognition of the doctrine that a man is incapable of distinguishing between right and wrong so as to determine that the case is not a case of murder, and yet capable of distinguishing between right and wrong so as to be guilty of manslaughter. There is no such doctrine, and nothing in the books that favors any such idea. The prayer therefore is unsound in all respects, and even if it had been sound, not being supported by evidence, the court below was entirely justified in rejecting it."

1902), p. 195; see *Hill* v. *United States,* 22 App. D. C. 395, 401; *Hamilton* v. *United States,* 26 App. D. C. 382, 386–91; *Burge* v. *United States,* 26 App. D. C. 524, 527–30. Manslaughter was unlawful homicide without malice. Blackstone, Book IV (Lewis ed., 1902), p. 191. As capacity of a defendant to have malice would depend upon the same kind of evidence and instruction which is urged here,[10] it cannot properly be said that the separation of murder into degrees introduced a new situation into the law of the District of Columbia.[11] As shown by the action of the District of Columbia courts in this case and the other District cases cited in this and the preceding paragraph, we think it is the established law in the District that an accused in a criminal trial is not entitled to an instruction based upon evidence of mental weakness, short of legal insanity, which would reduce his crime from first to second degree murder.

Petitioner urges forcefully that mental deficiency which does not show legal irresponsibility should be declared by this Court to be a relevant factor in determining whether an accused is guilty of murder in the first or second degree, upon which an instruction should be given, as requested. It is pointed out that the courts of certain states have adopted this theory. Others have rejected it.[12] It is urged, also, that since evidence of intoxication

[10] See *Hart* v. *United States,* 76 U. S. App. D. C. 193, 130 F. 2d 456, 458; *Bishop* v. *United States,* 71 App. D. C. 132, 107 F. 2d 297, 302–3; *McHargue* v. *Commonwealth,* 231 Ky. 82, 21 S. W. 2d 115; *State* v. *Eaton,* 154 S. W. 2d 767 (Mo.).

[11] The reference to the establishment of degrees of murder in *Hopt* v. *People,* 104 U. S. 631, 634, may indicate a different point of view. The Court was there considering intoxication under a statutory requirement that the intoxication should be taken into consideration by the jury in determining the degree of the offense.

[12] We are indebted to the respondent's brief for the collection of cases. Those accepting the petitioner's theory are: *Andersen* v. *State,* 43 Conn. 514, 526 (1876); *State* v. *Johnson,* 40 Conn. 136, 143–44

to a state where one guilty of the crime of murder may not be capable of deliberate premeditation requires in the District of Columbia an instruction to that effect (*McAffee* v. *United States*, 72 App. D. C. 60, 111 F. 2d 199, 205 r. c.), courts from this must deduce that disease and congenital defects, for which the accused may not

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(1873); *Fisher* v. *People*, 23 Ill. 283, 295 (1860); *Donahue* v. *State*, 165 Ind. 148, 156, 74 N. E. 996 (1905); *Aszman* v. *State*, 123 Ind. 347, 356, 24 N. E. 123 (1890); *Rogers* v. *Commonwealth*, 96 Ky. 24, 28, 27 S. W. 813 (1894); *Mangrum* v. *Commonwealth*, 19 Ky. Law Rep. 94, 39 S. W. 703 (1897); *Commonwealth* v. *Trippi*, 268 Mass. 227, 231, 167 N. E. 354 (1929); *State* v. *Close*, 106 N. J. L. 321, 324, 148 A. 764 (1930); *State* v. *Schilling*, 95 N. J. L. 145, 148, 112 A. 400 (1920); *People* v. *Moran*, 249 N. Y. 179, 180, 163 N. E. 553 (1928); *Jones* v. *Commonwealth*, 75 Pa. 403, 408, 410 (1874); *State* v. *Green*, 78 Utah 580, 602, 6 P. 2d 177 (1931); *State* v. *Anselmo*, 46 Utah 137, 145, 157, 148 P. 1071 (1915); *Dejarnette* v. *Commonwealth*, 75 Va. 867, 880–81 (1881); *Hempton* v. *State*, 111 Wisc. 127, 135, 86 N. W. 596 (1901).

Those rejecting it are: *United States* v. *Lee*, 15 D. C. (4 Mackey) 489, 495–96 (1886); *Foster* v. *State*, 37 Ariz. 281, 289–90, 294 P. 268 (1930); *Bell* v. *State*, 120 Ark. 530, 557–58, 180 S. W. 186 (1915); *People* v. *French*, 12 Cal. 2d 720, 738, 87 P. 2d 1014 (1939); *People* v. *Cordova*, 14 Cal. 2d 308, 311–12, 94 P. 2d 40 (1939); *People* v. *Troche*, 206 Cal. 35, 47, 273 P. 767 (1928); *State* v. *Van Vlack*, 57 Idaho 316, 360–67, 65 P. 2d 736 (1937); *Sage* v. *State*, 91 Ind. 141, 144–45 (1883); *Spencer* v. *State*, 69 Md. 28, 41–43, 13 A. 809 (1888); *Commonwealth* v. *Cooper*, 219 Mass. 1, 5, 106 N. E. 545 (1914); *State* v. *Holloway*, 156 Mo. 222, 231, 56 S. W. 734 (1900); *State* v. *Rodia*, 132 N. J. L. 199, 39 A. 2d 484 (1944); *State* v. *Noel*, 102 N. J. L. 659, 676–77, 133 A. 274 (1926); *State* v. *James*, 96 N. J. L. 132, 149–51, 114 A. 553 (1921); *State* v. *Maioni*, 78 N. J. L. 339, 74 A. 526 (1909); *Sindram* v. *People*, 88 N. Y. 196, 200–201 (1882); *Commonwealth* v. *Barner*, 199 Pa. 335, 342, 49 A. 60 (1901); *Commonwealth* v. *Hollinger*, 190 Pa. 155, 160, 42 A. 548 (1899); *Commonwealth* v. *Wireback*, 190 Pa. 138, 151–52, 42 A. 542 (1899); *Jacobs* v. *Commonwealth*, 121 Pa. 586, 592–93, 15 A. 465 (1888); *Commonwealth* v. *Scott*, 14 Pa. D. & C. Rep. 191 (1930); *Witty* v. *State*, 75 Tex. Cr. Rep. 440, 457, 171 S. W. 229 (1914); *Hogue* v. *State*, 65 Tex. Cr. Rep. 539, 542, 146 S. W. 905 (1912); *State* v. *Schneider*, 158 Wash. 504, 510–11, 291 P. 1093 (1930).

be responsible, may also reduce the crime of murder from first to second degree. This Court reversed the Supreme Court of the Territory of Utah for failure to give a partial responsibility charge upon evidence of drunkenness in language which has been said to be broad enough to cover mental deficiency. *Hopt* v. *People,* 104 U. S. 631, 634.[13] It should be noted, however, that the Territory of Utah had a statute specifically establishing such a rule.[14]

No one doubts that there are more possible classifications of mentality than the sane and the insane. White, Insanity and the Criminal Law 89. Criminologists and psychologists have weighed the advantages and disadvantages of the adoption of the theory of partial responsibility as a basis of the jury's determination of the degree of crime of which a mentally deficient defendant may be guilty.[15] Congress took a forward step in defining the degrees of murder so that only those guilty of deliberate

[13] 104 U. S. at 634: "But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury."

See Edwin R. Keedy, Insanity and Criminal Responsibility, 30 Harv. L. Rev. 535 at 552.

The cases cited by this Court to support this statement are all instances of intoxication. Since drunkenness alone is specifically mentioned, the "or otherwise" may refer to various stages of intoxication.

[14] See 104 U. S. 631 at 634.

[15] Wharton, Criminal Law (12th ed.), vol. 1, § 64; Weihofen, Insanity as a Defense in Criminal Law (1933), pp. 100–103; Weihofen, Partial Insanity and Criminal Intent, 24 Ill. Law Rev. 505 (1930); Keedy, Insanity and Criminal Responsibility, 30 Harv. Law Rev. 535, 552–554 (1917); Mental Abnormality and Crime, English Studies in Criminal Science (1944), pp. 61–63; Glueck, Mental Disorder and the Criminal Law (1925), pp. 199–208; Hall, Mental Disease and Criminal Responsibility, 45 Col. Law Rev. 677 (1945).

and premeditated malice could be convicted of the first degree. It may be that psychiatry has now reached a position of certainty in its diagnosis and prognosis which will induce Congress to enact the rule of responsibility for crime for which petitioner contends. For this Court to force the District of Columbia to adopt such a requirement for criminal trials would involve a fundamental change in the common law theory of responsibility.

We express no opinion upon whether the theory for which petitioner contends should or should not be made the law of the District of Columbia. Such a radical departure from common law concepts is more properly a subject for the exercise of legislative power or at least for the discretion of the courts of the District. The administration of criminal law in matters not affected by constitutional limitations or a general federal law is a matter peculiarly of local concern. Compare *McNabb* v. *United States,* 318 U. S. 332, with *Ashcraft* v. *Tennessee,* 322 U. S. 143, 156. This Court has in a less important matter undertaken to adjust by decision an outmoded rule of the common law to modern conditions. But when that step was taken, it was declared that "experience has clearly demonstrated the fallacy or unwisdom of the old rule." *Funk* v. *United States,* 290 U. S. 371, 381. See *Weiler* v. *United States,* 323 U. S. 606, 609.

Matters relating to law enforcement in the District are entrusted to the courts of the District. Our policy is not to interfere with the local rules of law which they fashion, save in exceptional situations where egregious error has been committed.

Where the choice of the Court of Appeals of the District of Columbia in local matters between conflicting legal conclusions seems nicely balanced, we do not interfere. *District of Columbia* v. *Pace,* 320 U. S. 698, 702; *Busby* v. *Electric Utilities Union,* 323 U. S. 72, 74–5. The policy

of deferring to the District's courts on local law matters is reinforced here by the fact that the local law now challenged is long established and deeply rooted in the District.

Affirmed.

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

MR. JUSTICE FRANKFURTER, dissenting.

A shocking crime puts law to its severest test. Law triumphs over natural impulses aroused by such a crime only if guilt be ascertained by due regard for those indispensable safeguards which our civilization has evolved for the ascertainment of guilt. It is not enough that a trial goes through the forms of law. Especially where life is at stake it is requisite that the trial judge should so guide the jury that the jurors may be equipped to determine whether death should be the penalty for conduct. Of course society must protect itself. But surely it is not self-protection for society to take life without the most careful observance of its own safeguards against the misuse of capital punishment.

This case has been much beclouded by laymen's ventures into psychiatry. We are not now called upon to decide whether the antiquated tests set down more than a hundred years ago regarding mental responsibility for crime [1] are still controlling or whether courts should choose from among the conflicting proposals of scientific special-

[1] *M'Naghten's Case,* 10 Cl. & Fin. 200 (1843). More than sixty years ago Sir James Fitzjames Stephen brought weighty criticism to bear on the *M'Naghten* case. 2 Stephen, *A History of the Criminal Law of England* (1883) 153 *et seq.;* for more recent consideration of the case, see Glueck, *Mental Disorder and the Criminal Law* (1925) c. 6; Cardozo, *What Medicine Can Do For Law* (1930) 28–35.

ists.[2] This is not the occasion to decide whether the only alternative is between law which reflects the most advanced scientific tests and law remaining a leaden-footed laggard. The case turns on a much simpler and wholly conventional issue. For the real question, as I see it, is whether in view of the act of Congress defining murder in the first degree for prosecutions in the District and in light of the particular circumstances of this case, the trial court properly sent the case to the jury. That is a very different question from whether the court's charge was unimpeachable as an abstract statement of law. For Fisher is not the name of a theoretical problem. We are not hear dealing with an abstract man who killed an abstract woman under abstract circumstances and received an abstract trial on abstract issues. Murder cases are apt to be peculiarly individualized, and this case has its own distinctive features. It is in the light of these that we must decide whether Fisher's death sentence should legally stand.

According to the more enlightened rule, appellate courts may review the facts in a capital case.[3] Were such the

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[2] See, *e. g.*, White, *Insanity and the Criminal Law* (1923); Abrahamsen, *Crime and the Human Mind* (1944); Lindner, *Rebel Without A Cause* (1944); Radzinowicz & Turner, eds., *Mental Abnormality and Crime* (1944); Reik, *The Unknown Murderer* (1945); see also, Hall, *Mental Disease and Criminal Responsibility* (1945) 45 Col. L. Rev. 677, 680–84, and authorities cited therein.

[3] See, *e. g.*, Annotated Laws of Massachusetts, c. 278, § 33E; *Commonwealth* v. *Gricus*, 317 Mass. 403, 406, 58 N. E. 2d 241; *Massachusetts Judicial Council, Third Report* (1927) 40–43, 131–35; *Massachusetts Judicial Council, Thirteenth Report* (1937) 28–30; New York Constitution, Article 6, § 7; *People* v. *Crum*, 272 N. Y. 348, 6 N. E. 2d 51; Cardozo, *Jurisdiction of the Court of Appeals* (2d ed., 1909) § 51; American Law Institute, *Code of Criminal Procedure* (Official Draft, 1930) § 457 (2); Orfield, *Criminal Appeals in America* (1939) 83 *et seq.*

The reasons for such review are succinctly stated in the *Thirteenth Report of the Massachusetts Judicial Council, supra*, at 29: "In

scope of our review of death sentences, I should think it would be hard to escape what follows as the most persuasive reading of the record.

Fisher had learned from his boss of Miss Reardon's complaint about the slackness of his work. On the fatal morning, Miss Reardon told Fisher that he was not doing the work for which he was being paid, and in the course of her scolding called him a "black nigger." This made him angry—no white person, he claimed, had ever called him that—and he struck her. She ran screaming towards the window in the back of the room. Fisher ran out of the room and up the stairs. Her screaming continued. At the top of the stairs he saw a pile of wood lying by the fireplace. He seized a piece of wood, ran down the stairs and struck her on the head. The stick broke and he seized her by the throat. She continued to scream until she went limp. He then dragged her to the lavatory and left her there while he went back to clean up the spots of blood. She recovered sufficiently to scream again, and he returned to the lavatory and cut her slightly with a knife he carried in his pocket. The importance of the screaming is a key to the tragedy. It is difficult to disbelieve Fisher's account that he never wanted to kill Miss Reardon but wanted only to stop her screaming, which unnerved him.

> "She ran out from behind her desk, down toward the back, screaming."

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substance this [denial of the right to consider the facts by the appellate court] means that there is no review of the discretion of the single judge. Thus a matter of life or death, once treated [in Massachusetts] with the utmost care, even beyond the requirements of the law, has now been committed to a single judge of the Superior Court, with no review whatever on its most vital aspects. Such a situation places an unfair responsibility upon the trial judge and upon the governor, is a potential threat to justice and is not reassuring to the public who have a right to demand that judicial consideration should be exhausted before a man is condemned to death."

"The screaming seemed to have gotten on my nerves."

"I was running on up the steps, with her all the time screaming."

"She was still screaming, and I began choking her then."

"I was just trying to keep her from making a noise."

". . . she started hollering and I tried to stop her from hollering."

"Then I began choking her because she was still hollering."

". . . I did not strike her any more after the noise had ceased."

". . . she started hollering again."

"She kept hollering, seemed like to me."

"My idea was just trying to stop her from hollering, is all I can think about."

"After that she stopped hollering."

The next day he started to go to the Cathedral to work as usual. He made two attempts to enter the Cathedral grounds. About the first, he said he got "nervous and shaky, and [he] couldn't go in there." Later he "kept thinking about what [he] had done to her. [He] didn't know whether she was dead or alive. [He] was afraid to go up there and tell them that [they] had had an argument or a fight." When apprehended by two detectives, he said he "had some trouble with the lady out at the Cathedral."

The evidence in its entirety hardly provides a basis for a finding of premeditation. He struck Miss Reardon when she called him "black nigger." He kept on when her screaming frightened him. He did not know he had killed her. There is not the slightest basis for finding a motive for the killing prior to her use of the offensive phrase. Fisher, to be sure, had Miss Reardon's ring in

his possession. But it came off in his hand while he was dragging her, and he put it away when he reached home to conceal its possession from his wife. He did not run away and he cleaned up the blood "because [he] didn't want to leave the library dirty, leave awful spots on the floor. [He] wanted to clean them up." He treated the spots on the floor not as evidence of crime but as part of his job to keep the library clean. Fisher was curiously unconnected with the deed, unaware of what he had done. His was a very low grade mentality, unable to realize the direction of his action and its meaning. His whole behavior seems that of a man of primitive emotions reacting to the sudden stimulus of insult and proceeding from that point without purpose or design. Premeditation implies purpose and purpose is excluded by instantaneous action. Fisher's response was an instinctive response to provocation, and premeditation means nothing unless it precludes the notion of an instinctive and uncalculated reaction to stimulus. Accordingly, if existing practice authorized us to review the facts in a capital case I should be compelled to find that the ingredients of murder in the first degree were here lacking. I would have to find that the necessary premeditation and deliberation for the infliction of a death sentence were wanting, as did the New York Court of Appeals in a case of singularly striking similarity. *People* v. *Caruso*, 246 N. Y. 437, 159 N. E. 390. It is significant that the Court of Appeals for the District of Columbia has heretofore deemed it within its duty to examine the evidence in order to ascertain whether a finding of premeditation and deliberation was justified. *Bullock* v. *United States*, 74 App. D. C. 220, 122 F. 2d 213.

But while it is not now this Court's function to interpret the facts independently,[4] the jury, under guidance appro-

[4] As to certain classes of litigation that come here, this Court has, of course, always had power to review the evidence. *E. g.*, "[Since] by an appeal, except when specially provided otherwise, the entire

priate for a murder case, might well have so interpreted them because the facts are persuasively so interpretable. If, under adequate instructions, it could have so found, the homicide falls outside the requirements for a finding of murder in the first degree. Congress in 1901 enacted a code for the District in which it joined the growing movement of dividing murder into degrees.[5] Congress confined the death sentence to killing by premeditation; it required designed homicide, previous deliberation that life was to be taken, before the United States would take life in retribution.[6] The division of murder into degrees arose

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case on both law and facts is to be reconsidered, there seems to be little doubt that, so far as it is essential to a proper decision of this case, the appeal requires us to examine into the evidence brought to sustain or defeat the right of the petitioner to his discharge." *In re Neagle*, 135 U. S. 1, 42.

[5] District of Columbia Code (1940) § 22–2401: "Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22–401 or 22–402 of this Code, rape, mayhem, robbery, or kidnapping, or in perpetrating or in attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree."

§ 22–2402: "Whoever maliciously places an obstruction upon a railroad or street railroad, or displaces or injures anything appertaining thereto, or does any other act with intent to endanger the passage of any locomotive or car, and thereby occasions the death of another, is guilty of murder in the first degree."

§ 22–2403: "Whoever with malice aforethought, except as provided in sections 22–2401, 22–2402, kills another, is guilty of murder in the second degree."

[6] The legislative history of these sections is meagre. The separation of the crime of murder into two degrees seems to have been first proposed for the District in the Code of 1857. C. 130, §§ 1–2. That Code was never enacted by Congress. The present provisions are

from the steadily weakened hold of capital punishment on the conscience of mankind. See Calvert, *Capital Punishment in the Twentieth Century* (5th ed., 1936); *Report from the Select Committee of the House of Commons on Capital Punishment, and Minutes of Evidence* (1930). The crime of murder was divided into two classes, in some

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the result of a Code prepared by Judge Cox and enacted in 1901. 31 Stat. 1189, 1321. In an historical note that precedes the Code, Judge Cox stated that it was to have been based on the laws of Maryland. District of Columbia Code (1940 ed.) XIV. In a letter to the Washington Board of Trade, however, Judge Cox stated that the Code was based on the laws of Maryland, Virginia, New York, and Ohio. *Report of the Washington Board of Trade,* November 14, 1898, pp. 23–24. And the Washington *Law Reporter,* vol. 26, p. 801, states that the "portions of the work relating to crimes and punishments follow the statutes of New York in creating degrees in the crime of murder." A comparison of the Code with the New York Penal Code of 1898, §§ 183, 183a, 184, bears out this statement, though the exact language of the New York statute was not adopted.

The reports of each of the four States, however, up to the time of the enactment of the District Code, indicates unanimity in one essential element. For a homicide to constitute murder in the first degree, the jury must find in addition to the element of intent to kill, premeditation and deliberation. *E. g., Spencer* v. *State,* 69 Md. 28 (1888); *Leighton* v. *People,* 88 N. Y. 117 (1882); *People* v. *Majone,* 91 N. Y. 211 (1883); *People* v. *Conroy,* 97 N. Y. 62 (1884); *People* v. *Hawkins,* 109 N. Y. 408, 17 N. E. 371 (1888); *People* v. *Barberi,* 149 N. Y. 256, 43 N. E. 635 (1896); *Ohio* v. *Neil,* Tappan (Ohio) 120 (1817); *State* v. *Turner,* Wright (Ohio) 20 (1831); *State* v. *Gardiner,* Wright (Ohio) 392 (1833); *State* v. *Thompson,* Wright (Ohio) 617 (1834); *Shoemaker* v. *State,* 12 Ohio 43 (1843); *Ohio* v. *Brooks,* 1 Ohio Dec. 407 (1851); *Fouts* v. *State,* 8 Ohio St. 98 (1857); *State* v. *Cook,* 2 Ohio Dec. 36 (1859); *Burns* v. *State,* 3 Ohio Dec. 122 (1859); *State* v. *Maxwell,* Dayton (Ohio) 362 (1867); *Zeltner* v. *State,* 32 Ohio C. C. 102 (1899); *Commonwealth* v. *Jones,* 1 Leigh (Va.) 598 (1829); *Dejarnette* v. *Commonwealth,* 75 Va. 867 (1881); *Hite* v. *Commonwealth,* 96 Va. 489, 31 S. E. 895 (1898); *Jackson* v. *Commonwealth,* 97 Va. 762, 33 S. E. 547 (1899).

States very early,[7] in recognition of the fact that capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation. It is this consideration that has led most of the States to divide common law murder into two crimes, and Congress followed this legislation. See Michael and Wechsler, *A Rationale of the Law of Homicide* (1937) 37 Col. L. Rev. 701, 703–704; Michael and Wechsler, *Criminal Law and Its Administration* (1940) 1269 *et seq.*

The bite of law is in its enforcement. This is especially true when careful or indifferent judicial administration has consequences so profound as does the application of legislation dividing murder into first and second degrees—consequences that literally make the difference between life and death. This places the guiding responsibility upon the trial court in no wise restricted by the course pursued by the defense. The preoccupation at the trial, in the treatment of the conviction by the court below and by the arguments at the bar of this Court, was with alluring problems of psychiatry. Throughout this melancholy affair the insistence was on claims of Fisher's mental deficiencies and the law's duty to take into consideration the skeptical views of modern psychiatry regarding the historic legal tests for insanity. I cannot but believe that this has diverted attention from the more obvious and conventional but controlling inquiry regarding the ab-

[7] Pennsylvania enacted this type of legislation in 1794. Pennsylvania Laws, 1794, c. 257, §§ 1–2. This early statute has served as the pattern upon which most legislative action with a similar purpose has been based. See Michael and Wechsler, *A Rationale of the Law of Homicide* (1937) 37 Col. L. Rev. 701, 703–704; Michael and Wechsler, *Criminal Law and Its Administration* (1940) 1270–73. The District Code does not depart very far from the language of the original Pennsylvania statute; nor did the statute of the Territory of Utah construed by this Court in *Hopt* v. *People,* 104 U. S. 631, 632.

sence or presence of the requisite premeditation, under the circumstances of this case.

That the charge requested by the defendant and denied did not go to this issue of premeditation unambiguously but in an awkward and oblique way did not lessen the responsibility of the trial judge to bring this issue—it was the crucial issue—sharply and vividly to the jury's mind. If their minds had been so focused, the jury might well have found that the successive steps that culminated in Miss Reardon's death could not properly be judged in isolation. They might well have found a sequence of events that constituted a single, unbroken response to a provocation in which no forethought, no reflection whatever, entered. A deed may be gruesome and not be premeditated. Concededly there was no motive for the killing prior to the inciting "you black nigger." The tone in which these words were uttered evidently pulled the trigger of Fisher's emotions, and under adequate instructions the jury might have found that what these words conveyed to Fisher's ears unhinged his self-control. While there may well have been murder, deliberate premeditation, for which alone Congress has provided the death sentence, may have been wanting.[8] "While it is unlikely that the jury would

[8] Federal judges are not referees in sporting contests. Their duty to keep a trial in the course of justice is especially compelling where the penalty for conviction is death. The kind of guidance that a trial judge should give a jury in a case like this is well illustrated by Judge Andrews in *People* v. *Caruso*, 246 N. Y. 437, 159 N. E. 390. *E. g.*, "But was there premeditation and deliberation? . . . Time to deliberate and premeditate there clearly was. Caruso might have done so. In fact, however, did he?

"Until the Saturday evening Caruso had never met Dr. Pendola. Nothing occurred at that interview that furnished any motive for murder. Then came nervous strain and anxiety culminating in grief, deep and genuine, for the death of his child. Brooding over his loss,

return a verdict of murder in the first degree unless satisfied that the defendant, at the time he committed the offense, was capable of entertaining the malicious intent, we cannot, in a case of this kind, speculate as to what considerations entered into their verdict." *Sabens* v. *United States,* 40 App. D. C. 440, 444. The same guiding consideration for reviewing a death sentence was pithily expressed the other day by the present Lord Chief Justice of England: "It is impossible to say what verdict would have been returned had the case been left to the jury with a proper direction." *Kwaku Mensah* v. *Rex,* [1946] A. C. 83, 94. In that case, the Privy Council found inadequacy in the direction given by the trial court on considerations that were not mentioned in the courts below nor raised by the appellant. Neither should we permit a death sentence to stand that raises such doubts as does Fisher's conviction on this record.

As I have already indicated, I do not believe that the facts warrant a finding of premeditation. But, in any event, the justification for finding first-degree murder pre-

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blaming the doctor for his delay in making the promised visit, believing he had killed the boy by his treatment, the doctor finally enters. And when told of the child's death he appears to laugh. This added to his supposed injuries would fully account for the gust of anger that Caruso says he felt. Then came the struggle and the homicide.

"As has been said, Caruso had the time to deliberate, to make a choice whether to kill or not to kill—to overcome hesitation and doubt—to form a definite purpose. And where sufficient time exists very often the circumstances surrounding the homicide justify—indeed require—the necessary inference. Not here, however. No plan to kill is shown, no intention of violence when the doctor arrived—only grief and resentment. Not until the supposed laugh did the assault begin. . . . The attack seems to have been the instant effect of impulse. Nor does the fact that the stabbing followed the beginning of the attack by some time affect this conclusion. It was all one transaction under the peculiar facts of this case. If the assault was not deliberated or premeditated then neither was the infliction of the fatal wound." 246 N. Y. at 445–46.

meditation was so tenuous that the jury ought not to have been left to founder and flounder within the dark emptiness of legal jargon.[9] The instructions to the jury on the vital issue of premeditation consisted of threadbare generalities, a jumble of empty abstractions equally suitable for any other charge of murder with none of the elements that are distinctive about this case, mingled with talk about mental disease. What the jury got was devoid of clear guidance and illumination. Inadequate direction to a jury may be as fatal as misdirection. The observations made by this Court in a civil case are especially pertinent to the duty of a federal judge in a trial for murder: ". . . it is the right and duty of the court to aid [the jury] . . . by directing their attention to the most important facts, . . . by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect, stripped of every consideration which might otherwise mislead or confuse them. . . . Constituted as juries are, it is frequently impossible for them to discharge their function wisely and well without this aid. In such cases, chance, mistake, or caprice, may determine the result." *Nudd* v. *Burrows,* 91 U. S. 426, 439.

Only the other day we exercised our supervisory responsibility over the lower federal courts to assure against the possibility of unfairness in the operation of the jury system

[9] ". . . It is not too much to say of any period, in all English history, that it is impossible to conceive of trial by jury as existing there in a form which would withhold from the jury the assistance of the court in dealing with the facts. Trial by jury, in such a form as that, is not trial by jury in any historic sense of the words. It is not the venerated institution which attracted the praise of Blackstone and of our ancestors, but something novel, modern, and much less to be respected.

"In the Federal courts the common-law doctrine on this subject has always held." Thayer, *Preliminary Treatise on Evidence* (1898) 188, n. 2.

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in ordinary civil suits. *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217. By how much more should we guard against a fatal mishap where life is at stake. This Court in reviewing a conviction for murder in the federal courts ought not to be behind the House of Lords and the Privy Council in rejecting strangling technicalities. See *Mancini* v. *Director of Public Prosecutions*, [1942] A. C. 1, 7–8;[10] *Kwaku Mensah* v. *Rex*, *supra*. It should be guided, as was the Privy Council in the case of a lowly West African villager, by broad considerations of justice so as to avoid

[10] "Although the appellant's case at the trial was in substance that he had been compelled to use his weapon in necessary self-defence—a defence which, if it had been accepted by the jury, would have resulted in his complete acquittal—it was undoubtedly the duty of the judge, in summing up to the jury, to deal adequately with any other view of the facts which might reasonably arise out of the evidence given, and which would reduce the crime from murder to manslaughter. The fact that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defence) does not relieve the judge from the duty of directing the jury to consider the alternative, if there is material before the jury which would justify a direction that they should consider it. Thus, in *Rex* v. *Hopper* [(1915) 2 K. B. 431], at a trial for murder the prisoner's counsel relied substantially on the defence that the killing was accidental, but Lord Reading C. J., in delivering the judgment of the Court of Criminal Appeal, said [*id.* at 435]: 'We do not assent to the suggestion that as the defence throughout the trial was accident, the judge was justified in not putting the question as to manslaughter. Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the judge to put such questions as appear to him properly to arise upon the evidence, even although counsel may not have raised some question himself. In this case it may be that the difficulty of presenting the alternative defences of accident and manslaughter may have actuated counsel in saying very little about manslaughter, but if we come to the conclusion, as we do, that there was some evidence—we say no more than that—upon which a question ought to have been left to the jury as to the crime being manslaughter only, we think that this verdict of murder cannot stand.' "

the mistake of affirming a death sentence which the jury may well not have returned had they had a direction that would have informed their understanding and guided their judgment. In the circumstances of this case, failure to charge the jury adequately was to deny Fisher the substance of a fair trial.

Men ought not to go to their doom because this Court thinks that conflicting legal conclusions of an abstract nature seem to have been "nicely balanced" by the Court of Appeals for the District of Columbia. The deference which this Court pays to that Court's adjudications in ordinary cases involving issues essentially of minor or merely local importance seems out of place when the action of this Court, no matter how phrased, sustains a death sentence at the seat of our Government as a result of a trial over which this Court, by direction of Congress, has the final reviewing power. This Court cannot escape responsibility for the death sentence if it affirms the judgment. One can only hope that even more serious consequences will not follow, which would be the case if the Court's decision were to give encouragement to doctrines of criminal law that have only obscurantist precedents of the past to recommend them. Moreover, a failure adequately to guide a jury on a basic issue, such as that of premeditation on a charge of murder in the first degree, does not reflect a "long established" practice, and one hopes will not become "deeply rooted," in the District.[11]

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[11] The only authority adduced for what the Court terms long-established practice is *United States* v. *Lee*, 4 Mackey (D. C.) 489 (1886). But that case was decided while common law murder was the law of the District. The enactment of the Code rendered that case's doctrine invalid. Counsel for the Government, a distinguished lawyer, Mr. A. S. Worthington, pointed to the distinction in his argument: "In jurisdictions where murder is divided into two degrees—murder in the first degree requiring deliberation and premeditation; in other words, actual malice—it has been frequently held that evidence of mental

Quite the contrary standard is indicated by an earlier opinion of the Court of Appeals. See *McAffee* v. *United States*, 70 App. D. C. 142, 105 F. 2d 21, 26.

The judgment should be reversed and a new trial granted.

MR. JUSTICE MURPHY, dissenting.

As this case reaches us, we are not met with any question as to whether petitioner killed an individual. That fact is admitted. Our sole concern here is with the charge given to the jury concerning the elements entering into the various degrees of murder for which petitioner could be convicted.

The rule that this Court ordinarily will refrain from reviewing decisions dealing with matters of local law in the District of Columbia is a sound and necessary one. But it is not to be applied without discretion. Like most rules, this one has its exceptions. And those exceptions are grounded primarily in considerations of public policy and of sound administration of justice.

In the past, this Court has seen fit to determine various common law issues affecting only the District of Columbia. *Aldridge* v. *United States*, 283 U. S. 308; *Reed* v. *Allen*, 286 U. S. 191; *Best* v. *District of Columbia*, 291 U. S. 411. It has also, on occasion, settled issues involving the interpretation of provisions of the District of Columbia Code.

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excitement resulting from drunkenness and, perhaps, also of other abnormal conditions of the mind not amounting to insanity, may reduce an unprovoked homicide to murder in the second degree; but it has always been held that such evidence cannot of itself reduce the crime to manslaughter." *Id.* at 493. The change wrought by Congress is reflected in *Sabens* v. *United States*, 40 App. D. C. 440; *Bishop* v. *United States*, 71 App. D. C. 132, 107 F. 2d 297; *Bullock* v. *United States*, 74 App. D. C. 220, 122 F. 2d 213, 214.

Washington Fidelity Ins. Co. v. *Burton,* 287 U. S. 97; *Loughran* v. *Loughran,* 292 U. S. 216; *District of Columbia* v. *Murphy,* 314 U. S. 441. In many respects, however, the problem in this instance far transcends the ones presented in those cases.

Here we have more than an exercise in statutory construction or in local law. It is a capital case involving not a question of innocence or guilt but rather a consideration of the proper standards to be used in judging the degree of guilt. What the Court says and decides here today will affect the life of the petitioner as well as the lives of countless future criminals in the District and in the various states. However guarded may be the Court's statements, its treatment of petitioner's claims will have inevitable repercussions in state and federal criminal proceedings. Moreover, these claims, whatever their merit, afford a rare opportunity to explore some of the frontiers of criminal law, frontiers that are slowly but undeniably expanding under the impact of our increasing knowledge of psychology and psychiatry. These factors are more than sufficient to warrant a full and careful consideration of the problems raised by this case.

The issue here is narrow yet replete with significance. Stated briefly, it is this: May mental deficiency not amounting to complete insanity properly be considered by the jury in determining whether a homicide has been committed with the deliberation and premeditation necessary to constitute first degree murder? The correct answer, in my opinion, was given by this Court more than sixty years ago in *Hopt* v. *People,* 104 U. S. 631, 634, when it said, "But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness *or otherwise,* as to be capable of deliberate

premeditation, necessarily becomes a material subject of consideration by the jury." (Italics added.)

The existence of general mental impairment, or partial insanity, is a scientifically established fact. There is no absolute or clear-cut dichotomous division of the inhabitants of this world into the sane and the insane. "Between the two extremes of 'sanity' and 'insanity' lies every shade of disordered or deficient mental condition, grading imperceptibly one into another." Weihofen, "Partial Insanity and Criminal Intent," 24 Ill. L. Rev. 505, 508.

More precisely, there are persons who, while not totally insane, possess such low mental powers as to be incapable of the deliberation and premeditation requisite to statutory first degree murder. Yet under the rule adopted by the court below, the jury must either condemn such persons to death on the false premise that they possess the mental requirements of a first degree murderer or free them completely from criminal responsibility and turn them loose among society. The jury is forbidden to find them guilty of a lesser degree of murder by reason of their generally weakened or disordered intellect.

Common sense and logic recoil at such a rule. And it is difficult to marshal support for it from civilized concepts of justice or from the necessity of protecting society. When a man's life or liberty is at stake he should be adjudged according to his personal culpability as well as by the objective seriousness of his crime. That elementary principle of justice is applied to those who kill while intoxicated or in the heat of passion; if such a condition destroys their deliberation and premeditation the jury may properly consider that fact and convict them of a lesser degree of murder. No different principle should be utilized in the case of those whose mental deficiency is of a more permanent character. Society, moreover, is ill-protected by a rule which encourages a jury to acquit a partially insane person with an appealing case simply because

his mental defects cannot be considered in reducing the degree of guilt.

It is undeniably difficult, as the Government points out, to determine with any high degree of certainty whether a defendant has a general mental impairment and whether such a disorder renders him incapable of the requisite deliberation and premeditation. The difficulty springs primarily from the present limited scope of medical and psychiatric knowledge of mental disease. But this knowledge is ever increasing. And juries constantly must judge the baffling psychological factors of deliberation and premeditation, Congress having entrusted the ascertainment of those factors to the good sense of juries. It seems senseless to shut the door on the assistance which medicine and psychiatry can give in regard to these matters, however inexact and incomplete that assistance may presently be. Precluding the consideration of mental deficiency only makes the jury's decision on deliberation and premeditation less intelligent and trustworthy.

It is also said that the proposed rule would require a revolutionary change in criminal procedure in the District of Columbia and that this Court should therefore leave the matter to local courts or to Congress. I cannot agree. Congress has already spoken by making the distinction between first and second degree murder turn upon the existence of deliberation and premeditation. It is the duty of the courts below to fashion rules to permit the jury to utilize all relevant evidence directed toward those factors. But when the courts below adopt rules which substantially impair the jury's function in this respect, this Court should exercise its recognized prerogative.

If, as a result, new rules of evidence or new modes of treatment for the partly defective must be devised, our system of criminal jurisprudence will be that much further enlightened. Such progress clearly outweighs any temporary dislocation of settled modes of procedure.

Only by integrating scientific advancements with our ideals of justice can law remain a part of the living fiber of our civilization.

MR. JUSTICE FRANKFURTER and MR. JUSTICE RUTLEDGE join in this dissent.

MR. JUSTICE RUTLEDGE, dissenting.

A revolting crime, such as was committed here, requires unusual circumspection for its trial, so that dispassionate judgment may have sway over the inevitable tendency of the facts to introduce prejudice or passion into the judgment. This means that the accused must not be denied any substantial safeguard for control of those influences. A trial for a capital offense which falls short of that standard, although unwittingly, does not give him his due.

Congress introduced the requirements of premeditation and deliberation into the District of Columbia Code, Title 22, §§ 2401, 2404, in 1901. 31 Stat. 1321, with which compare Rev. Stat. § 5339. I do not think it intended by doing so to change the preexisting law only in cases of intoxication. Hence, I cannot assent to the view that the instructions given to the jury were adequate on this phase of the case. I think the defendant was entitled to the requested instruction which was refused or one of similar import.

I have no doubt that the trial court declined to give it believing that it was not required, perhaps also that it would be erroneous. For the fair-minded and able assistant district attorney who argued the case here conceded, with characteristic candor, that the courts of the District have consistently limited the effect of the controlling Code provision, by way of changing the preexisting law, to cases of intoxication. But, for the reasons in the opinion of MR. JUSTICE MURPHY, I do not think Congress intended the change to be restricted so narrowly. Accordingly I join in that opinion.

Apart from this defect, the instructions given were correct as far as they went. They were however in wholly abstract form, which in some cases might be sufficient. But the issues of premeditation and deliberation were crucial here on the question of life or death. A more adequate charge, I agree with MR. JUSTICE FRANKFURTER, would have pointed up the evidence, at least in broad outline, in relation to those issues.

Because I think the charge was deficient in not including the requested instruction or one substantially similar, thus in my opinion failing to meet the standard set by Congress in the Code, and because the effect of this deficiency was magnified by the failure to point up the instructions given in some more definite relation to the evidence, I think the judgment should be reversed.

RECONSTRUCTION FINANCE CORPORATION ET AL. *v.* DENVER & RIO GRANDE WESTERN RAILROAD CO. ET AL.

NO. 278. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.*

Argued March 5, 6, 1946.—Decided June 10, 1946.

During lengthy proceedings for the reorganization of a railroad under § 77 of the Bankruptcy Act, it realized abnormally large earnings from war business. Most of these earnings were utilized to make capital improvements and a large amount was held as free cash. Meanwhile, the claims of secured creditors were increased substan-

*Together with No. 279, *Reconstruction Finance Corporation et al.* v. *Denver & Salt Lake Western Railroad Co. et al.;* No. 280, *Reconstruction Finance Corporation et al.* v. *City Bank Farmers Trust Co., Trustee, et al.;* No. 281, *Reconstruction Finance Corporation et al.* v. *Denver & Rio Grande Western Railroad Co. et al.;* and No. 282, *Reconstruction Finance Corporation et al.* v. *Thompson, Trustee, et al.,* on certiorari to the same court, argued and decided on the same dates.

tially by the accumulation of interest and the position of holders of general mortgage bonds (the most junior lien holders) deteriorated 90%. The Interstate Commerce Commission approved a plan of reorganization which eliminated the claims of all existing stockholders and unsecured creditors, gave the holders of general mortgage bonds new common stock in face amount of 10% of their claims, and gave senior bondholders new securities (including about 88% of the new common stock) having an aggregate face value equal to 100% of their claims. This was based upon a determination that the aggregate of the securities in the plan represented the value of the properties for reorganization purposes and that, through prospective earnings, there was adequate coverage for the charges. The large accumulation of free cash was not distributed. The plan was approved by the District Court and accepted by all creditors entitled to vote except the holders of general mortgage bonds. The District Court held that the latter's rejection of the plan was not "reasonably justified" and confirmed the plan. *Held:*

1. The orders of the District Court approving and confirming the plan are affirmed. P. 536.

2. Under § 77 of the Bankruptcy Act, the experience and judgment of the Commission must be relied upon for final determinations of value and of matters affecting the public interest, subject to judicial review to assure compliance with constitutional and statutory requirements. *Ecker* v. *Western Pacific R. Co.*, 318 U. S. 448; *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523. P. 508.

3. The Courts are empowered to review the plan to determine whether the Commission has followed the statutory mandates of § 77 (e) and had material evidence to support its conclusions. *Id.* P. 509.

4. The congressional authorization for the Commission to eliminate valueless claims from participation in reorganization is a valid exercise of the federal bankruptcy power. *Id.* P. 509.

5. The Commission's judgment that the earning prospect did not justify a greater capitalization than the one given is controlling. P. 515.

6. It was not required to add, and would not be justified in adding, to the capitalized value the amount of expenditures for improvements made during the reorganization proceedings if, in the exercise of sound discretion, it felt that the reasonable prospective earnings of the road, after the improvements, did not justify it. P. 515.

7. There was ample evidence to justify the valuation made by the Commission. Pp. 512–516.

8. The valuation having been based on earnings, the segregation of the system earnings to each existing lien and the allocation of new securities representing the system value to each class of claimants, was in full accord with the principle that senior creditors are to retain their relative priority of position in a reorganization. P. 517.

9. Junior claims can receive nothing until senior claims receive securities of a value equal to their indebtedness. P. 517.

10. When the Commission made its allocations of securities, it did not find that the cash value of those awarded senior claimants equalled the face value of their claims; and it definitely had in mind that one thing that gave them compensation for the admission of junior claimants to participation in securities before the seniors obtained full cash payment was their chance to share in the unlimited dividends that might be earned and paid on the common stock in the "lush years," thus taking into account the abnormal earnings during the war. P. 518.

11. The improved physical condition of the road through expenditures of the trustees for previously deferred maintenance, improvements and new equipment necessarily entered into the Commission's valuation of the property. P. 518.

12. That the creditors who received common stock to make them whole obtained with it an interest in all cash on hand or that might be accumulated was an important factor in the allocation of the new securities. Pp. 518, 519.

13. The senior creditors having accepted the plan as fair and equitable as between themselves, if the method and result of valuation are sound, the allocation of 10% of their claim in common stock to the junior creditors follows as a matter of computation. P. 519.

14. The objection of a stockholder to a voting trust for future control of the debtor is ineffective, because the stockholder was eliminated from the reorganization by the valuation of the property and allocation of securities. P. 520.

15. The Commission's action in fixing the effective date of the plan as January 1, 1943, was within its power. P. 521.

16. Assuming that the courts may set aside a plan which was fair and equitable when adopted by the Commission merely on account of subsequent changes in economic conditions, they should not do so when the changes are of the kind that were envisaged and considered by the Commission in its deliberations upon, or explanations of, the plan. Pp. 521, 522.

17. It would be erroneous to assume that the senior bondholders were paid in full by the securities allotted to them without also

accepting the Commission's determination that the assets represented as of the effective date and all subsequent earnings were a part also of the common stock that was awarded to them; since the opportunity to participate in war earnings and in the accumulations of cash beyond operating fund needs was part of their compensation for their loss of position. Pp. 522–524.

18. When common stock is issued in partial satisfaction of the claims of senior creditors and a reduction of senior capital takes place after the adoption of the plan by the use of anticipated earnings or existing cash, there can be no corresponding readjustment of junior participation; because assets in the balance sheet at the adoption of the plan and subsequent earnings are for the benefit of stockholders in the new company, the senior claimants, so that they may be compensated through these common stock advantages for their loss of payment in full in cash. Pp. 524, 525.

19. The settled rule in bankruptcy proceedings that a creditor secured by the property of others need not deduct the value of that collateral or its proceeds in proving his debt is applicable in proceedings under § 77. P. 529.

20. A provision in a plan of reorganization that the trustee under a certain bond issue secured in part by a lien on stock owned by a third party shall be permitted to obtain the release of the equities in the stock and distribute it among the bondholders or to enforce its rights as pledgee of the stock and distribute the proceeds to the bondholders did not change or affect existing rights in the stock; and those rights remained subject to judicial determination. Therefore, it could not result in the holders of the bonds secured thereby receiving more than they were entitled to nor deprive the holders of a junior lien on the stock of any of their rights, even though the Commission made no definite finding as to the value of the stock and the holders of the senior lien on the stock may have been fully compensated by other provisions of the plan. Pp. 525–531.

21. The provisions of § 77 (e) for confirmation of a plan of reorganization over the creditors' objection, if the reviewing court finds that it makes "adequate provision for fair and equitable treatment" of those rejecting it, that their rejection is not "reasonably justified" and that the plan complies with the requirements of the section, are within the bankruptcy powers of Congress. P. 533.

22. The finding of the District Court that the plan made "adequate provision for fair and equitable treatment" of the dissenters, as of its effective date, was justified. P. 533.

23. In view of the District Court's familiarity with the reorganization, this finding has especial weight with this Court. P. 533.

24. The rejection of the plan by the holders of general mortgage bonds was not "reasonably justified" within the meaning of § 77 (e). Pp. 533–535.

25. It is the duty of the Commission to plan reorganizations with an eye to the public interest as well as the private welfare of creditors and stockholders. P. 535.

26. The public interest in an efficient transportation system justifies the Commission's requirements for reasonable maintenance and improvements of the properties and for a capitalization with fair prospects for dividends on all classes of securities. P. 536.

150 F. 2d 28, reversed.

The Interstate Commerce Commission approved a plan of reorganization of a railroad under § 77 of the Bankruptcy Act. 254 I. C. C. 349. The District Court approved it. C. C. H. Bankruptcy Law Service ¶ 54,562. All creditors entitled to vote accepted the plan except holders of the general mortgage bonds. The District Court held that the latter's rejection of the plan was not "reasonably justified" and confirmed the plan. 62 F. Supp. 384. The Circuit Court of Appeals reversed the District Court and remanded the reorganization proceedings to the Commission for further consideration. 150 F. 2d 28. This Court granted certiorari. 326 U. S. 699. The judgment of the Circuit Court of Appeals is *reversed;* the orders of the District Court approving and confirming the plan are *affirmed;* and the cause is remanded to the District Court for further proceedings. P. 536.

George D. Gibson argued the cause for petitioners. With him on the brief were *Solicitor General McGrath, W. Meade Fletcher, Jr., Alexander M. Lewis, John W. Davis, Edwin S. S. Sunderland, James L. Homire, Thomas O'G. FitzGibbon, Judson C. McLester, Jr., Henry W. Anderson, W. A. W. Stewart* and *Arthur A. Gammell.*

George L. Shearer entered an appearance for the United States Trust Company of New York, and *John W. Drye, Jr.* entered an appearance for the Central Hanover Bank & Trust Company, petitioners.

Frank C. Nicodemus, Jr. argued the cause for the Denver & Rio Grande Western Railroad Company, respondent. With him on the brief was *William V. Hodges.*

Edward E. Watts, Jr. argued the cause for the City Bank Farmers Trust Company, respondent. With him on the brief were *Peter H. Holme* and *Milton J. Keegan.*

H. H. Larimore filed a brief and submitted for Thompson, Trustee, respondent.

MR. JUSTICE REED delivered the opinion of the Court.

The petitioners in these five cases are the owners of claims against the debtor, Denver & Rio Grande Western Railroad Company, or against a secondary debtor, the Denver & Salt Lake Western Railroad Company. The respondents are the two debtors just named; City Bank Farmers Trust Company, Trustee under the General Mortgage of the principal debtor; and the Trustee of the Missouri Pacific Railroad Company, a large owner of common stock of the principal debtor.

The debtors sought reorganization in the District Court of the United States for the District of Colorado under § 77 of the Bankruptcy Act,[1] on November 1, 1935. The Interstate Commerce Commission approved the plan of reorganization under consideration in this review on June 14, 1943.[2] The District Court approved the plan October

[1] 11 U. S. C. § 205.

[2] The plan is printed in *Denver & R. G. W. R. Co. Reorganization,* 254 I. C. C. 349, 385. See for former decisions of the Commission in this reorganization, 233 I. C. C. 515; 239 I. C. C. 583; 254 I. C. C. 5.

25, 1943.[3] It was then submitted by the Commission to the creditors of the classes deemed entitled to vote for acceptance or rejection of the plan and a certificate of the result filed in the District Court on July 15, 1944. All classes of voting creditors approved the plan as required by § 77 except the holders of the Denver's General Mortgage bonds.[4] On November 1, the District Court held the rejection of the plan by the holders of the General Mortgage was not reasonably justified [5] and thereafter confirmed the plan on November 29, 1944. § 77 (e).

The plan provided for a reorganization as of January 1, 1943, by the Denver by adjustment of its liabilities to its assets with or without a consolidation with the Salt Lake and the Salt Lake Western to form a system. The stock of the latter road is held by the Denver. There are no bonds. As no ruling that we are asked or required to make turns upon whether the reorganization is with or without the suggested consolidation, we need not give further consideration to possible differences. In either case, creditors with secured claims against the reorganized roads or against their property were left undisturbed or allocated new securities of the new company, consisting of first mortgage and income bonds, preferred and common stock, in lots, in face amount of the secured claims except for the General Mortgage issue, that the Commission and District Court determined, through adoption of the plan, were fair and equitable in the light of the respective priorities, liens and collateral of the various secured

[3] C. C. H. Bankruptcy Law Service ¶ 54,562.

[4] The Denver & Rio Grande Western Railroad Company is referred to herein as the debtor or the Denver; The Denver & Salt Lake Western Railroad Company as Salt Lake Western; The Denver & Salt Lake Railway Company as the Salt Lake; The Rio Grande Junction Railway Company as the Junction.

[5] *In re Denver & R. G. W. R. Co.*, 62 F. Supp. 384.

claims. All of the securities were given a par value. Interest partly fixed and interest partly contingent on earnings was used to gain play in annual charges. The plan eliminated unsecured claims and allocated common stock in face amount of ten per cent of their claim to General Mortgage bonds of the debtor. Its stockholders received nothing. It was determined that the aggregate of the securities in the plan represented the value of the properties for reorganization purposes and that through prospective earnings there was adequate coverage for the charges.[6]

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[6] 254 I. C. C. at 354 to 357.

Full details appear in the plan, note 2, *supra*, as well as explanation of certain items in the following tables. The tables are printed to give the reader a convenient summary of the plan. 254 I. C. C. 382–83.

CAPITALIZATION AND ANNUAL CHARGES.

	On basis of consolidation with Denver & Salt Lake		*Denver & Rio Grande Western without Denver & Salt Lake*	
	Principal	*Annual charges*	*Principal*	*Annual charges*
Equipment-trust obligations	$5,758,000	$139,989	$5,758,000	$139,989
Chase National Bank note	2,158,458	45,722	2,158,458	45,722
R. F. C. claim	----------	----------	13,900,605	556,024
Denver & Salt Lake first-mortgage bonds, 4 percent interest	1,500,000	60,000	----------	----------
Denver & Salt Lake income bonds, 3–1 percent interest	9,734,000	292,020	----------	----------
	19,150,458	537,731	21,817,063	741,735
New first-mortgage bonds, 3–1 percent interest	38,573,680	1,157,210	33,373,680	1,001,210
Total fixed interest	57,724,138	1,694,941	55,190,743	1,742,945
Capital fund, maximum payment	----------	750,000	----------	750,000
Prior contingent interest, 1 percent	----------	498,318	----------	348,978
Sinking fund for first-mortgage bonds, one-half of 1 percent	----------	200,489	----------	182,323
	----------	3,143,748	----------	3,024,246
New income bonds, 4½ percent	29,750,184	1,364,133	21,049,579	972,606
Sinking fund for income bonds, one-fourth of 1 percent	----------	76,808	----------	58,527
Total debt, interest, payments to funds	87,474,322	4,584,689	76,240,322	4,055,379
New 5-percent preferred stock, par value $100	32,531,220	1,626,561	32,120,120	1,606,006
New common stock, par value $100	35,167,585	----------	35,167,585	----------
Total capitalization	155,173,127	----------	143,528,027	----------

Respondents sought review in separate appeals from the order of approval or the order of confirmation or both to the Circuit Court of Appeals for the Tenth Circuit. That court reversed the District Court on all appeals and remanded the reorganization proceedings to the Interstate Commerce Commission for further consideration with the statement, 150 F. 2d 28, 40,

> "Nothing in this opinion shall prejudice or foreclose the rights of the parties to propose a new plan of reorganization or the power of the Commission to formulate, approve, and certify a new plan of reorganization in the light of any relevant facts presented to the Commission in any proceeding under 11 U. S. C. Sec. 205 (d)."

DISTRIBUTION OF NEW SECURITIES PER $1,000 OF PRESENT BONDS WITH ACCRUED INTEREST.

	First-mortgage bonds	*Income bonds*	*Preferred stock*	*Common stock*
Rio Grande Western first trusts ($15,190,000)	$970.20	$349.80	----------	----------
Rio Grande Western consolidated's ($15,080,000)	----------	266.00	$970.90	$93.10
Junction firsts ($2,000,000)	1,061.96	317.21	----------	----------
Denver & Rio Grande consolidated 4's ($34,125,000)	318.92	217.08	321.60	482.40
Denver & Rio Grande consolidated 4½'s ($6,382,000)	329.03	223.97	331.80	497.70
Refunding and improvement 5's ($12,000,000)	250.01	159.61	310.75	692.13
Refunding and improvement 6's ($2,000,000)	264.61	168.94	328.90	732.55
General 5's ($29,808,000)	----------	----------	----------	146.10

CLAIMS.

	Claims as of Jan. 1, 1943	*Undisturbed or extended*
Equipment obligations	$5,758,000	$5,758,000
Rio Grande Western first-trust 4's	20,050,800	----------
Rio Grande Western consolidated 4's	20,056,400	----------
Rio Grande Junction first 5's	2,758,333	----------
Denver & Rio Grande consolidated 4's	45,727,500	----------
Denver & Rio Grande consolidated 4½'s	8,823,115	----------
Refunding and improvement 5's	16,950,000	----------
Refunding and improvement 6's	2,990,000	----------
General-mortgage 5's	43,548,155	----------
Chase National Bank note	2,158,458	2,158,458
R. R. Credit Corporation note; paid May 17, 1943	----------	----------
R. F. C. notes	13,900,605	----------
Unsecured claims, approximate	440,000	no equity
Total, Denver & Rio Grande Western	183,161,366	7,916,458

By this remand, the Commission was empowered to proceed anew to consideration of the reorganization in all its phases, § 77 (e), including those steps previously taken and approved by the opinion of the Circuit Court of Appeals.

That court approved the valuation of the debtor reached mainly by the use of present and prospective earnings. It held that the valuation adopted need not reflect necessarily the money spent for improvements during the trusteeship for reorganization. 150 F. 2d 35. The soundness of these conclusions is fully supported by the *Western Pacific* and *Milwaukee* cases.[7] The Circuit Court further held that the Commission was justified in refusing to reopen the hearings just before the entry of its order of June 14, 1943, approving the plan, to hear evidence of the then existing economic conditions and the 1943 earnings of the debtor.[8]

The reversal came from the Circuit Court's holding, contrary to the Commission and the District Court, that free cash in excess of operating capital needs and large earnings from war business after the date of the plan should be for the benefit of the General bondholders. 150 F. 2d 35–38. That court further held that decreases in debt by cash payments, with the consequent reduction of securities that were required to be issued under the plan to cover such debt claims, should inure to the benefit of the same General bondholders. 150 F. 2d 38–39. The Circuit Court disagreed also with the treatment of certain collateral deposited behind the First Consolidated Mortgage of the Rio Grande Western Railway Company and secondarily behind other issues of the debtor. This is the Utah Fuel stock issue hereinafter discussed. These differences from the conclusions of the District Court led the

[7] *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 477–83; *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 539–41.

[8] Cf. 318 U. S. at 543.

Circuit Court to hold that the General bondholders were "reasonably justified" in rejecting the plan and that the District Court was without authority to confirm the plan over their veto. § 77 (e).

Petitioners on July 30, 1945, sought a writ of certiorari to reverse these rulings of the Circuit Court and, on account of the importance of the issues in the administration of railroad reorganization under § 77, we granted their petition on October 8, 1945. 326 U. S. 699.

The briefs of all the parties here restate the questions presented in the petition for certiorari according to the emphasis the particular party places upon points of controversy. After a general consideration of the background of the plan and respondents' contentions to support the judgment besides the defenses applicable to petitioners' certiorari, we shall give attention to each of the just stated disagreements between the district and appellate court. This will cover the points under review.

The basic problems of railroad reorganization under § 77 of the Bankruptcy Act have been so recently considered by this Court in the *Western Pacific* and *Milwaukee* cases that only a summary reference to their conclusions attacked by respondents need be made now. No new enactments have changed the law since those decisions on March 15, 1943. The complexities of the reorganization of a railroad with responsibility to the public and obligations to its security holders were recognized. The impossibility without destruction of efficiency and values of reversing the process of integration to restore the parts that now make up the whole of a system of their original operational function was understood. The various bond issues with different and often overlapping liens, with competing claims for allocation of earnings pending reorganization, presented hard problems for legislative solution. A fair, administratively practical and lasting method was sought. By provisions for adjustment

of creditors' claims, Congress intended to avoid the delays, costs and sacrifices of liquidation.[9] The agencies em-

[9] Applicable provisions of § 77, 11 U. S. C. § 205, are as follows:

"(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; . . .

. . . . . .

"(d) The debtor, after a petition is filed as provided in subsection (a) of this section, shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, . . . After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

. . . . . .

"(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the

ployed by Congress to accomplish reorganizations under § 77 were the Interstate Commerce Commission and the

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time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; . . .

". . . If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided,* That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, . . . *Provided further,* That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no

courts. The answer reached by Congress was that the experience and judgment of the Commission must be relied upon for final determinations of value and of matters affecting the public interest, subject to judicial review to assure compliance with constitutional and statutory requirements. This was the interpretation of all mem-

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value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. . . . The Commission shall certify to the judge the results of such submission.

"Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided,* That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): . . .

"If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts."

bers of this Court from the language of the act and the evidence of congressional purpose in the hearings, reports and discussion.[10] To the courts, Congress confided the power to review the plan to determine whether the Commission has followed the statutory mandates of subsection (e), 318 U. S. at 477, and whether the Commission had material evidence to support its conclusions. 318 U. S. at 477; concurring opinion at 512.

At this point, we restate our conclusion reached in the former cases that the congressional authority to the Commission to eliminate valueless claims from participation in reorganization is a valid exercise of the federal bankruptcy power. Section 77 was directed at the relief of debtor railroads. § 73, 47 Stat. 1467. Liquidation in depression periods meant that large portions of debts, as well as stock interests in the properties, would be irretrievably lost to their holders, while reorganization on a capitalization that estimated what normal income would support meant the salvage of sound values. We see no more constitutional impediment to the elimination of claims against railroad debtors by the Interstate Commerce Commission's determination of values, with judicial review as to the sufficiency of the evidence and compliance with statutory standards, than we do to their elimination by an accepted bid in a depression market.[11] There is no occasion here to reexamine further these recent holdings of this Court in the *Western Pacific* and *Milwaukee* reorganizations.

In examining the contentions of petitioners as to the alleged errors of the Circuit Court of Appeals, we must

[10] 318 U. S. at 472, 473, 477; concurring opinion at 512; 318 U. S. at 545.

[11] 318 U. S. at 475–76; 318 U. S. at 536–39.

Compare *Wright* v. *Union Central Ins. Co.*, 311 U. S. 273, 279; *John Hancock Ins. Co.* v. *Bartels*, 308 U. S. 180, 186; *Gelfert* v. *National City Bank*, 313 U. S. 221.

approach the problems in accordance with our reviewing authority under § 77. That section embodies the method that Congress selected in 1933 [12] and improved in 1935 [13] to put the railroad transportation system of the country in order to meet its debts and perform its duties to the public after the hard years of the recent depression. Our constructions of the chief provisions of the section were handed down in March, 1943. Although the results of reorganizations under the section, as thus construed, have been criticized as unfortunate and changes have been suggested, no different legislation has been enacted.[14] Indeed

[12] 47 Stat. 1474.

[13] 49 Stat. 911. H. Rep. No. 1283, 74th Cong., 1st Sess., p. 1; S. Rep. No. 1336, 74th Cong., 1st Sess., p. 1; Craven & Fuller, Amendments of Railroad Bankruptcy Law, 49 Harv. L. Rev. 1254. See *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. at 470, *et seq.*

[14] H. R. 5924, 79th Cong., 2d Sess.; Hearings on H. R. 4779, 79th Cong., 1st Sess., Serial No. 13; H. Rep. No. 1838, 79th Cong., 2d Sess., p. 3:

> "Although all these laws were intended by Congress for the preservation of our railroads and their ownership, the theory has appeared to prevail that the capitalization of companies in section 77 proceedings should in all cases be drastically reduced. That is what has been done consistently and persistently. Under the past administration of section 77, as that statute was interpreted and applied by the Interstate Commerce Commission and affirmed by the Supreme Court, countless thousands of small stockholders already have been wiped out, and their investments, which would now be of great value, were uselessly destroyed. There are many more thousands upon thousands of such stockholders whose investments are imminently threatened with a like fate, unless Congress promptly enacts legislation to prevent such needless loss. And that loss—aggregating over $2,000,000,000—would be suffered largely by a widely scattered class of citizens (many thousands of whom are employees of these very railroads) who invested their legacies or their savings in one of America's greatest private enterprises, for education of their children, the purchase of homes, or security in old age. It literally may be said that these stocks were the favorite investments of widows and orphans and of trustees."

S. Res. 192, 79th Cong., 1st Sess.; S. Rep. No. 925, 79th Cong., 2d Sess.; S. 1253, 79th Cong., 2d Sess.; Hearings on S. 1253, 79th

a different method for reorganization, enacted in 1939 and designed to meet the requirements of railroads not in need of financial reorganization of the character provided by § 77 but only of an opportunity for voluntary adjustments with their creditors, terminated on July 31, 1940, and a comparable provision made in 1942 was allowed to lapse on November 1, 1945.[15] This situation leaves clear the duty of the agencies of the Government entrusted with the handling of reorganizations under § 77, including this

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Cong., 1st Sess., Voluntary Modification of Railroad Financial Structures; Hearings on S. 1253, 79th Cong., 2d Sess., Modification of Railroad Financial Structures, Part 2; S. Rep. No. 1170, 79th Cong., 2d Sess., pp. 1–2:

> "The bill (S. 1253) enables railroad companies to adjust their financial affairs quickly, economically, and on a business basis. The procedure it provides will reduce any disturbance of their affairs to a minimum, and will provide the maximum of protection for both the railroads and their investors.
>
> "The existing law, section 77, was enacted in 1933, without hearings and without consideration by any subcommittee or committee of the Senate. It was enacted in the belief that it would help railroads to correct their financial affairs. It was found to do the opposite. It has placed in the hands of Government officials extraordinary power, which they had not requested, over 25 percent of the country's railroad mileage—a power which they have exercised:
>
> (1) to demolish every part of the financial and corporate structures of those railroads;
> (2) to plan in every respect the financial and corporate future of those railroads;
> (3) to pick men to control those railroads; and
> (4) to decree the forfeiture of $2½ billion of investments.
>
> "The present bill puts an end to every one of those powers and restores the operation of railroads to their managements and the adjustment of their finances to the companies themselves, with the assistance of their securityholders, where necessary."

See A Critical Analysis of Recent Reorganization Decisions of the Supreme Court of the United States, F. C. Nicodemus, Jr., Hearings on H. R. 4779, subsequently H. R. 5924, 79th Cong., 1st Sess., p. 181.

[15] 53 Stat. 1134; 56 Stat. 787. A bill to extend this act to 1950, H. R. 3429, was passed by the House of Representatives on November 1, 1945, 91 Cong. Rec. 10276; H. Rep. No. 1128, 79th Cong., 1st Sess.

Court, to administer its provisions according to their best understanding of the purposes of Congress as expressed in the words of § 77 read in the light of the contemporaneous discussion in Congress. Changes in economic conditions cannot affect the powers of the reorganization agencies even though such changes may require a reexamination into the present fairness of the former exercise of those powers.

Valuation. The Denver & Rio Grande Western, the principal debtor, is an important link in transcontinental transportation.[16] The recent availability to the debtor of

[16] Full details of the properties, the elements of rate-making value, the corporate history, the capital structure at the beginning of the reorganization proceedings, the traffic and earnings appear throughout the various reports of the Commission, particularly the original report in 233 I. C. C. 515. The location and extent of its properties are succinctly described by the Commission at page 518, as follows:

"The Denver's principal eastern termini are Denver and Pueblo, Colo., at each of which points connection is made with the Atchison, Topeka & Santa Fe Railway and the Colorado & Southern Railway. At Denver connection is also made with the Chicago, Burlington & Quincy Railroad, the Chicago, Rock Island & Pacific Railway, and the Union Pacific Railroad; at Pueblo, also with the Missouri Pacific Railroad, which is the Denver's main outlet to the east.

"On the west the main line of the Denver passes through Salt Lake City and terminates at Ogden, Utah. Connection is made with the Union Pacific at each point; at Salt Lake City the Denver also connects with the Western Pacific Railroad and at Ogden with the Southern Pacific. The interchange with the Western Pacific is more important than that with any other western connection.

"The road owned by the Denver consists of 1,256.6 miles of main line and 1,094.9 miles of branch lines. Operated under lease are the Rio Grande Junction Railway . . . extending from Rifle to Grand Junction, Colo., 62.1 miles, the Goshen Valley Railroad, a branch line 8.8 miles in length, and the Salt Lake Western, extending from Dotsero, on the Denver, to Orestod on the Denver & Salt Lake Railway . . . 38.1 miles. Including these leased lines, the Denver operates approximately 1,357 miles of main lines and 1,104 miles of branch lines. Approximately 771 miles of narrow-gage lines are included in the operated mileage.

"In addition to the above-mentioned mileages, the Denver operates over the Salt Lake, between Denver and Orestod, 128.6 miles.

the Moffat Tunnel and the Dotsero Cut-off (1934) improves its strategic position in the competition for "overhead" or "bridge traffic," that is, traffic that is consigned from and destined to points beyond its lines. The traffic originating or terminating on its lines is mixed in character and varies with the general prosperity of the region.

The present Denver, the principal debtor, was organized in 1920. It succeeded the Denver & Rio Grande Railroad Company of 1908 which had in its turn acquired the property of the Rio Grande Western Railway Company, owning the western portion of the present debtor's lines, and of the Denver & Rio Grande Railroad Company of 1886, owning the eastern portion of the present debtor's lines. A connection between the two portions, Rio Grande Junction Railway, is under lease to the debtor which, as lessee and a stockholder, guarantees the Junction bonds. Substantially all of the capital stocks of the Salt Lake and Salt Lake Western, and various other branch lines are owned by the debtor.[17] These corporate arrangements for the operations of the debtor have resulted in the assumption or creation by the debtor of the claims of the various issues, listed in note 6, *supra.*

Just after these reorganization proceedings began, December 31, 1935, the debtor's report showed that its long-term debt was $120,541,000, and its current liabilities $24,990,901.63. It had current assets, including cash $1,257,943.43, of $5,966,666.93. At the time the plan

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This line, together with the Salt Lake Western, constitutes the Dotsero cut-off route. The Salt Lake's ownership embraces the line extending from Utah Junction, near Denver, to the western terminus at Craig, Colo., 220.2 miles. For its Denver terminal, the Salt Lake uses, under a lease, the facilities of the Northwestern Terminal Railroad Company. The Salt Lake derives no revenues from the through traffic moving over the cut-off, since all such traffic is handled by the Denver."

[17] See *Denver & Salt Lake Western R. Co. Construction,* 154 I. C. C. 51; 175 I. C. C. 535; 233 I. C. C. at 520.

became effective, the report, as of December 31, 1942, showed long-term debt of $130,264,826.65 and current liabilities of $14,172,575.50, and in addition deferred liabilities, chiefly matured interest in default of $45,582,132.66. There were current assets, including cash $10,850,149.96, of $20,983,652.54. As of December 31, 1944, these items were: Long-term debt $129,358,337.79, current liabilities $20,539,637.83, and deferred liabilities $55,310,151.80. The current assets were $32,665,501.33, including $19,142,626.96 in cash.

During the period examined the income of the system available for interest was found by the Commission at its lowest in 1936–1938. After adjustment this was $2,893,255. 233 I. C. C. at 552. In 1941 there was $5,019,436. 254 I. C. C. at 10. When the present plan was approved by the Commission in June, 1943, the 1942 income available for interest was recognized but the continuance of such earning power was thought to be negatived by any sound forecast.[18] 254 I. C. C. at 356.

Earnings during the trusteeship were used to improve the debtor railroad. When the vote was taken in 1944, the real estate and equipment account showed charges of $43,291,513 during the trusteeship. An estimated ten million of it was between the Commission's approval of the plan, June, 1943, and the Commission's certification on July 15, 1944, to the court of the vote by claimants. See 254 I. C. C. at 354 and 382 for explanation of new equipment program to meet the war situation. The retirements are said by the respondent trustee to have been about $13,000,000, leaving a net addition to capital account of $30,000,000. Respondents urge that since capi-

[18] The reports show the income available for interest as follows:

1942	$17,044,420.39
1943	11,573,667.94
1944	8,157,880.25

talization was not substantially increased by the Commission between 1938, when the first draft of a plan came from the Commission's staff, and 1943, the junior creditors got little or nothing for this investment. The improvements may have been wise or unwise. That question is not before us. Railroads, even in reorganizations, must make additions to take care of public needs or to lower operating costs. See 62 F. Supp. 389. The senior bond interest continued to accumulate during this period. As the capitalization was not increased *pari passu* with the purchases, the holders of junior securities received less participation. The Commission did not consider that the earning prospect justified a greater capitalization than the one given and we think its judgment controls the valuation. As was said by the Circuit Court of Appeals in *In re Denver & R. G. W. R. Co.*, 150 F. 2d at 38:

> "Neither was the Commission compelled to, nor would it be justified in adding the amount of these expenditures to the capitalized value if in the exercise of sound discretion it felt that the reasonable prospective earnings of the road, after the improvements did not justify it. However, in the face of all this, after satisfying in full the claims of the senior bondholders, the plan of reorganization should have made sure that all excess current assets, as well as all excess war profits yet to accrue, would go to the General Bondholders."

The last sentence, we think, has the vice of overlooking the reason the Commission gave common stock to the Seniors. See discussion under *Allocation of Securities.*

We note also the contention that the possibility of a national income much higher and interest rates much lower than before World War II should affect valuation based on prospective earnings. Those factors, we think, were before the Commission when it made its earnings estimate.

The Commission reached its determination of a sound capital structure for the combined properties with these figures on earnings and investments before it. In addition, of course, the Commission had complete statistical information to guide it from its Bureau of Valuation and its other sections dealing with traffic, rates, earnings, interest, et cetera. The discussion by the Commission will be found in its printed volumes listed in note 2. Proceeding upon the principle accepted in the *Western Pacific* and *Milwaukee* cases,[19] that capitalization based upon earnings is a permissible method of valuation in reorganization, the Commission fixed $155,173,127 as the sound capitalization. This capitalization under the terms of the issues, with provisions for a capital fund and the sinking funds, carries annual charges at rates varying with the security of $6,211,250 before dividends on common. This present annual charge, plus, let us assume, five per cent annually upon the common, $1,758,379, or a total of $7,969,629, is the basic figure to be applied, with adjustments for the variable factors, to earnings, past or prospective, available for interest and dividends, as an aid to determine the fairness of the present valuation. See note 6. The decision was unanimous except for one Commissioner who considered the valuation too high by ten per cent. 254 I. C. C. at 379. There can be no doubt that as of June, 1943, there was ample evidence to justify the valuation made by the Commission.

Allocation of Securities. Within the framework of that valuation, the Commission allotted the available securities to the claimants. Securities, including the common stock, were given a face value. The aggregate was too small to allow anything to former stockholders.[20] Thus they were eliminated from the reorganization.[21] For the

[19] 318 U. S. at 482 and 483; 318 U. S. at 539–541.

[20] *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. at 475–76.

[21] 233 I. C. C. 578–81.

holders of the General bonds, common stock was available to the amount of ten per cent only of their claim.[22] A glance at the proposed distribution in note 6 will show that the claimants did not receive all the new senior securities in the strict order of their old priorities.

The value of a lien on a part of a railroad when the valuation is made from earnings cannot be fixed solely on a mileage basis. Nor is it practicable to issue new securities with a lien limited to the property that was covered by the old lien. There must be segregation of the system earnings to each existing lien and allocation of securities representing the system value to each class of claimants. This was done here as shown in the second table in note 6.[23] Such a method is in full accord with the principle that senior creditors are to retain their relative priority of position in a reorganization. *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. at 561–64. Furthermore, junior claims can receive nothing until the senior claims receive securities of a worth or value equal to their indebtedness. 318 U. S. at 483; 318 U. S. at 569. The Generals are definitely junior. 233 I. C. C. at 524.

The Commission did not make a finding that the cash value of the securities awarded the senior claimants as of the effective date of the plan equalled the face of the claims. It did, however, carefully state its reasons for concluding that the compensation "flowing under the plan to the various classes of bondholders for the rights surrendered by them" was adequate in the light of the full priority rule. 254 I. C. C. at 360. For those classes, other than the Junior Generals, that received common stock, the Commission said that the possibility of "unlimited dividends on common stock" was a factor in offsetting

[22] 254 I. C. C. at 359.

[23] See for discussion of the formulae 233 I. C. C. at 581 *et seq.*; 254 I. C. C. at 16 and 359–76.

loss of position.[24] Thus it is clear that when the Commission made its allocations it had definitely in mind that one thing that gave the senior creditors compensation for the admission of junior claimants to participation in securities before the seniors obtained full cash payment was their chance to share in the unlimited dividends that might be earned and paid on the common stock to have a part in the "lush years." It should be noted that income applicable to dividends was at its highest in 1942 prior to the approval of the plan by the Commission in June, 1943. Therefore the abnormal earnings of 1942 were in the Commission's contemplation when it spoke of the opportunities for "unlimited dividends." Its discussion of the plan assumed that 1943 available earnings might be as large. 254 I. C. C. at 355.

The improved physical condition of the road through expenditures of the trustees for previously deferred maintenance, improvements and new equipment was before the Commission and necessarily entered into their valuation of the property. 233 I. C. C. 531.

There is another important factor, corollary to stock ownership, to be noted in the Commission's allocation of these securities. This factor is that the creditors who received common stock to make them whole obtained with

[24] Rio Grande Western consolidated, 254 I. C. C. at 365: "Loss in earnings position and surrender of other rights, in our opinion, are offset by the possibility of increased return permitted by the 4½-percent income bonds, 5-percent convertible preferred stock, unlimited dividends on common stock, and the other features of the plan."

Denver & Rio Grande consolidated, *id.* at 364: "This apparent change in earnings position is offset by the new sinking fund and capital fund and by the increased rate of return obtainable from the new securities, i. e., slightly in excess of 4.5 percent for 64 percent of the claim and unlimited stock dividends for the remainder."

Denver & Rio Grande Western refunding and improvement, *id.* at 366: "They also will receive whatever dividends may be paid on 97,706 shares of common stock."

that common stock an interest in all cash on hand or all cash that might be accumulated. Of course, the Commission thoroughly understood this. In fact, it referred to the ten million plus of cash on hand as of January 1, 1943. 254 I. C. C. 353. Immediately following this reference is a full discussion of the cash needs of the road for the year 1943, including additions, betterments and new equipment, and the amount which it was estimated would be in the treasury at the end of the year. That was $15,600,000. This cash would be reflected in the value of the common stock. The petitioner states that the highest when-issued Stock Exchange price in 1945 for the common stock was $31½, par $100. See Commercial and Financial Chronicle, May 13, 1946, p. 2618, where the common is quoted at 29 Bid, 31 Asked. Cash, material and supplies, as well as all other assets and all liabilities of the debtor, were represented by the securities. If there is more cash on hand than needed for taxes, expenses and proper improvements, it is at the disposal of the common stockholders. If money was used to pay indebtedness, there would be a corresponding reduction in the capital structure. Therefore, the plan provided, 254 I. C. C. at 386:

> "The new company shall be deemed to have come into possession of the properties as of the effective date of the plan.
>
> ". . . The capitalization of the new company, as of January 1, 1943, after consummation of the plan . . . shall consist substantially of the following securities, excluding those to be pledged, the amounts stated being subject to reduction to the extent, if any, that matured interest proposed to be funded in the plan is paid, and as equipment obligations or other liabilities are paid or reduced . . . ."

It is accepted by the senior claimants that the plan is fair and equitable as between themselves. If we are correct in our conclusion that the method and result of valuation

is sound, the allocation of ten per cent of their claim in common stock to the Generals follows as a matter of computation.

It would also follow that the objection of a stockholder, the Missouri Pacific Railroad Company, through its Trustee in reorganization, to a voting trust for future control of the debtor would be ineffective because this stockholder is eliminated from the reorganization by the valuation of the property and allocation of securities. For the Commission's reasons for creating a voting trust see 233 I. C. C. at 581, 254 I. C. C. at 33, 35, 367.

Cash and War Earnings. The Circuit Court of Appeals was of the view that war earnings were of "very little value in estimating the probable future earnings of this property in the peace economy which is to come" and that the Commission was well within its right in appraising them lightly. 150 F. 2d at 34. This was after the seventeen million earnings of the top year 1942. The appellate court agreed, too, that excess current assets should not be capitalized and that improvements made during the trusteeship for reorganization had been considered by the Commission and District Court in fixing their valuation by past and prospective earnings. 150 F. 2d at 35. The appellate court then made the following ruling:

> "The Senior Bondholders were paid in full. They received all the new securities and most of the common stock. Ninety per cent of the General Bondholders' claims were wiped out. They received only a small amount of common stock, ten per cent of their total claim. Adequate operating funds are essential to the operation of a railroad. The Senior Bondholders were entitled to receive in addition to the full amount of their claims, working capital sufficient for proper and efficient operation of the railroad. But anything in excess of what was reasonably necessary for this purpose constituted assets of the insol-

vent corporation which belonged to the remaining creditors.

"We think it is apparent from the record that there were current assets on hand consisting of cash and securities in excess of what was needed for the efficient operation of the road. As pointed out, the working capital of the debtor had increased from a deficit of $9,727,230 as of December 31, 1935, to a surplus of $12,125,863.50 as of December 31, 1944. While these increased net earnings are due in large part to the war and will not continue after the end of the war, and may therefore be disregarded in setting up the capitalized structure based upon prospective earnings, we cannot disregard the fact that these huge surpluses actually exist. Their existence is an accomplished fact. It is also obvious that surpluses will continue to pile up for a reasonable time yet to come. We think any plan which fails to take this into account and which gives the Senior Bondholders their claims in full by substantially delivering the road to them, and gives them the surplus cash actually on hand and further enables them to receive in addition the excess war profits which are reasonably sure to come, is inherently inequitable and unfair, so long as there are classes of creditors whose claims are not fully satisfied."

In our judgment this holding is erroneous.

The effective date of the plan was fixed by the Commission as January 1, 1943. This was in its power.[25] The allocation of the securities took into consideration the interest of the secured claims to that date. Any gain or any loss after that time was a benefit or an injury to the new common stockholders and then sometimes to security holders in positions senior to them. Assuming that the courts, as courts with equity powers in a bankruptcy mat-

[25] *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. at 509.

Interest accrues on the secured claims until the effective date of the plan. *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. at 546. Compare *Ticonic Bank* v. *Sprague*, 303 U. S. 406.

ter, might set aside a plan, fair and equitable when adopted by the Commission, merely on account of subsequent changes in economic conditions of the region or the nation,[26] it should not be done when the changes are of the kind that were envisaged and considered by the Commission in its deliberations upon or explanations of the plan.

We have pointed out in the section of this opinion dealing with the allocations of the securities that a part of the compensation to senior claimants for their loss of position was the opportunity to participate in war earnings. This was understood by the District Court [27] and the Commission.[28] Accumulations of cash beyond operating fund needs are in the same category. In dealing with the problem, the Commission noted that a five per cent dividend on the authorized common would require an income available for interest and dividends of $7,969,629. The Trustee for General bonds claims no such earnings between 1929 and 1942. Even before the transportation difficulties of 1946, it was obvious that the Commission's judgment was being confirmed by events. See note 18, *supra*.[29]

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[26] 318 U. S. 506–509.

[27] 62 F. Supp. at 390:

> "The $25,000,000 or more the Trustees have expended in the Improvement Program inures to the benefit of the common stock. If the latter is worth anything it is as much due to these expenditures as to any other factor. This, with the increase in current assets and wartime earnings which counsel seem to believe are permanent, constitute the only equity behind the preferred and common stock."

[28] 254 I. C. C. at 356.

[29] Mankind's foresight is limited. The uncertainties of future estimates are recognized. It is not without interest to note, however, that on April 15, 1946, the railroads of the United States petitioned the Interstate Commerce Commission for increased freight rates and charges. This was said:

> "The situation of the railroads has now become critical and their need for a substantially higher level of freight rates has be-

The error of the Circuit Court in its holdings set out above lies in its assumption that the senior bondholders were paid in full by the securities allotted to them without also accepting the determination of the Commission that the assets represented as of January 1, 1943, and all

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come imperative. This is the result of an extraordinary combination of war and postwar conditions with which the railroads are confronted, and more particularly the result of three factors of recent development: (1) the increase in wages of railroad employes of 16 cents per hour determined under the procedures of the Railway Labor Act in April, 1946, retroactive to January 1, 1946; (2) large increases, both present and prospective, in the prices of railway materials and supplies; and (3) a sharp decline in volume of railway traffic and an even greater decline in railway revenue.

. . . . .

"The volume of freight and passenger traffic is falling continuously, and it is anticipated that the downward rate will accelerate in the months to come. The revenues will be reduced by reason both of the decline in volume and a return to a more nearly normal composition of traffic. It is estimated that the operating revenues of Class I railroads for 1946, on the basis of the present rates, fares and charges, would be approximately $6,800,000,000, or 23.5 per cent less than they were in 1945.

. . . . .

"Freight and passenger traffic reached their peaks in 1944. But net railway operating income and net income began to diminish in 1943 on account of rising costs of operation. In the face of increasing traffic through 1944, both net railway operating income and net income moved steadily downward after reaching their peak in 1942. With the cessation of hostilities in 1945 there began to be a decline also in gross revenues which is expected to become more pronounced as the abnormal war conditions disappear, disabilities of highway carriers and other agencies of transportation are removed, and the prewar pattern of railway traffic is resumed."

The Denver apparently did not vary greatly from this overall picture. Its net revenue for 1945 from railway operations dropped from $20,569,809 to $14,246,504. Its gross operating revenue, however, increased four and a half million. The loss in net was due largely to increased amortization of defense projects.

The monthly report of revenues and expenses by the Denver for January and February of 1946 shows a decrease of operating revenues from $10,856,764 to $8,932,983.

subsequent earnings were a part also of the common stock that was awarded the senior bondholders.

Decreases in Senior Debt. The plan provides for securities to take the place of the Rio Grande Junction's first 5's in the face amount of $2,758,333 and for the assumption by the reorganized road of $5,758,000 equipment obligations. All of these securities are senior to the Generals. The Denver purchased the Junctions and paid $1,218,000 on the Equipments. This reduced the necessary capitalization by that aggregate sum. The Circuit Court of Appeals was of the opinion that "The value behind these securities in no wise belonged to the Senior Bondholders, because they had been paid in full." 150 F. 2d 39. This ruling, we conclude, was erroneous for the same basic reason that we held the cash and war earnings belong to the owners of the common stock.

We called attention, *supra* page 519, to the authority granted the District Court to reduce the capitalization of the new company as interest due on January 1, 1943, or equipment obligations or other liabilities were paid. The District Court acted on this authority and in its approval of the plan said of the Junctions, "They may be cancelled or they may be utilized under the plan in acquisition of new securities which will become an asset of the reorganized company." C. C. H., Bankruptcy Law Service Decisions 1942–1945, ¶ 54,562 at p. 55,635. The Junction bondholders did not vote on the plan. Under our determination that the creditors who received common stock were compensated partly by the assets and future earnings, it is obvious that the use of such assets to retire senior claims is a part of the normal and expected increment from holdings of common stock. The increase of common stock by the Commission to the Generals from five to ten per cent of the bondholders' claims, preliminary to the adoption of the plan, 254 I. C. C. at 352, 359, is partly attributable to a reduction of necessary capitaliza-

tion. This increase in junior participation differs from that now proposed. The former reduction of senior capitalization could be carried out because earnings prior to the adoption of the plan made it unnecessary to borrow money for reorganization. When proposed capitalization is being planned on earnings, a reduction of senior capital without reduction of estimated earnings increases possible junior capital within the scheme. When the reduction of senior capital takes place after the adoption of the plan by use of anticipated earnings or existing cash, there can be no such readjustment of junior participation because assets in the balance sheet at the adoption of the plan and subsequent earnings are, as we have pointed out, for the benefit of the stockholders in the new company so that through these common stock advantages these new stockholders may be compensated for their loss of payment in full in cash. Of course, this section of the opinion is written and must be read on the assumption that the allocations of common stock are fair and equitable, a matter discussed *supra*.

Utah Fuel Company Stock. The Rio Grande Western Railroad Co. in 1899 executed its First Consolidated Mortgage, an indenture to secure its issue of First Consolidated Bonds, maturing April 1, 1949. Rio Grande Western reserved the right to issue additional bonds under the indenture.

The Utah Fuel Company was organized in 1900, with a capitalization of 100,000 shares. In 1901 an agreement was entered into by Rio Grande Western, the trustee under the First Consolidated Mortgage, and the owner of the Utah Fuel stock. The contract provided that the stock would be held by the trustee to secure bonds issued under the First Consolidated Mortgage and that Rio Grande Western would have the right at any time on paying the trustee $6,000,000 in cash or delivering an equal face amount in First Consolidated bonds to receive the Utah

Fuel stock, free of the mortgage lien. Subject to the lien, the stock was transferred to Rio Grande Western. $6,000,000 in additional First Consolidateds were issued to the owner of the stock.

In 1908, the Denver & Rio Grande Railroad Company was organized and acquired the property of Rio Grande Western, assuming the obligation of its First Consolidated Mortgage bonds of 1899. The equity of redemption of Denver & Rio Grande Railroad Company in the Utah Fuel stock was sold in 1918 under execution and transferred to the Western Pacific Railroad Corporation.

In 1924 under an agreement among the Denver & Rio Grande Western Railroad Company, the Western Pacific Railroad Corporation, Missouri Pacific Railroad Company, and T. S. Alexander, who by the agreement became trustee of the equity of redemption in the Utah Fuel stock, Western Pacific transferred to T. S. Alexander, Trustee, subject to the pledge under the Consolidated Mortgage, its Utah Fuel stock and the debtor transferred to said trustee whatever interest it had in the stock, through certain releases, not here important.

The agreement first provided that the ultimate beneficial interest in the Utah Fuel stock so held was vested one-half in Missouri Pacific and one-half in Western Pacific. Except for certain contingencies not here important, it was provided that the trustee under the 1924 agreement would pay all dividends received by him from the trustee under the Consolidated Mortgage on Utah Fuel stock to the debtor so long as any of the General or Refunding bonds were outstanding.

The agreement further provided that, if the General Mortgage or the Refunding or other mortgage of the debtor were foreclosed, the trustee would sell the interest of these mortgages in the Utah Fuel stock subject to the Consolidated Mortgage, if outstanding, and apply the proceeds to the payment of the bonds secured by the

equity of redemption in the stock, dividing any surplus between Western Pacific and Missouri Pacific.

The General Mortgage and Refunding bonds created in the 1924 reorganization were thus given a lien on the Utah Fuel stock, junior to the lien of the Denver & Rio Grande First Consolidated Mortgage.

Under the plan approved by the Commission and the District Court, the First Consolidated bonds were allotted 20% of their claim in new income bonds, 73% in preferred stock, and 7% in common stock. The plan further provided, 254 I. C. C. at 398–99, that:

> "The trustee under the Rio Grande Western Railway Company consolidated mortgage shall be permitted to obtain the release of the equities in the stock of the Utah Fuel Company and distribute the stock among the holders of the aforesaid bonds in any manner agreeable to them, or to enforce its rights as pledgee of the stock of the Utah Fuel Company, the proceeds recovered to be distributed to the holders of the bonds."

The Commission took the position that this and the other features of the treatment of the First Consolidated bonds were justified as compensation for "loss in earnings position and surrender of other rights" [30] under the plan.

The Commission made no definite finding with respect to the value of the Fuel Company stock. The Commission had before it evidence through 1936 with respect to the value of the stock as well as an appraisal of the value of the Fuel Company made for the trustee of the First Consolidated Mortgage, which indicated a value of $4,653,720. The only dividend paid to the debtor by Utah Fuel under the 1924 agreement was in 1934 and amounted to $250,000; the debtor in applying its formula for allocation of earnings by mortgage districts credited the Consolidated Mortgage with an income of $83,333 per

[30] See note 24.

annum based on that dividend payment allocated over the three-year period, 1932 to 1934. The status of the stock was considered by the Commission in its original report and its several supplemental reports, and its proposals with respect to the stock remained unchanged.

In proceedings before the District Court in 1943 on objections to the plan, it was revealed that the Fuel Company's net income for 1942 was $415,000 and for the first seven months of 1943, $535,869.[31] The company has no funded debt.

In the Circuit Court the respondents contended that the holders of the First Consolidated bonds should be compelled either to foreclose this collateral, applying the proceeds to their claim, or credit their claim with the value of the collateral and be allowed new securities only for the balance. The Circuit Court disapproved the treatment by the plan of the General bondholders with respect to the Fuel Company stock, pointing to the fact that the Commission had permitted "doubts and uncertainties" to remain with respect to the value of the collateral, and that there was a danger that, if the collateral had substantial value, the First Consolidated bondholders might receive more than full payment.

The facts set out above fully support the conclusion of the Commission that the "title to the stock is vested in the Missouri Pacific and Western Pacific." Whatever rights the debtor may have retained after the sale of the stock on execution in 1918 were released to the trustee and the two railroads in 1924. We have then a situation in which the holders of the ultimate beneficial interest in stock which had been pledged previously under a mortgage have permitted that interest to be encumbered by a third person, namely the debtor, as security for its

[31] According to Moody's Manual (1945) the net income of the Fuel Company for 1943 was $865,140, 1944 $653,901, and earned surplus at the end of the latter year $4,862,980.

General and Refunding bonds. The rule is settled in bankruptcy proceedings that a creditor secured by the property of others need not deduct the value of that collateral or its proceeds in proving his debt. *Ivanhoe Bldg. & Loan Assn.* v. *Orr,* 295 U. S. 243. We see no reason why the same should not be true under § 77. See *New York Trust Co.* v. *Palmer,* 101 F. 2d 1, 3. Therefore the First Consolidated Mortgage bonds were properly permitted to prove the full amount of their debt.

Respondents, speaking only for the General bondholders, object that the plan gives the First Consolidated bondholders all the Utah Fuel stock or its proceeds in addition to securities the face value of which amounts to one hundred per cent of their claims. The Refunding bondholders make no objection. It is thus contended that the plan deprives the General bondholders of their junior interest in the stock without a determination of the value of that stock, or a finding of the extent to which the Consolidated bondholders have been paid by the new securities to be given them. We do not so read the plan. The plan provides merely that the trustee of the Consolidated Mortgage "shall be permitted to obtain the release of the equities in the stock of the Utah Fuel Company" and distribute the stock or its proceeds to the holders of the bonds. This statement contains at least two requirements to be met before the Consolidated bonds obtain anything from the collateral. The first is that the trustee of the First Consolidated Mortgage be in existence. Even after the plan goes into operation and the old securities are surrendered for cancellation, there is no requirement that the trusts terminate since they will continue to hold property other than that of the debtor. Section 77 (f), which deals with the effect of a confirmation and the discharge of the debtor from liability, does not so require. Hence whatever action the trustee of the Consolidated takes may be commenced prior to or after the consummation of the

plan. This will permit the respondent, trustee under the General Mortgage, which would continue in existence for the purpose, to take the necessary steps to safeguard its rights in the collateral on behalf of the Generals.[32]

The second requirement, which is explicit in the plan, is that the trustee obtain the release of the equities in the stock. The junior lienors have an absolute right under the terms of the 1901 pledge and the 1924 agreement to all the proceeds of the stock over $6,000,000 and a right also to any part of the proceeds not needed to make the First Consolidated bonds whole. The trustee of the Consolidated concedes in its brief here that enforcement of the pledge can be brought about only through judicial proceedings. It correctly points out that in such proceedings full protection can be given to all those who have any junior interest in the stock. Respondents' fear that the General bondholders and the mortgage trustees for the junior interests will not be in existence and so unable to protect themselves has been above demonstrated to be without foundation in fact.

The result is that this feature of the plan did not in any way change or affect existing rights in the collateral. The respondents may show in the judicial proceedings which must be brought by the trustee of the First Consolidated Mortgage that the First Consolidated bonds have been fully paid by the securities awarded them under the plan, if such be the fact, or the respondent, trustee of the General, may itself bring a proceeding against the trustee of the First Consolidated mortgage for a determination of the rights of the Generals. Petitioners concede, as they must, that they are not entitled to more than full payment and that they are under a duty to account to the respond-

[32] Obviously, the Fuel stock or its proceeds could be distributed to record holders of the old securities as of the date or dates of distribution of the new securities.

ents for any surplus remaining after they have been made whole.[33]

The treatment of the Utah Fuel stock in the plan is consistent with the Commission's disposition of certain collateral pledged with the Reconstruction Finance Corporation and the Railroad Credit Corporation by parties other than the debtor to secure notes of the debtor in the *Western Pacific* case. *Western Pacific R. Co. Reorganization,* 233 I. C. C. 409, 432. The Commission permitted the pledgees to retain the collateral and this Court approved that action, saying, "This collateral, other than the refunding bonds, was therefore left with the pledgees with its position unaffected by any direct action of the Commission." *Ecker* v. *Western Pacific R. Corp., supra,* at 506.

Reasonableness of Rejection. As the conclusions of the Circuit Court of Appeals upon the allocation of securities, the treatment by the Commission of cash, war earnings, and decrease in debt with priority over the Generals differed from those made by this Court, that court's conclusion that the General bondholders were reasonably justified in rejecting the plan followed naturally. 150 F. 2d 40. Section (e) gives power to a class, here the General bondholders, to reject the plan subject to the power of the District Court, after certification of the result of the submission, to "confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision

[33] There is a certain illogic in the position of First Consolidated bonds in asserting any rights in the collateral at all. If, as they concede and we now hold, they are entitled to be paid in full in new securities without regard to the collateral, it may be that they have been fully paid by the new securities given them since they do not complain of their treatment under the plan. Since they are entitled only to full payment it would then seem to follow that they have no rights against the collateral. We should not be taken as deciding this question, however, since we leave it to an independent suit in which there is jurisdiction over the proper parties.

for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e) . . . ." 11 U. S. C. § 205; see note 9, *supra*.[34] The plan was confirmed after appropriate findings. 62 F. Supp. at 390.

This provision for confirmation of a plan despite rejection by a class appeared in the draft for the 1935 amendments. Apparently it caused no particular comment.[35]

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[34] Clauses (2) to (3) are not involved. They relate to expenses, fees and costs.

[35] H. Rep. No. 1283, 74th Cong., 1st Sess., p. 18. S. Rep. No. 1336, 74th Cong., 1st Sess., p. 3, contains the following statement: "Further, the consent of two-thirds of each class of stockholders must be acquired, unless, by an elaborate valuation proceeding, it is proved that the value of the property is so low that the stock has no interest. This is an effective obstruction. . . .

"In order to remedy these defects, S. 1634, as amended, provides that two-thirds of those of each class who vote upon a plan will bind the dissenters or those failing to vote. But it also provides that the court may make effective a fair plan where the parties do not agree. . . . If two-thirds of each class consent, the plan will bind the remainder of each class. But the judge may make the plan effective, even if not so accepted, if he finds that it conforms to the requirements just stated, provides fair and equitable treatment for the interests of those rejecting it, and that their rejection is not reasonably justified in the light of the respective rights and interests. These provisions give complete due process of law from a procedural standpoint, there being provision for full hearings both before the commission and the court. Within the broad powers of Congress under the bankruptcy clause as recently declared by the Supreme Court in *Continental Illinois Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co.* (55 Sup. Ct. Rep. 595), the provisions also afford due process of law in fully protecting the property rights which are involved."

See also Hearings, House Judiciary Committee, 74th Cong., 1st Sess., on H. R. 6249, Serial 3, pp. 15 and 22.

We think that the provisions for confirmation by the courts over the creditors' objection are within the bankruptcy powers of Congress. Those powers are adequate to eliminate claims by administrative valuations with judicial review and they are adequate to require creditors to acquiesce in a fair adjustment of their claims, so long as the creditor gets all the value of his lien and his share of any free assets.[36]

The grounds accepted by us in former sections of this opinion as sustaining, as of January 1, 1943, the valuation of the road, the allocation of the securities, and the treatment of cash, war earnings and capital reductions establish that for the act of confirmation on November 29, 1944, over the objection of the General bondholders, the finding of the judge that the plan then made "adequate provision for fair and equitable treatment" of the dissenters was justified. 62 F. Supp. at 390. In view of the district judge's familiarity with the reorganization, this finding has especial weight with us. See Rule 52, F. R. C. P. There is no doubt that the plan then conformed to subsection (b) and the other requirements of the first paragraph of subsection (e). Note 9 *supra.*

This leaves for consideration the question of whether, the plan being fair and equitable as of June, 1943, effective January 1, 1943, the Generals were reasonably justified in rejecting the plan by ballots cast between April 26 and July 15, 1944.

As we have pointed out under *Allocation of Securities, supra,* the Commission's plan was adopted after 1942, the year of greatest profit, and with anticipation on the part of the Commission that there might be other "big" years but with realization that the war profits were not a sound basis for higher valuation. Current reports of earnings

[36] *Wright* v. *Union Central Ins. Co.,* 311 U. S. at 278, and discussion at p. 509, *supra.*

were a part of the record. Nothing that respondents have called to our attention indicates any improvement in economic conditions or prospects in July, 1944, or any date since, over June, 1943, the date of the Commission's approval of the plan, which would justify a treatment different from that accorded the claimants in 1943.[37] The challenge to the reasonableness or the unreasonableness of the rejection of the plan is not based on any change of conditions since its approval by the District Court October 25, 1943. Under subsection (e), note 9 *supra*, the judge automatically confirms a plan after a vote of classes of creditors if satisfied that two-thirds of each class have accepted. If there is a rejection, there is a reexamination of the plan to assure that those who dissent have had fair and equitable treatment. Apparently the reexamination for this treatment does not differ from that for the original court approval under the first paragraph of subsection (e). It does, however, center upon the rights of those who rejected the plan.

A rejection would not be reasonably justified unless the dissenters had a valid reason for their vote. As is shown by Judge Symes' discussion of their objections to confirmation,[38] their reasons were the payment of the senior obligations with consequent claimed release of capitalization for junior securities and the inadequate valuation, particularly in view of the large additions to plants from earnings. We think that we have demonstrated that there was an adequate basis for the valuation, see page 512 *et seq.*, and that the decreases in senior debt were not for the account of the junior creditors. See pp. 524–525, *supra*. Respondents offer no other ground for their votes in rejection.

Congress with its purpose to stop the blockade of sound reorganization by classes of creditors with the veto power

[37] Cf. *I. C. C.* v. *Jersey City*, 322 U. S. 503, 515.

[38] 62 F. Supp. 384.

of the 1933 statute, note 35, *supra,* certainly did not intend to leave a class with the same power of interference because in its reasonable judgment that class thought the valuation was erroneous or the senior creditors were paid in full by the face value of securities. If a plan gives fair and equitable treatment to dissenters, the elements which make the plan fair and equitable cannot be the basis for a reasonably justified rejection. If only those elements are relied upon, as here, the rejection is not reasonably justified.

Of course, this does not mean that if a plan is approved as fair and equitable by the Commission and the court, there cannot be a reasonable justification for its rejection by a class of claimants on submission. Reasons to make their rejection reasonable may arise thereafter. For example, unanticipated, large earnings might develop. We see no reasonable justification here for the action of the General bondholders.

In conclusion, we shall add that the foregoing opinion has been written without heavy reliance upon the duty of the Commission to plan reorganizations with an eye to the public interest as well as the private welfare of creditors and stockholders.[39] The Commission had this duty in mind. Our failure to comment more upon that feature of the plan should not be interpreted as an intimation upon our part that it is not important. These respondents cannot be called upon to sacrifice their property so that a depression-proof railroad system might be created. But they invested their capital in a public utility that does owe an obligation to the public. The Insurance Group Committee, with fiduciary responsibility to the myriad holders of policies, and the other investors or

[39] § 77 (d), note 9 *supra.* 318 U. S. at 473; 318 U. S. at 544.

speculators in senior bonds as well as the holders of General bonds or other investors or speculators in junior security issues, by their entry into a railroad enterprise, assumed the risk that in any depression or any reorganization the interests of the public would be considered as well as theirs. That public interest in an efficient transportation system justifies the Commission's requirements for reasonable maintenance and improvement of the properties and for a capitalization with fair prospects for dividends on all classes of securities.[40]

The judgment of the Circuit Court of Appeals is reversed and the orders of the District Court of October 25, 1943, approving the plan, and of November 29, 1944, confirming the plan, are affirmed.

The cause is remanded to the District Court for further proceedings.

It is so ordered.

MR. JUSTICE FRANKFURTER dissents, and will set forth the detailed grounds for his dissent in an opinion to be filed hereafter.

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

MR. JUSTICE FRANKFURTER, dissenting.*

On November 1, 1935, The Denver and Rio Grande Western Railroad Company and The Denver and Salt Lake Western Railroad Company (hereinafter compendiously called "the debtor"), initiated these proceedings for their reorganization under § 77 of the Bankruptcy Act. 49 Stat. 911 (1935), 11 U. S. C. § 205. The plan of reor-

[40] See concurrence of Commissioner Eastman, *Western Pacific R. Co. Reorganization*, 233 I. C. C. at 437.

*Filed October 28, 1946.

ganization here in controversy was approved by the Interstate Commerce Commission on June 14, 1943. 254 I. C. C. 349, 385. The District Court approved the plan for necessary submission to the various classes of creditors. C. C. H. Bankruptcy Law Service ¶ 54,562. All classes except the holders of the general mortgage bonds accepted the plan. On the effective date of the plan, the claims of these General Bondholders constituted about one-fourth of the debtor's entire debt. Just short of eighty percent of this class of creditors (79.33%) voted to reject the plan. Congress has made the right of any class to reject a plan subject to the power of a district court to override such rejection, if the judge "is satisfied and finds . . . that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts . . ." 49 Stat. 911, 919 (1935), 11 U. S. C. § 205 (e). The District Court on November 1, 1944, found that all the requirements of the statute had been met, and confirmed the plan. 62 F. Supp. 384. But the Circuit Court of Appeals for the Tenth Circuit, a strong bench, on May 10, 1945, found that "the General Bondholders were reasonably justified, within the meaning of the statute, in rejecting the plan, and that the District Court was without authority to confirm the plan in the face of their adverse vote." 150 F. 2d 28, 40. On a fair construction of the requirements of Congress for the adjudication of railroad reorganizations, as applied to the situation before us, I cannot escape agreement with the Circuit Court of Appeals.

Railroad reorganizations are so enshrouded in the confusing intricacies of high finance that the true nature of decisive issues is too often lost to view. It may be useful to an appreciation of what appears to me to be the crux of the case to put a situation that is sufficiently analogous but much more familiar. In the early depression years the

big life insurance companies foreclosed a large number of farms. The foreclosure process, we assume, involved the control of the farm and all its income by a judge. The hypothetical farm began to make a fair income, enough to pay the insurance company a considerable part, if not the whole, of the annual interest. But instead of paying the interest, the judge applied the money to rebuild the homestead, to add a new barn, to purchase an adjacent field, the most modern machinery and additional head of cattle. Thereby the farm became far more valuable than at any time since the insurance company placed the mortgage on it. Moreover, the judge retained as cash in the bank a portion of the income sufficient to pay off at least twenty percent of the mortgage. The farmer thinks he ought to be allowed to use the cash to reduce the mortgage, should be given credit for the income which the judge used to make the considerable improvements and which could have been used to reduce the mortgage. This would appear to be a natural attitude on the part of the farmer, and it would hardly seem that he was not reasonably justified to resist the claim of the insurance company to the farm, with all its improvements as well as the cash in bank.

This simple analogy may look almost trifling alongside the complicated details involved in a plan for the reorganization of a railroad system. But is it an oversimplification of the controlling issue, namely, was the Circuit Court of Appeals wrong in holding that the General Bondholders were "reasonably justified" in rejecting the plan? Let the facts, clearly and fairly stated in the opinions below, speak for themselves. Judge Huxman thus summarizes the Court's conclusion that the General Bondholders had "a real grievance":

> "On November 1, 1935, the Debtor's total debts senior to the claim of the General Bondholders was slightly over $101,000,000. The General Bondhold-

ers' claims at that time were approximately $30,000,000, making the total of the two claims approximately $131,000,000. Any one of the ten plans of reorganization prior to the final one fixed the value of the property at more than enough to satisfy the claims of all bondholders in full, as of the date this proceeding was instituted. During the ten intervening years, the claim of the Senior Bondholders increased to more than $139,000,000, and that of the General Bondholders to more than $43,500,000, making a total of more than $182,000,000, required for the two classes of claims.

During all of this period the Debtor enjoyed substantial income, amounting to approximately $50,000,000. Instead of using this income in payment of interest on the senior claims, it was used in making permanent and lasting improvements in the road. More than $43,000,000 was used in this way. None of these expenditures has resulted in a comparable increase or in any substantial increase in the final valuation, over the valuation prior to the making of the improvements. But as a result of this operation, the position of the General Bondholders has deteriorated from a 100 per cent participation in the amount of their claims to a mere ten per cent. Nor does it change the picture to say that these improvements were necessary to the railroad system. The fact still remains that earnings in which all had a vital interest were used in building a new railroad in many respects, which will be handed over to the Senior Bondholders, and the General Bondholders will practically be eliminated as a result thereof.

But this alone does not entitle the General Bondholders to a greater participation in the reorganized company. Neither does it condemn the plan of reorganization or the capital structure set up therein.

The operation of a railroad involves the expenditure of large sums for operation. It involves the formulation of plans of operation and the exercise of judgment and discretion. If, in the exercise of this discretion, funds are unwisely spent, from the viewpoint of the interest of all creditors, they may feel aggrieved, but they have no legal cause of complaint.

Neither was the Commission compelled to, nor would it be justified in adding the amount of these expenditures to the capitalized value if in the exercise of sound discretion it felt that the reasonable prospective earnings of the road, after the improvements did not justify it. However, in the face of all this, after satisfying in full the claims of the senior bondholders, the plan of reorganization should have made sure that all excess current assets, as well as all excess war profits yet to accrue, would go to the General Bondholders.

The commission, as pointed out, adopted a conservative, sound estimate of the prospective earnings of the reorganized company. For this it is not to be criticized. An over-optimistic view would again surely lead the Debtor into the bankruptcy courts, with which it has had too much acquaintance already.[7] We, however, feel that there is more than a speculative probability that these war industries which have been constructed along the system, as well as the improvements which have been made by the

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"[7] Properties included in this railroad system have participated in the following reorganizations: The Denver & Rio Grande R. Co. was a successor in a reorganization proceeding in 1886; the Rio Grande & Western R. Co. was the successor in a reorganization proceeding in 1889; these two companies consolidated in 1908 under the name of the Denver & Rio Grande R. Co.; the present company was reorganized in 1920 and again in 1922 to 1924."

use of these net earnings, might produce greater net returns than anticipated in the plan. If such should be the case, they certainly belong to the General Bondholders and not to the Seniors, and the plan should bring this about. It could be done by issuing to the General Bondholders an additional amount of a subordinate stock which would receive returns only from excess dividends. This is a mere suggestion on our part, and in no wise binding on the Commission. Our duty is limited to pointing out defects in the plan. It is the responsibility of the Commission to correct them.

The Junction Bonds

We think that the complaint as to the manner in which the Junction Bonds were handled is well taken. The Rio Grande Junction Railroad is a wholly owned subsidiary of the Debtor. It had bonds outstanding in the hands of the public for the payment of which the Debtor was liable, totaling $2,758,333. This claim was senior to that of the General Bondholders. The plan set aside securities for the payment of this claim. In an order dated September 13, 1943, the District Court directed the trustee to pay this claim with some of the surplus cash on hand, and retained the securities which were to be used in the payment thereof in the treasury of the company. The court treated the transaction as a purchase of securities rather than a payment of a debt. This is a play upon words, and, in any event, is immaterial to the issue. The fact remains that the new capitalization provided securities for the payment of these bonds. The value behind these securities in no wise belonged to the Senior Bondholders, because they had been paid in full. When surplus cash was used to pay this claim, the value behind the securities set aside for that purpose remained undistributed. Since the

Senior Bondholders had been satisfied in full, this undistributed value in all equity and fairness belonged to the General Bondholders. Any plan which does not give it to them does not comply with the requirements of Section 77, sub. e, of the Act." 150 F. 2d 28, 38–39.

Inasmuch as the decision in this case seems to me to turn on an adequate appreciation of the facts, I deem it important to quote the analysis of the situation on the basis of which Judge Phillips reached his conclusion:

"On November 1, 1935, during the depths of the national depression, the debtor came into court for reorganization. At that time the debtor's senior debts ahead of the general mortgage bonds aggregated slightly over $101,000,000 and the claim of the general mortgage bondholders aggregated about $30,000,000. With an immediate reorganization, a capitalization of $132,000,000 would have been adequate to give the general mortgage bondholders new stock equal to 100 per cent of their claim. No capitalization or valuation ever proposed for the debtor, in any plan presented, has been that low. During the eight years' delay in reorganization (in nowise due to the general mortgage bondholders, but, at least in part, to controversies among the senior security holders) and up to January 1, 1943, the effective date of the plan, the claims of the senior security holders, due to the accrual and nonpayment of interest, increased about $38,000,000. The debtor's net income available for interest during the trusteeship to the end of 1944 amounted to $49,420,972. It exceeded by approximately $9,500,000 the interest charges which accrued on the claims of senior security holders to the end of that year. As of December 31, 1935, the debtor's current assets were $9,727,230 less than its

current liabilities. As of December 31, 1944, the debtor's current assets exceeded its current liabilities by $12,125,863.50. Thus, it will be seen there has been a favorable change in the current situation of $21,853,093, and, moreover, since the plan was formulated, the Junction Bonds have been paid and equipment obligations have been reduced from $5,758,000, the amount provided for in the plan, to $4,540,000, a reduction in that requirement of $1,218,000.

Approximately $43,000,000 of the income available, but not used, for the payment of interest has been expended in permanent improvements and betterments. While the investment value of the debtor's property thus was substantially increased, the Commission's valuation, based on estimated future earnings, was not increased proportionately. As a result, the claim of the senior security holders has increased and the participation of the general mortgage bondholders has been pressed downward until it is now fixed at 10 per cent of the new common stock. Many of the improvements and betterments referred to above have substantially increased the capacity of the railroad to handle increased traffic as it arises. Central train control installed in many segments, where the greatest density of traffic obtains, gives to those segments, in a large degree, the equivalent of a double-track railroad and increases the number of trains that can be operated over the road and the volume of traffic that can be handled by the road. Other of such improvements have contributed to efficiency and economy in operations. These improvements have enabled the debtor to handle the great increase in traffic resulting from the war effort and have placed the debtor in a position to more economically and efficiently handle a volume of traffic largely in excess

of its prewar traffic, should future economic conditions produce such traffic. Under the plan approved and confirmed by the district court, 90 per cent of the common stock goes to the holders of the senior securities and 10 per cent to the general mortgage bondholders. As a result, should there be a substantial increase in the debtor's postwar traffic over its prewar traffic, 90 per cent of the increased earnings will inure to the benefit of the holders of the senior securities and only 10 per cent to the general mortgage bondholders, whose claim was decreased 90 per cent by reason of the failure to discharge interest accruals with income available therefor and the diversion of such income to the cost of such permanent improvements. It seems to me, under all these circumstances, that, in addition to the other adjustments required to make the plan fair and equitable, the Commission should endeavor to modify the plan so as to give relief from the situation that lets the full impact of the improvement program fall upon the claim of the general mortgage bondholders and accords them no corresponding benefits." 150 F. 2d 28, 40, 41–43.

From the confusing financial details one stark fact emerges. In 1939 the Commission found that the debtor would be able to earn enough in the future to provide an income on one-third of the General Mortgage bonds. 233 I. C. C. 515, 592. In the reorganization plan in 1943 the Commission concluded that the debtor would not earn enough to provide income on more than one-tenth of the General Mortgage claims. 254 I. C. C. 349, 359, 380. The capitalization proposed by the Commission in 1943 eliminated as valueless more of the total claim of the General Mortgage bonds and more of the face amount of these bonds than did the capitalization proposed by the Commission in 1939. Since 1939 the debtor achieved a position permitting it to make large debt reductions and

to reduce considerably its interest charges. It accumulated a very large net income in excess of its interest service, it expended large sums to decrease operating costs and improve its business prospects, so that the future earning power of the railroad was greatly increased. In the face of all these factors the senior security holders were given not only securities for the full amount of their claim but also all cash accumulations available for the reduction of the road's indebtedness. Improvements in the financial and physical structure of the road patently calculated to increase the profits of the future owners of this road have been made the basis of substantially wiping out one class of the present owners. Inequitable consequences such as these led the Circuit Court of Appeals to conclude that the plan failed to satisfy the command of Congress that as a matter of judicial judgment a reorganization plan must be found "fair and equitable."

To defeat the plan it is not necessary, however, to find it intrinsically wanting in fairness and equity. Congress did not authorize the enforcement of a plan for reorganization once it is found, as a matter of judicial judgment, to be "fair and equitable." Congress wrote into law another and a vital condition to the validity of a railroad reorganization plan. A plan must also commend itself as "fair and equitable" to the various classes of creditors. And if any class rejects it, the plan can prevail only if the District Court is warranted in finding that such rejection "is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts . . ." 49 Stat. 911, 919 (1935), 11 U. S. C. § 205 (e).

Claimants who are thus entitled to vote on their interests as a class are surely not expected to vote as altruists any more than they are to be allowed to behave as unreasonable obstructionists. If that which Congress has written is not to be stricken out, we must recognize the

referendum which Congress has lodged in each class of creditors as a means of self-protection by each class of creditors and not as an occasion for empty dialectic. On a fair and practical construction of the power which Congress has seen fit to place in the hands of the various creditor classes, a class can be deemed not "reasonably justified" in exercising the right which Congress gave them to vote their interests, only if a court can say that no intelligent class of creditors, regardful of their class interests, but not obviously hostile to the common interest with which their class interest is involved, could have objected to the plan. Any other construction reads "reasonably justified" out of the statute. In effect that is what the District Court has done. And this Court, with almost the candor of silence, appears to sanction such judicial deletion of what Congress has written. For it does not find that the General Bondholders were not reasonably justified from their intrinsic point of view to exercise their right to reject the plan. It does little more than assert this conclusion, apparently on the finding that the plan was in fact "fair and equitable." It imposes its judgment that the plan was "fair and equitable" upon the General Bondholders and thus in effect deprives them of the very right which Congress gave them to be judges of their own interests so long as the court cannot say they were capricious or greedy in their judgment. This Court seems to be of the view that if in its judgment a plan is "fair and equitable," it must appear equally fair and equitable to every class of creditors. Here three circuit judges found the plan not "fair and equitable," yet this Court holds that the General Bondholders were not "reasonably justified" in not finding it "fair and equitable." This can only mean that the Court deems redundant, and therefore eliminates, the Congressional requirement that before a plan can be approved, it must commend itself to the judgment of a class of creditors exercising the kind of judgment

that men are entitled to exercise in the pursuit of their legitimate self-interest, as well as commend itself to the judicial sense of fairness.

In assuming that if a plan seems fair and equitable to a court, rejection of it by any class must be unreasonable, the Court not only disregards the contrary assumption on the basis of which Congress legislated. Such an attitude is also oblivious of the practicalities of the situation. To assume that if a court finds a plan is "fair and equitable" no class of creditors can be reasonably justified in rejecting it, is to assume that the ascertainment of fairness concerning so complicated a situation as a plan for a railroad's reorganization lies in the realm of even approximate certitude. Quite the opposite is true. A court in ascertaining whether a plan is fair and equitable is not engaged in ascertaining indisputable facts. It is forming a judgment, and largely a prophetic judgment, regarding a maze of factors, and as to each factor there is usually room for considerable difference of opinion. It is for this reason that Congress made it a condition for judicial approval of the plan that it appear fair and equitable in the voting system by the classes of creditors.

For an addition it was, made by Congress to the recommendation of the legislation by Commissioner Joseph B. Eastman. As Federal Coordinator, he proposed to Congress that a court be authorized to confirm the reorganization plan despite the failure to obtain a majority vote of one or more of the affected classes of creditors, provided that the district court was satisfied in two respects: (1) that the plan "makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it"; and (2) that the judge was satisfied that the plan is "fair and equitable" "even if not so approved" by a class of creditors. See Coordinator's Annual Report for 1934, pp. 101–102, 237, 238.

But Congress deemed it in the public interest to give greater protection to the various classes of creditors than the Coordinator suggested. In several respects Congress limited the power of courts to disregard a class vote against a plan beyond the safeguards proposed by the Coordinator. For present purposes it is decisive to note that Congress added to the protection formulated by the Coordinator by requiring that a judge, after finding that a plan is "fair and equitable," must also be satisfied and find that "such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts . . ." I cannot escape the conclusion that to hold, in the circumstances of this case, that the General Bondholders were not reasonably justified in rejecting the plan is to decide that this requirement, purposefully written into the law by Congress as an addition to the requirement that the judge must find the plan to be "fair and equitable," is but a meaningless repetition of that requirement.

The undesirability of further delay in taking this road out of the District Court, where it has been for more than a decade, is bound to press upon any court. But it ought not lead to confirmation of a plan which fails to satisfy the explicit prerequisites for approval laid down by Congress, particularly so where the result is as drastic as the Circuit Court of Appeals and the expert Senate Committee on Interstate Commerce have made manifest. See S. Rep. 1170, 79th Cong., 2d Sess., pp. 17–18, 40, 42, 67–68, 72–73, 91–95, 105–109, 121–123.

Congress has not curtailed, nor shown any desire to restrict, the right of self-protection which it gave to railroad creditors by the Act of 1935 and to which the result of this case appears indifferent. On the contrary, Congress has since given decisive proof that it disapproved the construction which courts have heretofore given to § 77, resulting in undue harshness to junior interests and

promoting concentration of railroad control. It has emphatically indicated that the rights of junior interests, reflecting public interests, should be more carefully safeguarded. Whether Congress has been wise or unwise in manifesting this view is not our business to decide. But it is the business of this Court to respect what I find to be a clear enunciation by Congress of the conditions which alone authorize courts to sanction a railroad reorganization.

COLEGROVE ET AL. *v.* GREEN ET AL.

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

No. 804. Argued March 7, 8, 1946.—Decided June 10, 1946.

Three persons who were qualified to vote in congressional districts of Illinois which have much larger populations than other congressional districts of that State, brought suit in a Federal District Court in Illinois, under the Declaratory Judgment Act, to restrain officers of the State from arranging for an election, in which members of Congress were to be chosen, pursuant to provisions of an Illinois law of 1901 governing congressional districts. The complaint alleged that, by reason of later changes in population, the congressional districts created by the Illinois law lacked compactness of territory and approximate equality of population; and prayed a decree, with incidental relief, declaring the provisions of the state law invalid as in violation of various provisions of the Federal Constitution and in conflict with the Reapportionment Act of 1911, as amended. The District Court dismissed the complaint. *Held,* dismissal of the complaint is affirmed. Pp. 550–551, 556.

64 F. Supp. 632, affirmed.

Appeal from a decree of a District Court of three judges, 64 F. Supp. 632, which dismissed the complaint in a suit to restrain state officers from acting pursuant to provisions of a state election law alleged to be invalid under the Federal Constitution. *Affirmed,* p. 556.

Urban A. Lavery argued the cause for appellants. With him on the brief was *Edwin Borchard.*

William C. Wines, Assistant Attorney General of Illinois, argued the cause for appellees. With him on the brief was *George F. Barrett,* Attorney General.

Abraham W. Brussell filed a brief for the Better Government Association, as *amicus curiae,* in support of appellants.

MR. JUSTICE FRANKFURTER announced the judgment of the Court and an opinion in which MR. JUSTICE REED and MR. JUSTICE BURTON concur.

This case is appropriately here, under § 266 of the Judicial Code, 28 U. S. C. § 380, on direct review of a judgment of the District Court of the Northern District of Illinois, composed of three judges, dismissing the complaint of the appellants. These are three qualified voters in Illinois districts which have much larger populations than other Illinois Congressional districts. They brought this suit against the Governor, the Secretary of State, and the Auditor of the State of Illinois, as members *ex officio* of the Illinois Primary Certifying Board, to restrain them, in effect, from taking proceedings for an election in November 1946, under the provisions of Illinois law governing Congressional districts. Illinois Laws of 1901, p. 3. Formally, the appellants asked for a decree, with its incidental relief, § 274 (d) Judicial Code, 28 U. S. C. § 400, declaring these provisions to be invalid because they violated various provisions of the United States Constitution and § 3 of the Reapportionment Act of August 8, 1911, 37 Stat. 13, as amended, 2 U. S. C. § 2a, in that by reason of subsequent changes in population the Congressional districts for the election of Representatives in the Congress created by the Illinois Laws of 1901 (Ill. Rev. Stat. Ch. 46 (1945) §§ 154–56) lacked compactness of terri-

tory and approximate equality of population. The District Court, feeling bound by this Court's opinion in *Wood* v. *Broom,* 287 U. S. 1, dismissed the complaint. 64 F. Supp. 632.

The District Court was clearly right in deeming itself bound by *Wood* v. *Broom, supra,* and we could also dispose of this case on the authority of *Wood* v. *Broom.* The legal merits of this controversy were settled in that case, inasmuch as it held that the Reapportionment Act of June 18, 1929, 46 Stat. 21, as amended, 2 U. S. C. § 2 (a), has no requirements "as to the compactness, contiguity and equality in population of districts." 287 U. S. at 8. The Act of 1929 still governs the districting for the election of Representatives. It must be remembered that not only was the legislative history of the matter fully considered in *Wood* v. *Broom,* but the question had been elaborately before the Court in *Smiley* v. *Holm,* 285 U. S. 355, *Koenig* v. *Flynn,* 285 U. S. 375, and *Carroll* v. *Becker,* 285 U. S. 380, argued a few months before *Wood* v. *Broom* was decided. Nothing has now been adduced to lead us to overrule what this Court found to be the requirements under the Act of 1929, the more so since seven Congressional elections have been held under the Act of 1929 as construed by this Court. No manifestation has been shown by Congress even to question the correctness of that which seemed compelling to this Court in enforcing the will of Congress in *Wood* v. *Broom.*

But we also agree with the four Justices (Brandeis, Stone, Roberts, and Cardozo, JJ.) who were of opinion that the bill in *Wood* v. *Broom, supra,* should be "dismissed for want of equity." To be sure, the present complaint, unlike the bill in *Wood* v. *Broom,* was brought under the Federal Declaratory Judgment Act which, not having been enacted until 1934, was not available at the time of *Wood* v. *Broom.* But that Act merely gave the federal courts competence to make a declaration of rights even though

no decree of enforcement be immediately asked. It merely permitted a freer movement of the federal courts within the recognized confines of the scope of equity. The Declaratory Judgment Act "only provided a new form of procedure for the adjudication of rights in conformity" with "established equitable principles." *Great Lakes Co.* v. *Huffman,* 319 U. S. 293, 300. And so, the test for determining whether a federal court has authority to make a declaration such as is here asked, is whether the controversy "would be justiciable in this Court if presented in a suit for injunction . . ." *Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249, 262.

We are of opinion that the appellants ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about "jurisdiction." It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination.

This is not an action to recover for damage because of the discriminatory exclusion of a plaintiff from rights enjoyed by other citizens. The basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity. Compare *Nixon* v. *Herndon,* 273 U. S. 536 and *Lane* v. *Wilson,* 307 U. S. 268, with *Giles* v. *Harris,* 189 U. S. 475. In effect this is an appeal to the federal courts to reconstruct the electoral process of Illinois in order that it may be adequately represented in the councils of the Nation. Because the Illinois legislature has failed to revise its Congressional Representative districts in order to reflect great changes, during more than a generation, in the distribution of its population, we are asked to do this, as it were, for Illinois.

Of course no court can affirmatively re-map the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system. At best we could only declare the existing electoral system invalid. The result would be to leave Illinois undistricted and to bring into operation, if the Illinois legislature chose not to act, the choice of members for the House of Representatives on a state-wide ticket. The last stage may be worse than the first. The upshot of judicial action may defeat the vital political principle which led Congress, more than a hundred years ago, to require districting. This requirement, in the language of Chancellor Kent, "was recommended by the wisdom and justice of giving, as far as possible, to the local subdivisions of the people of each state, a due influence in the choice of representatives, so as not to leave the aggregate minority of the people in a state, though approaching perhaps to a majority, to be wholly overpowered by the combined action of the numerical majority, without any voice whatever in the national councils." 1 Kent, *Commentaries* (12th ed., 1873) *230–31, n. (c). Assuming acquiescence on the part of the authorities of Illinois in the selection of its Representatives by a mode that defies the direction of Congress for selection by districts, the House of Representatives may not acquiesce. In the exercise of its power to judge the qualifications of its own members, the House may reject a delegation of Representatives-at-large. Article I, § 5, Cl. 1. For the detailed system by which Congress supervises the election of its members, see *e. g.*, 2 U. S. C. §§ 201–226; Bartlett, *Contested Elections in the House of Representatives* (2 vols.); Alexander, *History and Procedure of the House of Representatives* (1916) c. XVI. Nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof. It is hostile to

a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law.

The appellants urge with great zeal that the conditions of which they complain are grave evils and offend public morality. The Constitution of the United States gives ample power to provide against these evils. But due regard for the Constitution as a viable system precludes judicial correction. Authority for dealing with such problems resides elsewhere. Article I, § 4 of the Constitution provides that "The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, . . ." The short of it is that the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility. If Congress failed in exercising its powers, whereby standards of fairness are offended, the remedy ultimately lies with the people. Whether Congress faithfully discharges its duty or not, the subject has been committed to the exclusive control of Congress. An aspect of government from which the judiciary, in view of what is involved, has been excluded by the clear intention of the Constitution cannot be entered by the federal courts because Congress may have been in default in exacting from States obedience to its mandate.

The one stark fact that emerges from a study of the history of Congressional apportionment is its embroilment in politics, in the sense of party contests and party interests. The Constitution enjoins upon Congress the duty of apportioning Representatives "among the several States . . . according to their respective Numbers, . . ."

Article I, § 2. Yet, Congress has at times been heedless of this command and not apportioned according to the requirements of the Census. It never occurred to anyone that this Court could issue mandamus to compel Congress to perform its mandatory duty to apportion. "What might not be done directly by mandamus, could not be attained indirectly by injunction." Chafee, *Congressional Reapportionment* (1929) 42 Harv. L. Rev. 1015, 1019. Until 1842 there was the greatest diversity among the States in the manner of choosing Representatives because Congress had made no requirement for districting. 5 Stat. 491. Congress then provided for the election of Representatives by districts. Strangely enough, the power to do so was seriously questioned; it was still doubted by a Committee of Congress as late as 1901. See *e. g.*, Speech of Mr. (afterwards Mr. Justice) Clifford, Cong. Globe, April 28, 1842, 27th Cong., 2d Sess., App., p. 347; 1 Bartlett, *Contested Elections in the House of Representatives* (1865) 47, 276; H. R. Rep. No. 3000, 56th Cong., 2d Sess. (1901); H. R. Doc. No. 2052, 64th Cong., 2d Sess. (1917) 43; *United States* v. *Gradwell*, 243 U. S. 476, 482, 483. In 1850 Congress dropped the requirement. 9 Stat. 428, 432–33. The Reapportionment Act of 1862 required that the districts be of contiguous territory. 12 Stat. 572. In 1872 Congress added the requirement of substantial equality of inhabitants. 17 Stat. 28. This was reinforced in 1911. 37 Stat. 13, 14. But the 1929 Act, as we have seen, dropped these requirements. 46 Stat. 21. Throughout our history, whatever may have been the controlling Apportionment Act, the most glaring disparities have prevailed as to the contours and the population of districts. Appendix I summarizes recent disparities in the various Congressional Representative districts throughout the country and Appendix II gives fair samples of prevailing gerrymanders. For other illustrations of glaring inequalities, see 71 Cong. Rec.

2278–79, 2480 *et seq.;* 86 Cong. Rec. 4369, 4370–71, 76th Cong., 2d Sess. (1940); H. R. Rep. No. 1695, 61st Cong., 2d Sess. (1910); (1920) 24 Law Notes 124; (October 30, 1902) 75 The Nation 343; and see, generally, Schmeckebier, *Congressional Apportionment* (1941); and on gerrymandering, see Griffith, *The Rise and Development of the Gerrymander* (1907).

To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action. Thus, "on Demand of the executive Authority," Art. IV, § 2, of a State it is the duty of a sister State to deliver up a fugitive from justice. But the fulfilment of this duty cannot be judicially enforced. *Kentucky* v. *Dennison,* 24 How. 66. The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion, *Mississippi* v. *Johnson,* 4 Wall. 475. Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts. *Pacific Telephone Co.* v. *Oregon,* 223 U. S. 118. The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights.

Dismissal of the complaint is affirmed.

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

For opinions of RUTLEDGE and BLACK, JJ., see *post,* pages 564, 566.

APPENDIX I.

DISPARITIES IN APPORTIONMENT SHOWING DISTRICTS IN EACH STATE HAVING LARGEST AND SMALLEST POPULATIONS.

State	*1946*		*1928**		*1897**	
	Dist.	*Population*	*Dist.*	*Population*	*Dist.*	*Population*
ALA	9th	459, 930	9th	310, 054	2d	188, 214
	6th	251, 757	6th	170, 188	7th	130, 451
ARIZ	2 Representatives Elected at large.		1 Representative		Not yet admitted	
ARK	1st	423, 152	1st	330, 292	1st	220, 261
	3d	177, 476	3d	180, 348	4th	147, 806
CALIF	3d	409, 404	10th	516, 283	5th	228, 717
	21st	194, 199	2d	129, 357	4th	147, 642
COLO	1st	322, 412	3d	281, 170	2d	207, 539
	4th	172, 847	4th	140, 532	1st	204, 659
CONN	1st	450, 189	1st	336, 027	2d	248, 582
	5th	247, 601	5th	224, 426	3d	121, 792
DEL	1 Representative		1 Representative		1 Representative	
FLA	1st	439, 895	4th	315, 292	2d	202, 792
	6th	186, 831	2d	187, 474	1st	188, 630
GA	5th	487, 552	5th	308, 364	2d	180, 300
	9th	235, 420	3d	205, 343	11th	155, 948
IDAHO	2d	300, 357	2d	253, 542	1 Representative	
	1st	224, 516	1st	178, 324		
ILL	7th	914, 053	7th	560, 434	13th	184, 027
	5th	112, 116	5th	158, 092	22d	159, 186
IND	11th	460, 926	7th	348, 061	7th	191, 472
	9th	241, 323	4th	179, 737	6th	139, 359
IOWA	2d	392, 052	11th	295, 449	11th	203, 470
	4th	268, 900	1st	156, 594	1st	153, 712
KANSAS	4th	382, 546	3d	280, 045	7th	278, 208
	3d	249, 574	4th	152, 378	1st	167, 314
KY	9th	413, 690	11th	289, 766	4th	192, 055
	5th	225, 426	8th	168, 067	7th	141, 461

*These years were chosen at random.

APPENDIX I—*Continued.*

State	*1946*		*1928**		*1897**	
	Dist.	*Population*	*Dist.*	*Population*	*Dist.*	*Population*
LA	6th	333, 295	6th	255, 372	3d	214, 785
	8th	240, 166	7th	204, 909	2d	152, 025
ME	1st	290, 335	1st	195, 072	4th	183, 070
	2d	276, 695	2d	188, 563	1st	153, 778
MD	2d	534, 568	2d	311, 413	2d	208, 165
	1st	195, 427	1st	194, 568	5th	153, 912
MASS	10th	346, 623	8th	259, 954	5th	174, 866
	1st	278, 459	15th	217, 307	6th	169, 418
MICH	17th	419, 007	6th	533, 748	2d	191, 841
	12th	200, 265	10th	198, 679	9th	148, 626
MINN	6th	334, 781	5th	275, 645	2d	188, 480
	9th	283, 845	9th	112, 235	6th	184, 848
MISS	7th	470, 781	3d	349, 662	5th	224, 618
	4th	201, 316	8th	177, 185	1st	143, 315
MO	12th	503, 738	10th	521, 587	14th	230, 478
	9th	214, 787	8th	138, 807	9th	152, 442
MONT	2d	323, 597	2d	333, 476	1 Representative	
	1st	235, 859	1st	215, 413		
NEB	1st	369, 190	6th	288, 090	4th	195, 434
	2d	305, 961	1st	173, 458	3d	163, 674
NEV	1 Representative		1 Representative		1 Representative	
N. H	2d	247, 033	1st	224, 842	1st	190, 532
	1st	244, 491	2d	218, 241	2d	185, 998
N. J	1st	370, 220	8th	290, 610	7th	256, 093
	2d	226, 169	11th	228, 615	8th	125, 793
N. M	2 Representatives Elected at large		1 Representative		Not yet admitted	
N. Y	25th	365, 918	23d	391, 620	14th	227, 978
	45th	235, 913	12th	151, 605	7th	114, 766
N. C	4th	358, 573	5th	408, 139	6th	204, 686
	1st	239, 040	3d	202, 760	3d	160, 288
N. D	2 Representatives Elected at large		2d	220, 700	1 Representative	
			3d	210, 203		

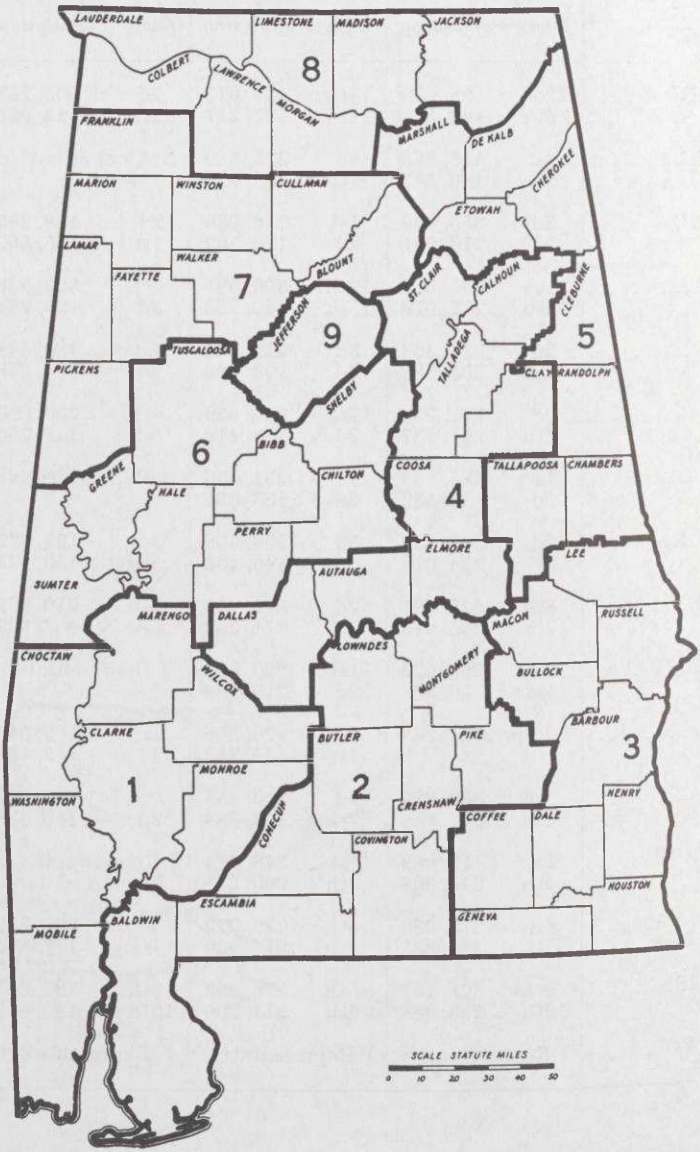
APPENDIX I—*Concluded.*

State	1946		1928*		1897*	
	Dist.	Population	Dist.	Population	Dist.	Population
OHIO	22d	698, 650	14th	439, 013	2d	205, 293
	5th	163, 561	11th	167, 217	12th	158, 026
OKLA	1st	416, 863	3d	325, 680	Not yet admitted	
	7th	189, 547	7th	189, 472		
ORE	3d	355, 099	1st	346, 989	2d	158, 205
	2d	210, 991	2d	160, 502	1st	155, 562
PA	11th	441, 518	12th	390, 991	4th	309, 986
	14th	212, 979	15th	136, 283	3d	129, 764
R. I	2d	374, 463	3d	210, 201	1st	180, 548
	1st	338, 883	2d	193, 186	2d	164, 958
S. C	2d	361, 933	7th	266, 956	4th	200, 000
	5th	251, 137	2d	203, 418	5th	141, 750
S. D	1st	485, 829	2d	251, 405	1 Representative	
	2d	157, 132	3d	138, 031		
TENN	2d	388, 938	3d	296, 396	3d	199, 972
	5th	225, 918	5th	145, 403	5th	153, 773
TEX	8th	528, 961	2d	349, 859	6th	210, 907
	17th	230, 010	7th	211, 032	1st	102, 827
UTAH	2d	293, 922	1st	229, 907	1 Representative	
	1st	256, 388	2d	219, 489		
VT	1 Representative		2d	176, 596	1st	169, 940
			1st	175, 832	2d	162, 482
VA	9th	360, 679	2d	312, 458	9th	187, 467
	4th	243, 165	7th	167, 588	2d	145, 536
WASH	1st	412, 689	1st	348, 474	2 Representatives	
	4th	244, 908	4th	200, 258	Elected at large	
W. VA	6th	378, 630	6th	279, 072	3d	202, 289
	1st	281, 333	4th	214, 930	1st	177, 840
WIS	5th	391, 467	5th	276, 503	6th	187, 001
	10th	263, 088	6th	214, 206	10th	149, 845
WYO	1 Representative		1 Representative		1 Representative	

APPENDIX II.

(1)

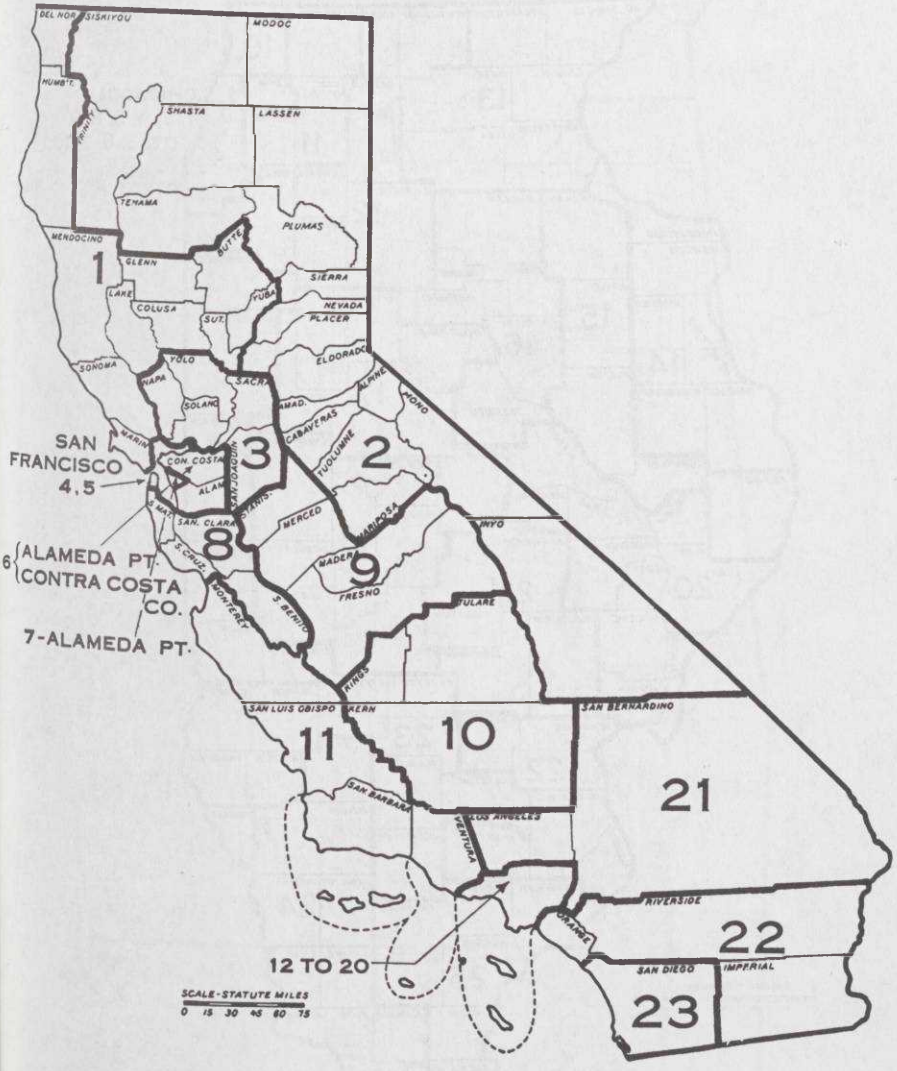
ALABAMA



APPENDIX II.

(2)

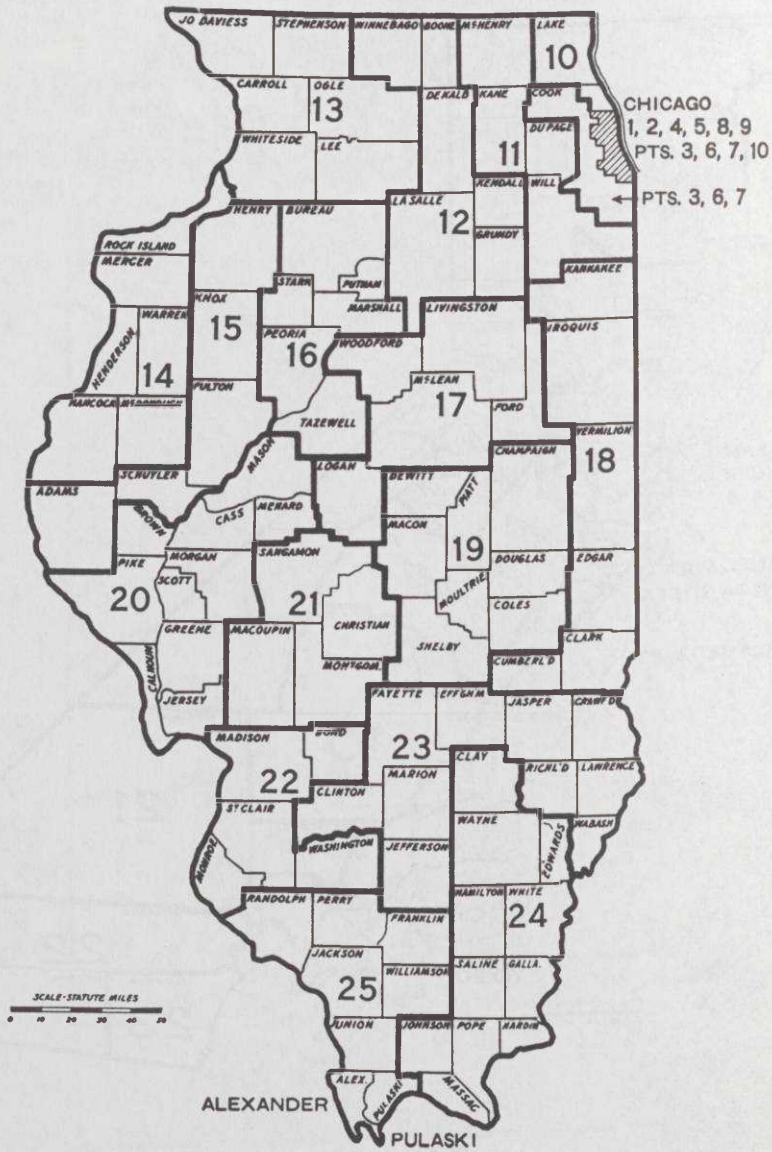
CALIFORNIA



APPENDIX II.

(3)

ILLINOIS

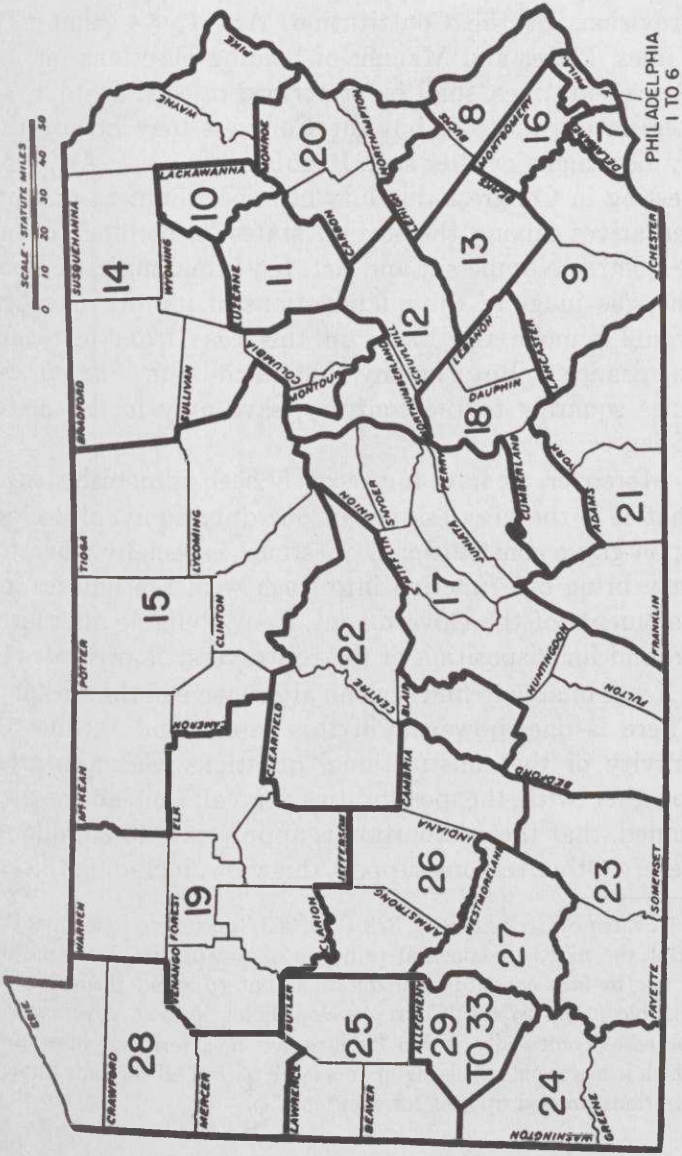


549 Opinion of FRANKFURTER, J.

APPENDIX II.

(4)

PENNSYLVANIA



MR. JUSTICE RUTLEDGE.

I concur in the result. But for the ruling in *Smiley* v. *Holm*, 285 U. S. 355, I should have supposed that the provisions of the Constitution, Art. I, § 4, that "The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . ."; Art. I, § 2, vesting in Congress the duty of apportionment of representatives among the several states "according to their respective Numbers"; and Art. I, § 5, making each House the sole judge of the qualifications of its own members, would remove the issues in this case from justiciable cognizance. But, in my judgment, the *Smiley* case rules squarely to the contrary, save only in the matter of degree.

Moreover, we have but recently been admonished again that it is the very essence of our duty to avoid decision upon grave constitutional questions, especially when this may bring our function into clash with the political departments of the Government, if any tenable alternative ground for disposition of the controversy is presented.[1]

I was unable to find such an alternative in that instance. There is one, however, in this case. And I think the gravity of the constitutional questions raised so great, together with the possibilities for collision above mentioned, that the admonition is appropriate to be followed here. Other reasons support this view, including the fact

[1] *United States* v. *Lovett*, 328 U. S. 303, concurring opinion at 320: "But the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible. And so the 'Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.' "

that, in my opinion, the basic ruling and less important ones in *Smiley* v. *Holm, supra,* would otherwise be brought into question.

Assuming that that decision is to stand, I think, with Mr. Justice Black, that its effect is to rule that this Court has power to afford relief in a case of this type as against the objection that the issues are not justiciable.

In the later case of *Wood* v. *Broom,* 287 U. S. 1, the Court disposed of the cause on the ground that the 1929 Reapportionment Act, 46 Stat. 21, did not carry forward the requirements of the 1911 Act, 37 Stat. 13, and declined to decide whether there was equity in the bill. 287 U. S. 1, 8. But, as the Court's opinion notes, four justices thought the bill should be dismissed for want of equity.[2]

In my judgment this complaint should be dismissed for the same reason. Assuming that the controversy is justiciable, I think the cause is of so delicate a character, in view of the considerations above noted, that the jurisdiction should be exercised only in the most compelling circumstances.

As a matter of legislative attention, whether by Congress or the General Assembly, the case made by the complaint is strong. But the relief it seeks pitches this Court into delicate relation to the functions of state officials and Congress, compelling them to take action which heretofore they have declined to take voluntarily or to accept the alternative of electing representatives from Illinois at large in the forthcoming elections.

The shortness of the time remaining makes it doubtful whether action could, or would, be taken in time to secure for petitioners the effective relief they seek. To force

[2] Want of equity jurisdiction does not go to the power of a court in the same manner as want of jurisdiction over the subject matter. Thus, want of equity jurisdiction may be waived. *Matthews* v. *Rodgers,* 284 U. S. 521, 524–525 and cases cited.

them to share in an election at large might bring greater equality of voting right. It would also deprive them and all other Illinois citizens of representation by districts which the prevailing policy of Congress commands. 46 Stat. 26, as amended; 2 U. S. C. § 2a.

If the constitutional provisions on which appellants rely give them the substantive rights they urge, other provisions qualify those rights in important ways by vesting large measures of control in the political subdivisions of the Government and the state. There is not, and could not be except abstractly, a right of absolute equality in voting. At best there could be only a rough approximation. And there is obviously considerable latitude for the bodies vested with those powers to exercise their judgment concerning how best to attain this, in full consistency with the Constitution.

The right here is not absolute. And the cure sought may be worse than the disease.

I think, therefore, the case is one in which the Court may properly, and should, decline to exercise its jurisdiction.[3] Accordingly, the judgment should be affirmed and I join in that disposition of the cause.

MR. JUSTICE BLACK, dissenting.

The complaint alleges the following facts essential to the position I take: Appellants, citizens and voters of Illinois, live in congressional election districts, the respective populations of which range from 612,000 to 914,000. Twenty other congressional election districts have populations that range from 112,116 to 385,207. In seven of

[3] "The power of a court of equity to act is a discretionary one. . . . Where a federal court of equity is asked to interfere with the enforcement of state laws, it should do so only 'to prevent irreparable injury which is clear and imminent.'" *American Federation of Labor* v. *Watson*, 327 U. S. 582, 593, and cases cited.

these districts the population is below 200,000. The Illinois Legislature established these districts in 1901 on the basis of the Census of 1900. The Federal Census of 1910, of 1920, of 1930, and of 1940, each showed a growth of population in Illinois and a substantial shift in the distribution of population among the districts established in 1901. But up to date, attempts to have the State Legislature reapportion congressional election districts so as more nearly to equalize their population have been unsuccessful. A contributing cause of this situation, according to appellants, is the fact that the State Legislature is chosen on the basis of state election districts inequitably apportioned in a way similar to that of the 1901 congressional election districts. The implication is that the issues of state and congressional apportionment are thus so interdependent that it is to the interest of state legislators to perpetuate the inequitable apportionment of both state and congressional election districts. Prior to this proceeding a series of suits had been brought in the state courts challenging the State's local and federal apportionment system. In all these cases the Supreme Court of the State had denied effective relief.[1]

In the present suit the complaint attacked the 1901 State Apportionment Act on the ground that it among other things violates Article I and the Fourteenth Amendment of the Constitution. Appellants claim that since they live in the heavily populated districts their vote is much less effective than the vote of those living in a district which under the 1901 Act is also allowed to choose one Congressman, though its population is sometimes

[1] *People* v. *Thompson*, 155 Ill. 451, 40 N. E. 307; *Fergus* v. *Marks*, 321 Ill. 510, 152 N. E. 557; *Fergus* v. *Kinney*, 333 Ill. 437, 164 N. E. 665; *People* v. *Clardy*, 334 Ill. 160, 165 N. E. 638; *People* v. *Blackwell*, 342 Ill. 223, 173 N. E. 750; *Daly* v. *Madison County*, 378 Ill. 357, 38 N. E. 2d 160. Cf. *Moran* v. *Bowley*, 347 Ill. 148, 179 N. E. 526.

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only one-ninth that of the heavily populated districts. Appellants contend that this reduction of the effectiveness of their vote is the result of a wilful legislative discrimination against them and thus amounts to a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. They further assert that this reduction of the effectiveness of their vote also violates the privileges and immunities clause of the Fourteenth Amendment in abridging their privilege as citizens of the United States to vote for Congressmen, a privilege guaranteed by Article I of the Constitution. They further contend that the State Apportionment Act directly violates Article I which guarantees that each citizen eligible to vote has a right to vote for Congressmen and to have his vote counted. The assertion here is that the right to have their vote counted is abridged unless that vote is given approximately equal weight to that of other citizens. It is my judgment that the District Court had jurisdiction;[2] that the complaint presented a justiciable case and controversy;[3] and that appellants had standing to sue, since the facts alleged show that they have been injured as individuals.[4] Unless previous decisions of this Court are to be overruled, the suit is not one against the State but against state officials as individuals.[5] The complaint attacked the 1901 Apportionment Act as unconstitutional and alleged facts indicating that the Act denied appellants the full right to vote and the equal protection of the laws.

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[2] 28 U.S.C. 41(14); *Bell* v. *Hood*, 327 U.S. 678.

[3] *Smiley* v. *Holm*, 285 U.S. 355; *Koenig* v. *Flynn*, 285 U.S. 375; *Carroll* v. *Becker*, 285 U.S. 380; *Wood* v. *Broom*, 287 U.S. 1; *Nixon* v. *Herndon*, 273 U.S. 536, 540; *McPherson* v. *Blacker*, 146 U.S. 1, 23–24; see also cases collected in 2 A. L. R. note, 1337 *et seq.*

[4] *Coleman* v. *Miller*, 307 U.S. 433, 438, 467.

[5] *Ex parte Young*, 209 U.S. 123; *Sterling* v. *Constantin*, 287 U.S. 378, 393.

These allegations have not been denied. Under these circumstances, and since there is no adequate legal remedy for depriving a citizen of his right to vote, equity can and should grant relief.

It is difficult for me to see why the 1901 State Apportionment Act does not deny appellants equal protection of the laws. The failure of the Legislature to reapportion the congressional election districts for forty years, despite census figures indicating great changes in the distribution of the population, has resulted in election districts the populations of which range from 112,000 to 900,000. One of the appellants lives in a district of more than 900,000 people. His vote is consequently much less effective than that of each of the citizens living in the district of 112,000. And such a gross inequality in the voting power of citizens irrefutably demonstrates a complete lack of effort to make an equitable apportionment. The 1901 State Apportionment Act if applied to the next election would thus result in a wholly indefensible discrimination against appellants and all other voters in heavily populated districts. The equal protection clause of the Fourteenth Amendment forbids such discrimination. It does not permit the States to pick out certain qualified citizens or groups of citizens and deny them the right to vote at all. See *Nixon* v. *Herndon,* 273 U. S. 536, 541; *Nixon* v. *Condon,* 286 U. S. 73. No one would deny that the equal protection clause would also prohibit a law that would expressly give certain citizens a half-vote and others a full vote. The probable effect of the 1901 State Apportionment Act in the coming election will be that certain citizens, and among them the appellants, will in some instances have votes only one-ninth as effective in choosing representatives to Congress as the votes of other citizens. Such discriminatory legislation seems to me exactly the kind that the equal protection clause was intended to prohibit.

The 1901 State Apportionment Act in reducing the effectiveness of appellants' votes abridges their privilege as citizens to vote for Congressmen and violates Article I of the Constitution. Article I provides that Congressmen "shall be . . . chosen . . . by the People of the several States . . ." It thus gives those qualified a right to vote and a right to have their vote counted. *Ex parte Yarbrough,* 110 U. S. 651; *United States* v. *Mosley,* 238 U. S. 383. This Court in order to prevent "an interference with the effective choice of the voters" has held that this right extends to primaries. *United States* v. *Classic,* 313 U. S. 299, 314. While the Constitution contains no express provision requiring that congressional election districts established by the States must contain approximately equal populations, the constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast. To some extent this implication of Article I is expressly stated by § 2 of the Fourteenth Amendment which provides that "Representatives shall be apportioned among the several States according to their respective numbers . . ." The purpose of this requirement is obvious: It is to make the votes of the citizens of the several States equally effective in the selection of members of Congress. It was intended to make illegal a nation-wide "rotten borough" system as between the States. The policy behind it is broader than that. It prohibits as well congressional "rotten boroughs" within the States, such as the ones here involved. The policy is that which is laid down by all the constitutional provisions regulating the election of members of the House of Representatives, including Article I which guarantees the right to vote and to have that vote effectively counted: All groups, classes, and indi-

viduals shall to the extent that it is practically feasible be given equal representation in the House of Representatives, which, in conjunction with the Senate, writes the laws affecting the life, liberty, and property of all the people.

It is true that the States are authorized by § 2 of Article I of the Constitution to legislate on the subject of congressional elections to the extent that Congress has not done so. Thus the power granted to the State Legislature on this subject is primarily derived from the Federal and not from the State Constitution. But this federally-granted power with respect to elections of Congressmen is not to formulate policy but rather to implement the policy laid down in the Constitution, that, so far as feasible, votes be given equally effective weight. Thus, a state legislature cannot deny eligible voters the right to vote for Congressmen and the right to have their vote counted. It can no more destroy the effectiveness of their vote in part and no more accomplish this in the name of "apportionment" than under any other name. For legislation which must inevitably bring about glaringly unequal representation in the Congress in favor of special classes and groups should be invalidated, "whether accomplished ingeniously or ingenuously." *Smith* v. *Texas,* 311 U. S. 128, 132. See also *Lane* v. *Wilson,* 307 U. S. 268, 272.

Had Illinois passed an Act requiring that all of its twenty-six Congressmen be elected by the citizens of one county, it would clearly have amounted to a denial to the citizens of the other counties of their constitutionally guaranteed right to vote. And I cannot imagine that an Act that would have apportioned twenty-five Congressmen to the State's smallest county and one Congressman to all the others, would have been sustained by any court. Such an Act would clearly have violated the con-

stitutional policy of equal representation. The 1901 Apportionment Act here involved violates that policy in the same way. The policy with respect to federal elections laid down by the Constitution, while it does not mean that the courts can or should prescribe the precise methods to be followed by state legislatures and the invalidation of all Acts that do not embody those precise methods, does mean that state legislatures must make real efforts to bring about approximately equal representation of citizens in Congress. Here the Legislature of Illinois has not done so. Whether that was due to negligence or was a wilful effort to deprive some citizens of an effective vote, the admitted result is that the constitutional policy of equality of representation has been defeated. Under these circumstances it is the Court's duty to invalidate the state law.

It is contended, however, that a court of equity does not have the power, or even if it has the power, that it should not exercise it in this case. To do so, it is argued, would mean that the Court is entering the area of "political questions." I cannot agree with that argument. There have been cases, such as *Coleman* v. *Miller, supra,* pp. 454, 457, where this Court declined to decide a question because it was political. In the *Miller* case, however, the question involved was ratification of a constitutional amendment, a matter over which the Court believed Congress had been given final authority. To have decided that question would have amounted to a trespass upon the constitutional power of Congress. Here we have before us a state law which abridges the constitutional rights of citizens to cast votes in such way as to obtain the kind of congressional representation the Constitution guarantees to them.

It is true that voting is a part of elections and that elections are "political." But as this Court said in *Nixon*

v. *Herndon, supra,* it is a mere "play upon words" to refer to a controversy such as this as "political" in the sense that courts have nothing to do with protecting and vindicating the right of a voter to cast an effective ballot. The *Classic* case, among myriads of others, refutes the contention that courts are impotent in connection with evasions of all "political" rights. *Wood* v. *Broom,* 287 U. S. 1, does not preclude the granting of equitable relief in this case. There this Court simply held that the State Apportionment Act did not violate the Congressional Reapportionment Act of 1929, 46 Stat. 21, 26, 27, since that Act did not require election districts of equal population. The Court expressly reserved the question of "the right of the complainant to relief in equity." *Giles* v. *Harris,* 189 U. S. 475, also did not hold that a court of equity could not, or should not, exercise its power in a case like this. As we said with reference to that decision in *Lane* v. *Wilson,* 307 U. S. 268, 272–273, it stands for the principle that courts will not attempt to "supervise" elections. Furthermore, the author of the *Giles* v. *Harris* opinion also wrote the opinion in *Nixon* v. *Herndon,* in which a voter's right to cast a ballot was held to give rise to a justiciable controversy.

In this case, no supervision over elections is asked for. What is asked is that this Court do exactly what it did in *Smiley* v. *Holm, supra.* It is asked to declare a state apportionment bill invalid and to enjoin state officials from enforcing it. The only difference between this case and the *Smiley* case is that there the case originated in the state courts while here the proceeding originated in the Federal District Court. The only type of case in which this Court has held that a federal district court should in its discretion stay its hand any more than a state court is where the question is one which state courts or administrative agencies have special competence to

decide. This is not that type of question. What is involved here is the right to vote guaranteed by the Federal Constitution. It has always been the rule that where a federally protected right has been invaded the federal courts will provide the remedy to rectify the wrong done. Federal courts have not hesitated to exercise their equity power in cases involving deprivation of property and liberty. *Ex parte Young, supra; Hague* v. *C. I. O.*, 307 U. S. 496. There is no reason why they should do so where the case involves the right to choose representatives that make laws affecting liberty and property.

Nor is there any more difficulty in enforcing a decree in this case than there was in the *Smiley* case. It is true that declaration of invalidity of the State Act and the enjoining of state officials would result in prohibiting the State from electing Congressmen under the system of the old congressional districts. But it would leave the State free to elect them from the State at large, which, as we held in the *Smiley* case, is a manner authorized by the Constitution. It is said that it would be inconvenient for the State to conduct the election in this manner. But it has an element of virtue that the more convenient method does not have—namely, it does not discriminate against some groups to favor others, it gives all the people an equally effective voice in electing their representatives as is essential under a free government, and it is constitutional.

MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY join in this dissent.

UNIVERSAL OIL PRODUCTS CO. *v.* ROOT REFINING CO.

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

Nos. 48 and 64. Argued October 15, 1945.—Decided June 10, 1946.

Attorneys representing clients interested in patents involved in an allegedly fraudulent judgment theretofore rendered by a federal court in favor of the petitioner, offered and undertook to serve as *amici curiae* in an investigation of the judgment. A master was appointed and an investigation was conducted, but without the usual safeguards of adversary proceedings. Petitioner, though it had consented to a reargument of the case in which the judgment was rendered, objected throughout to the character of the proceedings before the master if rights were to be adjudicated therein. The master found that the judgment was fraudulent, and the court set the judgment aside and ordered the case reargued. The master's fees and expenses, and fees and expenses of the attorneys as *amici curiae*, were taxed against petitioner. *Held:*

1. It was not improper to tax against petitioner the master's fees and expenses, in view of the fact that the petitioner appeared and participated in the investigation before the master, with knowledge that the master's fees and expenses would be assessed by the court. P. 579.

2. It was inequitable and improper to tax against petitioner fees and expenses of the *amici curiae*. P. 580.

(a) Petitioner having objected throughout to the character of the proceedings before the master if rights were to be adjudicated therein, it was unjust to tax against petitioner attorney's fees and expenses. P. 580.

(b) The *amici curiae* having already been compensated by their clients for their services in the investigation, it was inequitable and inappropriate that their fees and expenses be taxed against petitioner for reimbursement of the clients. P. 581.

147 F. 2d 259, reversed.

The Circuit Court of Appeals taxed against the petitioner certain fees and costs in connection with an investigation of an allegedly fraudulent judgment theretofore

rendered by that court in favor of the petitioner. This Court granted certiorari. 324 U. S. 839. In No. 48 the judgment is *reversed and remanded;* and in No. 64 the writ of certiorari, invoked under § 262 of the Judicial Code, is *dismissed.* P. 581.

Ralph S. Harris argued the cause for petitioner. With him on the brief were *Robert T. McCracken, John R. McCullough* and *Frederick W. P. Lorenzen.*

By special leave of Court, *Thorley von Holst* argued the cause *pro se* and for the Skelly Oil Company et al., as *amici curiae,* urging affirmance. With him on the brief were *J. Bernhard Thiess, Sidney Neuman* and *Robert W. Poore.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Petitioner, Universal Oil Products Company, is a patent-holding and licensing company. In 1929 and 1931, it brought suits for infringement against the Winkler-Koch Engineering Co. and the Root Refining Company, respectively. The suits were consolidated, the validity of the patents sustained, and decrees for their infringement entered. 6 F. Supp. 763. The Circuit Court of Appeals for the Third Circuit, in an opinion by Judge J. Warren Davis, affirmed the decrees, 78 F. 2d 991, and this Court, in October, 1935, denied *certiorari. Root Refining Co.* v. *Universal Oil Products Co.,* 296 U. S. 626. Both before and after the decision in the *Root* case, Universal started similar infringement suits against other oil companies. Universal invoked the *Root* decisions as *res judicata* against some of these companies. It maintained that, although these companies had not been parties of record in the *Root* suit, they were members of a "patent club," to which Root belonged and which had been formed

to pool money for the defense of any member of the "club" in an infringement suit against it, and that the *Root* case had been defended by the attorneys for the "patent club." Universal contended that these circumstances made the other oil companies substantial parties to the *Root* litigation and as such bound by its outcome.

On June 2, 1941, during the pendency of these latter cases, attorneys who had represented Root and were representing the other oil companies advised the attorneys of the petitioner that on June 5, 1941, they would bring to the attention of the judges of the Third Circuit Court of Appeals the circumstances surrounding the appeal in the *Root* case, and, more particularly, the relations of one Morgan S. Kaufman to the outcome of that appeal, and invited petitioner's attorneys to attend. At the hearing on June 5, the moving attorneys suggested, in substance, that testimony taken at the trial of Judge Davis pointed to bribery of Judge Davis by Kaufman to secure a decision favorable to Universal in the *Root* appeal. They urged an investigation of the questionable features surrounding affirmance of the *Root* decree, but expressed doubt as to the capacity in which they could formally make such a request of the Court. Their difficulty was due to the fact that after this Court had denied *certiorari* in the *Root* case, Root had settled its controversy with Universal and was unwilling to disturb the agreement by an attempt to reopen the law suit. The other oil companies who were in litigation with Root insisted that they were neither formal nor substantial parties to the *Root* case. And so their attorneys, who were the attorneys in the *Root* litigation and the moving attorneys in the present proceedings, could not move on their behalf to have the *Root* decree vacated. But these other oil companies had an interest in the *Root* decree since it might be used in pending cases to their disadvantage. Universal offered

to consent to a reargument of the *Root* case and to preserve to the Root Company the benefits of the existing agreement, even if Universal should prevail upon reargument. Throughout these proceedings Universal stood ready to carry out this offer, but nothing ever came of it, presumably because Root was not represented at these hearings and the other oil companies were not parties of record in the original litigation.

The dilemma of the attorneys who initiated these proceedings to set aside a fraudulent judgment but could not speak for any client prepared to come before the court as a party in interest, was resolved by a suggestion from the presiding judge of the Circuit Court of Appeals. The suggestion was that the court would accept the services of these attorneys as *amici curiae*. Accordingly, they offered themselves in that role. Upon their acceptance as such by the court, they asked for the appointment of a master to investigate the *Root* appeal. While they thus proceeded as *amici* they stated quite candidly that they were also concerned with the interests of their clients, the oil companies in pending litigation. As a matter of law, however, their status was only that of *amici*, for their clients did not subject themselves to the court's jurisdiction. The relation of these lawyers to the court, after it recognized them as *amici*, remained throughout only that of *amici*.

A master was appointed and he conducted an extensive investigation. He examined records in the possession of the United States Attorney for the Southern District of New York, the records of proceedings before a Philadelphia grand jury, bank records, and various statements of interested parties. From this mass of material, he selected those documents which he deemed appropriate for submission to the inspection of the *amici* and of counsel for Universal. Witnesses were also heard and petitioner

was given the right to cross-examine. But the investigation was not governed by the customary rules of trial procedure. Petitioner's counsel duly excepted to the manner in which the investigation was being conducted, "if it were to involve any property rights of our clients, including the validity of any judgment . . ." The master evidently did not view the proceedings in the light of an adversary litigation. He ruled "that the investigation—for that is all it is—should [not] be conducted strictly according to the rules of evidence in litigation." At the conclusion of this investigation, the master rendered a report in which he concluded "that there was in connection with this case such fraud as tainted and invalidated the judgments" in the *Root* appeal.

On the basis of this conclusion, the Court of Appeals on June 15, 1944, entered an order directing that the judgments be vacated and the cause be reargued. The relief thus granted was that to which petitioner had consented before the investigation got under way. On July 24, 1944, the *amici* applied to the court below for an order directing that the expenses and compensation of the master be taxed against Universal. In view of the fact that Universal appeared and participated in the investigation before the master, with acquiescing knowledge that the master's fees and expenses would be assessed by the court, we do not disturb the taxation of the master's fees and expenses. The *amici* also asked the Court to assess against Universal their expenses and reasonable attorneys' fees. The court awarded $54,606.57 in expenses, part of which was for the amount they had advanced in payment to the master, and $100,000 as compensation for their services. These amounts had in fact already been paid to the attorneys by their oil company clients. The awards thus constituted an order for reimbursement of the clients by Universal. The case was heard by the court *en banc,*

and two of the judges thought that the *amici* were only entitled to a compensation of $25,000. 147 F. 2d 259. Questions of importance in judicial administration were obviously involved by the disposition below, and so we brought the case here. 324 U. S. 839.

The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question. *Hazel-Atlas Co.* v. *Hartford-Empire Co.*, 322 U. S. 238. The power to unearth such a fraud is the power to unearth it effectively. Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation. But if the rights of parties are to be adjudicated in such an investigation, the usual safeguards of adversary proceedings must be observed. No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire cost of the proceedings could justly be assessed against the guilty parties. Such is precisely a situation where "for dominating reasons of justice" a court may assess counsel fees as part of the taxable costs. *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 167. But, obviously, a court cannot deprive a successful party of his judgment without a proper hearing. This question is not before us, except as it bears on the order allowing attorneys' fees and costs. But if the judgment could not be nullified without adequate opportunity to be heard in a proper contest, neither is it just to assess the fees of attorneys and their expenses in conducting an investigation where petitioner throughout objected to the character of the investigation if it was to be used as a basis for adjudicating rights.

The case may readily be disposed of on a narrower ground. No doubt, a court that undertakes an investi-

gation of fraud upon it may avail itself, as did the court below, of *amici* to represent the public interest in the administration of justice. But compensation is not the normal reward of those who offer such services. After all, a federal court can always call on law officers of the United States to serve as *amici*. Here the *amici* also represented substantial private interests. Their clients were interested in vacating the *Root* judgment though they would not subject themselves to the court's jurisdiction and the hazards of an adverse determination. While the *amici* formally served the court, they were in fact in the pay of private clients. *Amici* selected by the court to vindicate its honor ordinarily ought not be in the service of those having private interests in the outcome. Certainly it is not consonant with that regard for fastidiousness which should govern a court of equity, to award fees and costs of *amici curiae* who have already been compensated by private clients so that these be reimbursed for what they voluntarily paid.

In No. 48, the judgment is reversed and remanded to the Circuit Court of Appeals for the entry of a judgment in conformity with this opinion.

In No. 64, the writ of *certiorari* invoked under § 262 of the Judicial Code, 28 U. S. C. § 377, is dismissed.

MR. JUSTICE BLACK concurs in the narrower ground of the opinion.

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

DAVIS *v.* UNITED STATES.

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

No. 404. Argued February 5, 1946.—Decided June 10, 1946.

1. Having obtained clear evidence of violations of the gasoline rationing regulations through sales without coupons and at above-ceiling prices (which are misdemeanors), officers arrested petitioner, president of the corporation which maintained the offending filling station, at his place of business during business hours and demanded ration coupons covering the aggregate amount of sales. After refusing at first, petitioner soon acquiesced and surrendered the coupons. In his trial for possessing them unlawfully (a misdemeanor), petitioner contended that there had been an unlawful search which resulted in seizure of the coupons and their use in evidence against him, in violation of his rights under the Fourth and Fifth Amendments. The evidence was conflicting; but the District Court found that he had consented to the search and seizure and that no force or threat of force had been employed to persuade him. He was convicted. *Held:* The conviction is affirmed, because this Court cannot say as a matter of law that the District Court's finding of fact was erroneous. Pp. 593, 594.
2. The gasoline ration coupons never became the private property of the holder but remained at all times the property of the Government and subject to inspection and recall by it. P. 588.
3. In the law of searches and seizures a distinction is made between private papers or documents and public property in the custody of a citizen. *Wilson* v. *United States*, 221 U. S. 361. Pp. 589–591.
4. Whatever may be the limits of inspection under the regulations, law enforcement is not so impotent as to require officers who have the right to inspect a place of business to stand mute when clear evidence of criminal activity is known to them. *Amos* v. *United States*, 255 U. S. 313, distinguished. Pp. 592, 593.
5. Where officers seek to inspect public documents at the place of business where they are required to be kept, permissible limits of persuasion are not so narrow as where private papers are sought, since the demand is one of right. P. 593.

151 F. 2d 140, affirmed.

Petitioner was convicted of unlawful possession of gasoline ration coupons in violation of § 2 (a) of the Act of June 28, 1940, as amended by the Act of May 31, 1941, and by § 301 of the Second War Powers Act of March 27, 1942. The Circuit Court of Appeals affirmed. 151 F. 2d 140. This Court granted certiorari. 326 U. S. 711. *Affirmed,* p. 594.

Samuel Mezansky argued the cause for petitioner. With him on the brief were *Irving Spieler* and *Moses Polakoff.*

John J. Cooney argued the cause for the United States. With him on the brief were *Solicitor General McGrath, Robert S. Erdahl* and *Leon Ulman.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner was convicted under an information charging him with unlawfully having in his possession on June 20, 1944, 168 gasoline ration coupons, representing 504 gallons of gasoline.[1] The judgment of conviction was sustained

[1] The information charged a violation of § 2 (a) of the Act of June 28, 1940, 54 Stat. 676, as amended by the Act of May 31, 1941, 55 Stat. 236 and by Title III, § 301 of the Second War Powers Act of March 27, 1942, 56 Stat. 177, 50 U. S. C. App., Supp. IV § 633. Sec. 2 (a) provides in part:

"(2) . . . Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

"(3) The President shall be entitled to obtain such information from, require such reports and the keeping of such records by, make such inspection of the books, records, and other writings,

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by the Circuit Court of Appeals (151 F. 2d 140) over the objection that there was an unlawful search which resulted in the seizure of the coupons and their use at the trial in

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premises or property of, any person . . ., and make such investigations, as may be necessary or appropriate, in his discretion, to the enforcement or administration of the provisions of this subsection (a).

. . . . . .

"(5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both."

The Office of Price Administration, to which that power had been delegated, issued ration orders for gasoline. Ration Order No. 5C, as it read on June 20, 1944 (8 Fed. Reg. 16423), provided in part as follows:

Sec. 1394.8177 (c): "No person shall have in his possession any gasoline deposit certificate, folder, or any coupon book, inventory or other coupon (whether or not such book was issued as a ration book and whether or not such coupon was issued as a ration or as part of a ration book) or other evidence, or any identifying folder, except the person, or the agent of the person, to whom such book, coupon, certificate or folder was issued or by whom it was acquired in accordance with the provisions of Ration Book [*sic*] No. 5C."

Sec. 1394.8217 (a): "Every dealer and intermediate distributor shall be accountable for all gasoline, ration credits, gasoline deposit certificates, coupons and other evidences received by him. Gasoline deposit certificates, coupons and other evidences received at or for a place of business shall be, at all times when the dealer or distributor is open to transact business, retained by him at the place of business for which they were received, or deposited in a ration bank account maintained for that place of business, until such time as they are surrendered to a dealer or distributor in exchange for gasoline, or otherwise surrendered pursuant to Ration Order No. 5C. The aggregate gallonage value of gasoline deposit certificates, coupons and other evidences on hand or on deposit for each place of business of a dealer or intermediate distributor, shall, at all times, be equal to, but not in excess of, the number of gallons of gasoline which would be required to fill the storage capacity of such place of business, as shown by the current certificate of registration, . . ." 8 Fed. Reg. 15981.

violation of the rule of *Weeks* v. *United States,* 232 U. S. 383, *United States* v. *Lefkowitz,* 285 U. S. 452, and related cases. The case is here on a petition for a writ of certiorari which we granted because of the importance of the question presented.

Davis was president of a corporation by the name of Davis Auto Laundry Corporation which maintained a gasoline filling station in New York City. He was suspected of running a black market in gasoline. Several agents drove to a place near the gasoline station and observed it for a few hours. They had no search warrant nor a warrant for the arrest of petitioner. Two of the agents drove their cars into the station and asked for gas. Petitioner was not present at the time. But an attendant, an employee of petitioner, was present and waited on them. Through her each of the two agents succeeded in purchasing gas without gasoline ration stamps by paying twenty cents a gallon above the ceiling price. Shortly thereafter they arrested her for selling gasoline without coupons and above the ceiling price. She said that in doing so she was following petitioner's instructions. While she was being questioned by the agents, petitioner returned to the station in his car. They immediately arrested him on the same charge as the attendant [2] and searched his car. They demanded and received from him the keys to tin boxes attached to the gasoline pumps and in which gasoline ration coupons were kept. One of them began to examine and measure the gasoline storage tanks and their contents. It soon appeared that the gasoline ration coupons found in the tin boxes were not sufficient

[2] Selling gasoline without receipt of ration coupons, selling gasoline in excess of the ceiling price, or unlawfully possessing ration coupons is a misdemeanor. See § 2 (a), *supra,* note 1. A felony is an offense punished by death or imprisonment for a term exceeding one year. Criminal Code § 335, 18 U. S. C. § 541.

to cover the amount by which the capacity of the storage tanks had been diminished by sales.

While this examination of the storage tanks was under way, petitioner went with two of the agents into his office which was on the premises.[3] The office consisted of a waiting room and inner room. He was questioned in the waiting room for about an hour. A door led from the waiting room into the inner room where records were kept. The door to it was locked. Petitioner at first refused to open it. When told that the examination of the tanks had revealed a shortage of coupons, petitioner assured the agents that he had sufficient coupons to cover the shortage and that they were in the locked room. The officers asked to see the coupons and based their demand on the fact that the coupons were property of the Government of which petitioner was only the custodian. Petitioner persisted, however, in his refusal to unlock the door. Before long he did unlock it, took from a filing cabinet the coupons on which the conviction rests, and gave them to the agents. He testified that he did so because the agents threatened to break down the door if he did not. The District Court did not believe petitioner's version of the episode. One agent testified: "Q. Did you try to convince Davis that he ought to open that door leading into the private office? A. I didn't try to convince him. I told him that he would have to open that door. Q. Did you tell him if he did not you would break it down? A. I did not tell him that at all." And it appeared that while the two agents were talking with Davis in the waiting room, another agent was in the rear shining a flashlight through an outside window of the inner room and apparently trying

[3] The filling station was located in a building about 250 feet long. One set of pumps was near the entrance to one street; the other set was at the opposite end near the entrance to another street. The office was located about half-way between the two sets of pumps.

to raise the window. According to one of the agents, when petitioner saw that, he said, "He don't need to do that. I will open the damned door." Some six weeks later petitioner was arrested on a warrant and arraigned.

The District Court found that petitioner had consented to the search and seizure and that his consent was voluntary. The Circuit Court of Appeals did not disturb that finding, although it expressed some doubt concerning it. In its view, the seized coupons were properly introduced into evidence because the search and seizure, being incidental to the arrest, were "reasonable" regardless of petitioner's consent.

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

And the Fifth Amendment provides in part that "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

The law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of these two constitutional provisions. *Boyd* v. *United States,* 116 U. S. 616. It reflects a dual purpose—protection of the privacy of the individual, his right to be let alone; protection of the individual against compulsory production of evidence to be used against him. *Boyd* v. *United States, supra; Weeks* v. *United States, supra.* And see *Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186.

We do not stop to review all of our decisions which define the scope of "reasonable" searches and seizures. For they have largely developed out of cases involving

the search and seizure of *private* papers. We are dealing here not with *private* papers or documents, but with gasoline ration coupons which never became the private property of the holder but remained at all times the property of the Government and subject to inspection and recall by it.

At the times relevant here, gasoline was rationed. Dealers could lawfully sell it only on receipt of ration coupons.[4] They in turn could receive their supplies of gasoline from the distributors only on delivery of coupons.[5] It was required that a dealer at all times have coupons on hand at his place of business or in a bank equal to but not in excess of the gallonage necessary to fill his storage tanks.[6] Possession of coupons obtained in contravention of the regulations was unlawful.[7] The coupons remained the property of the Office of Price Administration [8] and were at all times subject to recall by it.[9] And they were subject to inspection at all times.[10]

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[4] See Ration Order No. 5C, *supra*, note 1, §§ 1394.8152, 1394.8153.

[5] *Id.*, § 1394.8207.

[6] *Id.*, § 1394.8217 (a), *supra*.

[7] *Id.*, § 1394.8177 (c), *supra*, note 1.

[8] *Id.*, § 1394.8227 (b) provided that all "gasoline deposit certificates and all coupon books, coupons, and other evidences are, and when issued shall remain, the property of the Office of Price Administration."

[9] *Id.*, § 1394.8104 (a):

> "All coupon books, bulk coupons, inventory coupons, other evidences . . . are, and when issued shall remain, the property of the Office of Price Administration. The Office of Price Administration may refuse to issue, and may suspend, cancel, revoke, or recall any ration and may require the surrender and return of any coupon book, bulk coupon, inventory coupons or other evidences . . . during suspension or pursuant to revocation or cancellation, whenever it deems it to be in the public interest to do so."

[10] *Id.*, § 1394.8227 (b) provided in part:

> "Upon demand made by any investigator of the Office of Price Administration or by any police officer, constable, or other law

We are thus dealing not with *private* papers or documents but with *public* property in the custody of a citizen. The distinction between the two classes of property in the law of searches and seizures was recognized in *Wilson* v. *United States,* 221 U. S. 361, 380, where the Court stated:

> "But the physical custody of incriminating documents does not of itself protect the custodian against their compulsory production. The question still remains with respect to the nature of the documents and the capacity in which they are held. It may yet appear that they are of a character which subjects them to the scrutiny demanded and that the custodian has voluntarily assumed a duty which overrides his claim of privilege. This was clearly implied in the *Boyd Case* where the fact that the papers involved were the *private* papers of the claimant was constantly emphasized. Thus, in the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his criminal dereliction. If he has embezzled the

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enforcement officer of the United States or of any state, county, or local government, every person shall produce for inspection any tire inspection record and gasoline deposit certificate and any gasoline coupon books, coupons, and other evidences in his possession or control, whether valid, invalid, void or expired . . . in accordance with Ration Order No. 5C. Investigators of the Office of Price Administration and all police officers, constables and other law enforcement officers of the United States, or of any state, county or local government are authorized to make such inquiries of any person as may be pertinent to determine whether a violation of Ration Order No. 5C has been or is being committed, and are authorized to receive the surrender of all gasoline deposit certificates, gasoline coupon books, coupons and other evidences acquired by any person otherwise than in accordance with Ration Order No. 5C, whether valid, invalid, void or expired."

As to the power of inspection given by the Act of June 28, 1940, see § 2 (a) (3), *supra,* note 1.

public moneys and falsified the public accounts he cannot seal his official records and withhold them from the prosecuting authorities on a plea of constitutional privilege against self-crimination. The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained."

The Court proceeded to analyze the English and American authorities and added, pp. 381–382:

"The fundamental ground of decision in this class of cases, is that where, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to criminate him. In assuming their custody he has accepted the incident obligation to permit inspection."

The distinction is between property to which the Government is entitled to possession and property to which it is not.[11] See 8 Wigmore on Evidence (3d ed.) § 2259c.

[11] This distinction was noted in another connection in *Boyd* v. *United States, supra,* pp. 623–624, where the Court said:

"The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement

The distinction has had important repercussions in the law, beyond that indicated by *Wilson* v. *United States, supra.* For an owner of property who seeks to take it from one who is unlawfully in possession has long been recognized to have greater leeway than he would have but for his right to possession. The claim of ownership will even justify a trespass and warrant steps otherwise unlawful. *Richardson* v. *Anthony,* 12 Vt. 273; *Madden* v. *Brown,* 8 App. Div. 454, 40 N. Y. S. 714; *State* v. *Dooley,* 121 Mo. 591, 26 S. W. 558.

We do not suggest that officers seeking to reclaim government property may proceed lawlessly and subject to no restraints. Nor do we suggest that the right to inspect under the regulations subjects a dealer to a general search of his papers for the purpose of learning whether he has any coupons subject to inspection and seizure. The nature of the coupons is important here merely as indicating that the officers did not exceed the permissible limits of persuasion in obtaining them.

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of the government. The first statute passed by Congress to regulate the collection of duties, the act of July 31, 1789, 1 Stat. 29, 43, contains provisions to this effect. As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment. So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. So, also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, &c., are not within this category. *Commonwealth* v. *Dana,* 2 Met. (Mass.) 329."

And see *Tennessee* v. *Hall,* 164 Tenn. 548, 51 S. W. 2d 851; *State* v. *Knight,* 34 N. M. 217, 279 P. 947; *State* v. *Bennett,* 315 Mo. 1267, 288 S. W. 50.

They appeared on the premises during business hours. They had ocular evidence that a misdemeanor had been committed, a crime to which petitioner was an aider or abetter,[12] since, according to the attendant, she made the illegal sales pursuant to petitioner's instructions. Since sales were being made without receipt of coupons from customers, it was fair to assume (unless, as was at no time suggested, the business was being liquidated) that petitioner somewhere had a supply of coupons adequate to replenish his storage tanks. The inspection which was made was an inspection of the tanks attached to the pumps. And the search was of the office adjacent to the pumps—the place where petitioner transacted his business. Moreover, the officers demanded the coupons on the basis that they were property of the Government and that petitioner was merely the custodian of them. And there was no general, exploratory search. Only the contraband coupons were demanded; only coupons were taken.

These facts distinguished this case from such cases as *Amos* v. *United States,* 255 U. S. 313, where officers without a search warrant swoop down on a private residence, obtain admission through the exertion of official pressure, and seize private property. The filling station was a place of business, not a private residence. The officers' claim to the property was one of right. For the coupons which they demanded to see were government property. And the demand was made during business hours. Whatever may be the limits of inspection under the regulations, law enforcement is not so impotent as to require officers, who have the right to inspect a place of business, to stand

[12] Criminal Code § 332, 18 U. S. C. § 550, provides:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

mute when such clear evidence of criminal activity is known to them.

Where the officers seek to inspect *public* documents at the place of business where they are required to be kept, permissible limits of persuasion are not so narrow as where *private* papers are sought. The demand is one of right. When the custodian is persuaded by argument that it is his duty to surrender them and he hands them over, duress and coercion will not be so readily implied as where private papers are involved. The custodian in this situation is not protected against the production of incriminating documents. *Wilson* v. *United States, supra.* The strict test of consent, designed to protect an accused against production of incriminating evidence, has no place here. The right of privacy, of course, remains. But, as we have said, the filling station was a place of business, not a private residence. The right to inspect existed. And where one is seeking to reclaim his property which is unlawfully in the possession of another, the normal restraints against intrusion on one's privacy, as we have seen, are relaxed. The District Court found, after hearing the witnesses, that petitioner consented—that although he at first refused to turn the coupons over, he soon was persuaded to do so and that force or threat of force was not employed to persuade him. According to the District Court, the officers "persuaded him that it would be a better thing for him to permit them to examine" the coupons; "they talked him into it." We cannot say as a matter of law that that finding was erroneous. The public character of the property, the fact that the demand was made during business hours at the place of business where the coupons were required to be kept, the existence of the right to inspect, the nature of the request, the fact that the initial refusal to turn the coupons over was soon followed by acquiescence in the demand—these circum-

stances all support the conclusion of the District Court. We accordingly affirm the judgment below without reaching the question whether but for that consent the search and seizure incidental to the arrest were reasonable.

Affirmed.

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

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

In its surface aspects this case concerns merely a squalid effort to evade the wartime system of gasoline rationing. But it should not be disposed of in that perspective. It is not the first petty little case to put to the test respect for principles which the founders of this nation deemed essential for a free society. For the case is directly related to one of the great chapters in the historic process whereby civil liberty was achieved and constitutionally protected against future inroads.

The Court's decision, as I see it, presents this issue: May papers which an accused could not be compelled to produce even by a judicial process of a search warrant be taken from him against his will by officers of the law without such judicial process for use as evidence in a criminal prosecution against him? Judicial process may not compel the production of documents either because of the protection of the Fifth Amendment against self-crimination, or, as in this case, because the authorization by Congress of search warrants is withheld in a situation like the present.[1] The Court apparently rules that because the gasoline business was subject to regulation, the

[1] The petitioner was arrested for the sale of gasoline without coupons and at a price greater than that authorized by the Office of Price Administration ceilings; he was prosecuted for the illegal possession

search and seizure of such documents without a warrant is not an unreasonable search and seizure condemned by the Fourth Amendment. To hold that the search in this case was legal is to hold that a search which could not be justified under a search warrant is lawful without it. I cannot escape the conviction that such a view of the Fourth Amendment makes a travesty of it and of the long course of legislation in which Congress applied that Amendment.

Where search is made under the authority of a warrant issued from a judicial source, the scope of the search must be confined to the specific authorization of the warrant. It cannot be that the Constitution meant to make it legally advantageous not to have a warrant, so that the police may roam freely and have the courts retrospectively hold that the search that was made was "reasonable," reasonableness being judged from the point of view of obtaining relevant evidence. I had supposed that that was precisely what the Fourth Amendment was meant to stop. "The Government could desire its possession only to use it as evidence against the defendant and to search for and seize it for such purpose was unlawful." *Gouled* v. *United States*, 255 U. S. 298, 310.

There is indeed a difference between private papers and papers having also a public bearing. Private papers of an accused cannot be seized even through legal process because their use would violate the prohibition of the Fifth Amendment against self-crimination. So-called public papers—papers in which the public has an interest

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of gasoline ration documents. These offenses are misdemeanors. 56 Stat. 176, 179, 50 U. S. C. App. § 633 (5).

The Espionage Act limits the issuance of search warrants to those in which the property sought was stolen or embezzled, used as a means of committing a felony, or used to aid illegally a foreign nation. 40 Stat. 217, 228, 18 U. S. C. § 612. The documents involved in this case do not come within any of these categories.

other than that which they may serve as evidence in a case—may be seized, but like all other things in an individual's possession they can be seized only upon a properly safeguarded search. The amenability of corporate papers to testimonial compulsion means that a corporation, because it is a corporation, cannot make claim to the privilege of self-crimination. Nor can the custodian of corporate books immunize them against their production in court because they may also carry testimony against him. The Fourth Amendment does not give freedom from testimonial compulsion. Subject to familiar qualifications every man is under obligation to give testimony. But that obligation can be exacted only under judicial sanctions which are deemed precious to Anglo-American civilization. Merely because there may be the duty to make documents available for litigation does not mean that police officers may forcibly or fraudulently obtain them. This protection of the right to be let alone except under responsible judicial compulsion is precisely what the Fourth Amendment meant to express and to safeguard.

An even more fundamental issue lurks in the Court's opinion if a casual but explicit phrase about the locus of the search and seizure as "a place of business, not a private residence" is intended to carry relevant legal implications. If this is an indirect way of saying that the Fourth Amendment only secures homes against unreasonable searches and seizures but not offices—private offices of physicians and lawyers, of trade unions and other organizations, of business and scientific enterprises—then indeed it would constitute a sudden and drastic break with the whole history of the Fourth Amendment and its applications by this Court. See *Olmstead* v. *United States,* 277 U. S. 438, 477, and cases cited in footnotes 5, 6, and 7. I cannot believe that a vast area of civil

liberties was thus meant to be wiped out by a few words, without prior argument or consideration.

The course of decision in this Court has thus far jealously enforced the principle of a free society secured by the prohibition of unreasonable searches and seizures. Its safeguards are not to be worn away by a process of devitalizing interpretation. The approval given today to what was done by arresting officers in this case indicates that we are in danger of forgetting that the Bill of Rights reflects experience with police excesses. It is not only under Nazi rule that police excesses are inimical to freedom. It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end.

The issue in this case is part of a long historic process and proper consideration of the problem before us compels rather extended discussion. These are the circumstances that give rise to our problem. For some time operations of the gasoline station owned by Davis under a corporate form had been suspect by the Office of Price Administration. On the day of the questioned seizure, three O. P. A. investigators and two New York City detectives kept watch on the station for several hours. One of the O. P. A. men drove his car to the pumps for gas. After the attendant had filled his tank, he told her, when asked for coupons, that he had none. She then demanded a higher price for the gasoline which he paid with a marked five dollar bill. Later, another investigator repeated this performance. Then all five officers went into the station, notified the attendant that she was under arrest, and requested and obtained from her the two marked bills and a card on which she had recorded the sales. While the girl's ques-

tioning was still proceeding, Davis drove into the station. His car was immediately searched and he was charged with selling gas over ceiling prices and without coupons. These were charges of misdemeanors. The officers then demanded and received from Davis keys for the locked boxes on the pumps intended for the deposit of coupons received for gas sold. While some of the officers were engaged in checking the discrepancy between the amount of gas in storage tanks and the coupons in the boxes, Davis was taken by two of the agents to an outer room in his office. They demanded from him gas coupons which he claimed to have in sufficient numbers to make up the deficiencies in the locked boxes. He stubbornly refused despite the insistence of one of the officers that "he would have to open that door" to his private office. Finally, when another officer flashed a light into the office from an outside window and evinced an intention to force the window, Davis unlocked the door. Thereupon he took some envelopes from a filing cabinet and handed them to the agents. These envelopes contained the stamps which formed the basis of the prosecution. He was then taken to O. P. A. headquarters and questioned, but eventually allowed to go. Several weeks later he was taken into custody and then charged with the illegal possession of gasoline ration documents. This charge also is a misdemeanor.

The petitioner made timely motions for the suppression of the evidence, see *Nardone* v. *United States*, 308 U. S. 338, 341–42, claiming that they were illegally seized and barred as evidence against him. The trial court denied these motions on the ground that Davis had voluntarily turned the stamps over to the officers. The Circuit Court of Appeals sustained the conviction but it did not accept the District Court's view that Davis had surrendered the stamps of his own free will. What the Circuit Court of Appeals thought about the matter is best expressed in

its own language: "The judge found that Davis' consent was 'voluntarily' given, and for that reason denied the motion to suppress the evidence. We need not decide that that finding is wrong, for we can dispose of the case upon other grounds; but we must own to some doubt whether a consent obtained under such circumstances should properly be regarded as 'voluntary.' Davis must have known, under arrest as he was, that the officers were not likely to stand very long upon ceremony, but in one way or another, would enter the office." 151 F. 2d 140, 142. One must reject the District Court's finding that Davis' consent went with his surrender of the documents unless one is to hold that every submission to the imminent exertion of superior force is consensual if force is not physically applied. The District Court's finding that Davis voluntarily surrendered the documents is not one of those findings of facts which appropriately calls for our acceptance. When such a finding involves conflicting evidence or the credibility of a witness, the advantage of having seen or heard a witness may be decisive. But here the issue is not as to what took place but as to the significance of what took place. And when a district court's finding of a so-called fact is as interwoven as it is here with constitutional consequences, we cannot accept a finding whereby the constitutional issue is predetermined. We are not bound by findings that operate as cryptic constitutional determinations even when they come here, unlike the present case, supported by both lower courts. See *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 404. To say that a yielding to continuous pressure by arresting officers, accompanied by minatory manifestations to resort to self-help, constitutes a voluntary yielding, is to disregard ordinary experience. This Court preferred not to do that in *Amos* v. *United States*, 255 U. S. 313. We there held that where officers stated that they were revenue officers and requested ad-

mission to the premises in order to make a search, there was, as a matter of law, "implied coercion." Inasmuch "as conduct under duress involves a choice," the Fourth Amendment is hardly to be nullified by finding every submission short of overpowering force "voluntary." See *Union Pacific R. Co.* v. *Public Service Comm'n*, 248 U. S. 67, 70.

This Court also attributes voluntariness to Davis' surrender of the documents. But it does so not because it finds that what Davis did was an exercise of free choice. It does not question the doubt of the Circuit Court of Appeals whether the consent obtained from Davis was, as a psychological fact, a voluntary act. The Court derives voluntariness from the fact that what the officers compelled Davis to give up were ration coupons. But, surely, this is to assign to ordinary words a private, esoteric meaning. Common usage rejects such meaning of "voluntary" and law has not heretofore indulged it. In considering whether evidence was freely given or coerced, the law has always meant by "voluntary" what everybody else means by it. To make voluntariness turn on the nature of the quest, instead of on the nature of the response of the person in control of the sought documents, is to distort familiar notions on the basis of which the law has heretofore adjudged legal consequences. The Court accepts the Government's argument [2] which the Circuit

[2] A few words only need be said about the cases on which the Government relies. Most of them deal with the amenability of documents to production upon legal process. *Wilson* v. *United States*, 221 U. S. 361; *Bowles* v. *Insel*, 148 F. 2d 91; *Cudmore* v. *Bowles*, 79 U. S. App. D. C. 255, 145 F. 2d 697; *Rodgers* v. *United States*, 138 F. 2d 992; *Fleming* v. *Montgomery Ward & Co.*, 114 F. 2d 384. In the others, consent was given to inspect the papers in accordance with the provisions of the governing statute. *Bowles* v. *Beatrice Creamery Co.*, 146 F. 2d 774; *Bowles* v. *Glick Bros. Lumber Co.*, 146 F. 2d 566; *In re Sana Laboratories*, 115 F. 2d 717 (subsequent to the inspection

Court of Appeals rejected, and rejected because gravely disturbed by its implication. Though differently phrased, the argument which has here found favor evoked this comment in the concurring opinion of Judge Frank: "I add a few words only because I think it important to underscore our rejection of the following argument on which the Assistant United States Attorney chiefly relied: Whenever the government validly regulates any business and includes in its regulation a valid requirement that records be kept which shall be open to official inspection, then refusal to produce the records for such inspection authorizes the officers to enter the premises and seize the records. One variant of the argument was that refusal to permit inspection in such circumstances constitutes, in effect, the legal equivalent of consent to enter; another variant was that, in such circumstances, conduct of the defendant must be interpreted as consent to entry although, in other circumstances, the very same conduct would be regarded as refusal. In one way or another, the Assistant United States Attorney urged that obstruction of the right of the officers to inspect deprived the

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there was a wrongful taking; the court admitted the evidence procured as a result of the inspection, but barred the documents from evidence); *C. M. Spring Drug Co.* v. *United States*, 12 F. 2d 852; *United States* v. *Kempe*, 59 F. Supp. 905; *Bowles* v. *Stitzinger*, 59 F. Supp. 94; *Bowles* v. *Curtiss Candy Co.*, 55 F. Supp. 527; *United States* v. *Sherry*, 294 F. 684 (here the documents were taken with the consent of the custodian). In *A. Guckenheimer & Bros. Co.* v. *United States*, 3 F. 2d 786, however, the situation bears some resemblance to the present case. There the Circuit Court of Appeals attributed the consent of the custodian, following continual refusal, to the command of the statute. While there was no indication, as evidenced by the opinion, that the documents were secured through fear of force, the inspection afforded was probably not voluntary. Insofar as there is support in that case for a search that transgressed the Fourth Amendment, the observations are mere dicta, since no timely objection was filed.

defendant of his usual privilege to be free of unreasonable search and seizure." 151 F. 2d at 144.

Of course there is an important difference in the constitutional protection afforded their possessors between papers exclusively private and documents having public aspects. Cf. *Weeks* v. *United States*, 232 U. S. 383, 393–94; *Gouled* v. *United States*, 255 U. S. 298, 308–309. But the essence of the difference is that under appropriate circumstances wholly private papers are not even subject to testimonial compulsion whereas other papers, once they have been legally obtained, are available as evidence. Had the coupons in controversy been secured by a proper search they could be used against the defendant at the trial. But their character does not eliminate the restrictions of the Fourth Amendment and subject the person in possession of such documents, against his protest, to searches and seizures otherwise unwarranted.

The acceptance of the Government's argument opens an alarming vista of inroads upon the right of privacy. This right the Fourth Amendment sought to protect by its general interdiction of police intrusion without prior judicial authorization through search warrants issued "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Amendment IV. Only the other day every person not in the armed forces had in his possession O. P. A. documents which technically were the property of the O. P. A., and the same situation may come to pass tomorrow; most businesses in the country are in possession of documents required to be kept under federal and State authority; and there is every prospect that this network of required records will be extended. It misconceives the issues to assume that the protection for privacy here urged would serve as a shield against scrutiny of the records of the giant industries or the great trade unions. The Fourth Amendment does not differ-

entiate between big and small enterprise. But, in any event, while our economy is extensively carried on through the corporate form, the latest available figures show that of the multitudinous income-reporting corporations only about five per cent have a net income above $100,000. It cannot be that the highly prized constitutional immunity from police intrusion, as it affects activities that permeate our national life, is now to be curtailed or viewed with laxity.

The Court's opinion has only its own reasoning to support it. Nothing that this Court has ever decided or sanctioned gives it strength. *Wilson* v. *United States,* 221 U. S. 361, invoked by the Court was a very different story. That case was concerned with the difference between the amenability of a corporation to testimonial compulsion and the immunity of an individual, under relevant circumstances, to be free from the duty to give testimony. The core of the Government's claim here is the right to seize documents in the absence of judicial process. The difference between demanding documents without legal process and seizing them on the basis of such process, is the difference between the protection of civil liberties and their invasion. The difference is the essence of the Fourth Amendment.

Indeed, so unhappy was the experience with police search for papers and articles "in home or office," *Gouled* v. *United States,* 255 U. S. 298, 308, 309, that it was once maintained that no search and seizure is valid. To Lord Coke has been attributed the proposition that warrants could not be secured even for stolen property. But see Coke, *Fourth Institute,* 176–77. Under early English doctrine even search warrants by appropriate authority could issue only for stolen goods. See 2 Hale, *Pleas of the Crown,* 113–14, 149–51; 2 Gabbett, *Criminal Law* (1843) 156 *et seq.;* 1 Chitty, *Criminal Law* (5th ed., 1847) 64 *et seq.;* Barbour, *Criminal Law* (2d ed., 1852) 499 *et*

seq.; 1 Archbold, *Criminal Procedure* (7th ed., 1860) 141. Certainly warrants lacking strict particularity as to location to be searched or articles to be seized were deemed obnoxious. *Ibid.;* see also 2 Hawkins, *Pleas of the Crown,* 130, 133. An attempt to exceed these narrow limits called forth the enduring judgment of Lord Camden, in *Entick* v. *Carrington,* 19 Howell's State Trials 1029, in favor of freedom against police intrusions. And when appeal to the colonial courts on behalf of these requisite safeguards for the liberty of the people failed, *Paxton's Case,* Quincy (Mass.) 51, a higher tribunal resolved the issue. The familiar comment of John Adams on Otis' argument in *Paxton's Case* can never become stale: "American independence was then and there born; the seeds of patriots and heroes were then and there sown, to defend the vigorous youth, the *non sine Diis animosus infans.* Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born. In fifteen years, namely in 1776, he grew up to manhood, and declared himself free." 10 Adams, *Works,* 247–248; for a description of Otis' speech in *Paxton's Case,* see 2 *id.* 523. So basic to liberty is the protection against governmental search and seizure, that every State in the Union [3] has this as a constitutional safeguard.

This bleak recital of the past was living experience for Madison and his collaborators. They wrote that experience into the Fourth Amendment, not merely its words. Mention has been made of the doubt in the minds of English and Colonial libertarians whether searches and

[3] This historic safeguard against unreasonable search and seizure was given formal constitutional sanction in New York in 1938. N. Y. Const. of 1938, Art. 1, § 12.

seizures could be sanctioned even by search warrants. It is significant that Madison deemed it necessary to put into the Fourth Amendment a qualifying permission for search and seizure by the judicial process of the search warrant—a search warrant exacting in its foundation and limited in scope. This qualification gives the key to what the framers had in mind by prohibiting "unreasonable" searches and seizures. The principle was that all seizures without judicial authority were deemed "unreasonable." If the purpose of its framers is to be respected, the meaning of the Fourth Amendment must be distilled from contemporaneous history. The intention of the Amendment was accurately elucidated in an early Massachusetts case. The court there had before it the terms of the Massachusetts Constitution, on which, with like provisions in other State Constitutions, the Fourth Amendment was based:

> "With the fresh recollection of those stirring discussions [respecting writs of assistance], and of the revolution which followed them, the article in the Bill of Rights, respecting searches and seizures, was framed and adopted. This article does not prohibit all searches and seizures of a man's person, his papers, and possessions; but such only as are 'unreasonable,' and the foundation of which is 'not previously supported by oath or affirmation.' The legislature were not deprived of the power to authorize search warrants for probable causes, supported by oath or affirmation, and for the punishment or suppression of any violation of law. The law, therefore, authorizing search warrants in certain cases, is in no respect inconsistent with the declaration of rights." *Commonwealth* v. *Dana*, 2 Met. (Mass.) 329, 336.

Such was the contemporaneous construction of the Fourth Amendment by the Congress. It gave specific

authorization whenever it wished to permit searches and seizures. Beginning with the first Congress down to 1917, Congress authorized search by warrant not as a generally available resource in aid of criminal prosecution but in the most restricted way, observing with a jealous eye the recurrence of evils with which our early statesmen were intimately familiar. For each concrete situation Congress deemed it necessary to pass a separate act. An incomplete examination finds scores of such *ad hoc* enactments scattered through the Statutes at Large. Not until 1917, and then only after repeated demands by the Attorney General, did Congress pass the present statute authorizing the issue of search warrants for generalized situations. 40 Stat. 217, 228, 18 U. S. C. §§ 611 *et seq.* Even then the situations were restricted and the scope of the authority was strictly defined. In the case before us no attempt was made to get a search warrant because none could have been got. Congress did not authorize one either on the charges on which Davis was originally arrested or on which he was ultimately tried. And even since the 1917 Act Congress has emphasized the importance of basing the compulsory demand for evidence upon judicial process rather than the zeal of arresting officers. The habit of continual watchfulness against the dangers of police abuses has been reflected in that Congress has continued to authorize search warrants for particular situations by specific legislation or by reference to the 1917 Act. These revealing enactments are summarized in an Appendix.

In the course of its decisions, with a deviation promptly retraced, this Court has likewise reflected the broad purpose of the Fourth Amendment. The historic reach of the Amendment and the duty to observe it was expounded for the Court by Mr. Justice Bradley in *Boyd* v. *United States,* 116 U. S. 616, "a case that will be remembered as long as civil liberty lives in the United States."

Brandeis, J., in *Olmstead* v. *United States,* 277 U. S. 438, 471, at 474. The Amendment has not been read in a niggardly spirit or with the outlook of a narrow-minded lawyer.

Since the opinion in this case seems to me out of line with our prior decisions, it becomes important to recall how this Court has heretofore viewed the Fourth Amendment and what has actually been decided. I shall draw on a summary of the Court's decisions by Mr. Justice Brandeis:

> "Time and again, this Court in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it. This was notably illustrated in the *Boyd* case itself. Taking language in its ordinary meaning, there is no 'search' or 'seizure' when a defendant is required to produce a document in the orderly process of a court's procedure. 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,' would not be violated, under any ordinary construction of language, by compelling obedience to a subpoena. But this Court holds the evidence inadmissible simply because the information leading to the issue of the subpoena has been unlawfully secured. *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385. Literally, there is no 'search' or 'seizure' when a friendly visitor abstracts papers from an office; yet we held in *Gouled* v. *United States,* 255 U. S. 298, that evidence so obtained could not be used. No court which looked at the words of the Amendment rather than at its underlying purpose would hold, as this Court did in *Ex parte Jackson,* 96 U. S. 727, 733, that its protection extended to letters in the mails. The provision against self-incrimination in the Fifth Amendment has been given an equally broad construction.

The language is: 'No person . . . shall be compelled in any criminal case to be a witness against himself.' Yet we have held, not only that the protection of the Amendment extends to a witness before a grand jury, although he has not been charged with crime, *Counselman* v. *Hitchcock,* 142 U. S. 547, 562, 586, but that: 'It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant.' *McCarthy* v. *Arndstein,* 266 U. S. 34, 40. The narrow language of the Amendment has been consistently construed in the light of its object, 'to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.' *Counselman* v. *Hitchcock, supra,* p. 562.

"Decisions of this Court applying the principle of the *Boyd* case have settled these things. Unjustified search and seizure violates the Fourth Amendment, whatever the character of the paper; whether the paper when taken by the federal officers was in the home, in an office or elsewhere; whether the taking was effected by force, by fraud, or in the orderly process of a court's procedure. From these decisions, it follows necessarily that the Amendment is violated by the officer's reading the paper without a physical seizure, without his even touching it; and that use, in any criminal proceeding, of the contents of the papers so examined—as where they are testified to by a federal officer who thus saw the document or where, through knowledge so obtained, a copy has been procured elsewhere—any such use constitutes

a violation of the Fifth Amendment." *Olmstead* v. *United States,* 277 U. S. 438, 471, at 476–478.

And so we are finally brought to the question whether the seizure of documents which could not possibly have been justified as the result of a search under a warrant, since no such warrant could have been authorized by law, can be justified as a search and seizure without a warrant. Such justification must have some historic foundation, otherwise it is clearly out of the bounds of the Fourth Amendment. The court below evidently struggled in reaching its conclusion because of some decisions here which it naturally found "not entirely harmonious." Its chief reliance was language in *Marron* v. *United States,* 275 U. S. 192. A short answer would be that the sting of the *Marron* case was taken by two later cases. *Go-Bart Co.* v. *United States,* 282 U. S. 344, 358, and *United States* v. *Lefkowitz,* 285 U. S. 452, 465. But a closer analysis is called for.

One would expect a hard-headed system like the common law to recognize exceptions even to the most comprehensive principle for safeguarding liberty. This is true of the prohibition of all searches and seizures as unreasonable unless authorized by a judicial warrant appropriately supported. Such is the exception, historically well recognized, of the right to seize without warrant goods and papers on ships or other moving vehicles. Another exception is the right of searching the person upon arrest. Whether that right is a surviving incident of the historic role of the "hue and cry" in early Anglo-Saxon law, see *People* v. *Chiagles,* 237 N. Y. 193, 196, 142 N. E. 583, or is based on the necessity of depriving the prisoner of potential means of escape, *Closson* v. *Morrison,* 47 N. H. 482, or on preventing the prisoner from destroying evidence otherwise properly subject to seizure, see *Reifsnyder* v. *Lee,* 44 Iowa 101, 103; *Holker* v. *Hennessey,* 141 Mo. 527, 42 S. W. 1090, the right to search a prisoner upon lawful

arrest was early settled in our law.[4] 1 Bishop, *New Criminal Procedure* (4th ed., 1895) §§ 210 *et seq.*

A casual and uncritical application of this right to search the person of the prisoner has led some decisions in the lower federal courts to an unwarranted expansion of this narrow exception, with resulting inroads upon the overriding principle of the prohibition of the Fourth Amendment. Slight extensions from case to case gradually attain a considerable momentum from "judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right."

[4] For purposes of present discussion, the validity of the arrest has been assumed. But its legality raises several serious questions. First, it is not clear whether the O. P. A. investigators or the New York City detectives made the arrest. The O. P. A. investigators, of course, have no authorization to make an arrest. Whether the New York detectives are authorized to make arrests for federal offenses is a debatable issue. See *Gambino* v. *United States,* 275 U. S. 310; *Marsh* v. *United States,* 29 F. 2d 172; § 20 (a) of the Emergency Price Control Act, 56 Stat. 23, 29, 50 U. S. C. App. § 921. Though local law makes provision for punishment of the same acts that are federal offenses in this regard, N. Y. Laws, 1942, c. 544, the arrest was made for a federal and not a state or local offense. If the New York law is controlling as to the validity of the arrest, however, it is within the power of any person to make an arrest for a crime, including a misdemeanor, in his presence. The common law rule restricted arrest without warrant for a misdemeanor to those acts which were breaches of the peace. Here again, there is the issue of whether the petitioner committed any misdemeanor in the presence of those making the arrest at the time the arrest was made. A recent decision by the English Court of Appeal focuses attention on this last question. In *Leachinsky* v. *Christie* (1945), [1946] 1 K. B. 124, at 135, Lord Justice Scott makes clear why the legality of arrest turns on the justification which the arresting officer gives at the time of the arrest: "The law does not allow an arrest in vacuo, or without reason assigned, and the reason assigned must be that the arrest is for the purpose of a prosecution on the self-same charge, as is the justification for the arrest. It follows, and it is a principle lying at the very roots of English free-

Byars v. *United States*, 273 U. S. 28, 33–34. In cases dealing with the search of the person,[5] it is natural to speak of the right to search and seize things "in his possession" without strict regard to the ambiguous scope of a man's "possession." From that, opinions slide readily to including the right to search and seize things "within the immediate control" of the arrested person, language appropriate enough when applied to goods which the arrested person was transporting at the time.[6] Taken out of their original context, these phrases are used until they are made to include the entire premises[7] in which

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dom, that if a man is arrested on one charge he is entitled to his release the moment the prosecution of that charge is abandoned. The prosecution cannot arrest on one charge, abandon their intention to proceed on that charge and then keep him in cold storage, still nominally on that charge, while they inquire into the possibility of putting forward a different charge. To do that they must first release him: then, when they propose to put forward some other charge, they can make that new charge the occasion of a new arrest." See also *Dumbell* v. *Roberts* (1944), 113 L. J. (K. B.) 185; *People* v. *Marendi*, 213 N. Y. 600, 609 *et seq.*, 107 N. E. 1058. The *Law Quarterly Review*, in commenting on the *Leachinsky* case, pointed out: "An accused person has a right to know what the charge is against him so that, if he elects to speak, he may have a fair and open chance of clearing himself at the earliest moment." 62 L. Q. Rev. at 4. It is to be noted that *Carroll* v. *United States*, 267 U. S. 132, 157, assumes the federal law of arrest to be the same as that of the English.

[5] *E. g.*, *United States* v. *Wilson*, 163 F. 338, 340; *United States* v. *Murphy*, 264 F. 842, 844; *United States* v. *Snyder*, 278 F. 650, 658; *Maynard* v. *United States*, 23 F. 2d 141, 144; *cf. United States* v. *Welsh*, 247 F. 239; *Laughter* v. *United States*, 259 F. 94; *Donegan* v. *United States*, 287 F. 641; *Winkler* v. *United States*, 297 F. 202.

[6] *E. g.*, *Green* v. *United States*, 289 F. 236, 238; *Browne* v. *United States*, 290 F. 870, 875; *Garske* v. *United States*, 1 F. 2d 620; *Kwong How* v. *United States*, 71 F. 2d 71.

[7] *E. g.*, *Swan* v. *United States*, 295 F. 921; *Sayers* v. *United States*, 2 F. 2d 146; *United States* v. *Poller*, 43 F. 2d 911; *United States* v. *71.41 Ounces Gold Filled Scrap*, 94 F. 2d 17; *United States* v. *Feldman*, 104 F. 2d 255; *Matthews* v. *Correa*, 135 F. 2d 534; *United States* v. *Lindenfeld*, 142 F. 2d 829.

the arrest takes place. Another factor enters. This language is sometimes used in cases involving the seizure of items properly subject to seizure because in open view at the time of arrest.[8] But this last confusion is due to a failure to distinguish between the appropriate scope of a search on arrest and the very different problem as to the right of seizure where no search is in question.

It is important to keep clear the distinction between prohibited searches on the one hand and improper seizures on the other. See Mr. Justice Miller, in *Boyd* v. *United States,* 116 U. S. 616, 638, 641. Thus, it is unconstitutional to seize a person's private papers, though the search in which they were recovered was perfectly proper. *E. g., Gouled* v. *United States,* 255 U. S. 298. It is unconstitutional to make an improper search even for articles that are appropriately subject to seizure, *e. g., Amos* v. *United States,* 255 U. S. 313; *Byars* v. *United States,* 273 U. S. 28; *Taylor* v. *United States,* 286 U. S. 1. And a search may be improper because of the object it seeks to uncover, *e. g., Weeks* v. *United States,* 232 U. S. 383, 393–94, or because its scope extends beyond the constitutional bounds, *e. g., Agnello* v. *United States,* 269 U. S. 20.

The course of decisions here has observed these important distinctions. The Court has not been indulgent towards inroads upon the Amendment. Only rarely have its dicta appeared to give undue scope to the right of search on arrest, and *Marron* v. *United States, supra,* is the only decision in which the dicta were reflected in the result. That case has been a source of confusion to the

[8] *E. g., Laney* v. *United States,* 294 F. 412, 416; *United States* v. *Chin On,* 297 F. 531, 533; *United States* v. *Seltzer,* 5 F. 2d 364; *Mattus* v. *United States,* 11 F. 2d 503; *Cheng Wai* v. *United States,* 125 F. 2d 915; *cf. United States* v. *Borkowski,* 268 F. 408; *In re Mobile,* 278 F. 949; *O'Connor* v. *United States,* 281 F. 396; *Vachina* v. *United States,* 283 F. 35; *Furlong* v. *United States,* 10 F. 2d 492; *United States* v. *Fischer,* 38 F. 2d 830.

lower courts. Thus, the Circuit Court of Appeals for the Second Circuit felt that the *Marron* case required it to give a more restricted view to the prohibitions of the Fourth Amendment than that court had expounded in *United States* v. *Kirschenblatt*, 16 F. 2d 202, see *Go-Bart Co.* v. *United States, sub nom., United States* v. *Gowen*, 40 F. 2d 593, only to find itself reversed here, *Go-Bart Co.* v. *United States, supra*, partly on the authority of the *Kirschenblatt* decision which, after the *Marron* case, it thought it must disown. The uncritical application of the right of search on arrest in the *Marron* case has surely been displaced by *Go-Bart Co.* v. *United States, supra*, and even more drastically by *United States* v. *Lefkowitz, supra*, unless one is to infer that an earlier case qualifies later decisions although these later decisions have explicitly confined the earlier case.

In view of the jealousy with which this Court has applied the protection of the Fourth Amendment even where the search purported to take place under a proper warrant and there was the safeguard of judicial process in addition to the expressed judgment of the enforcement officials, see *e. g., Grau* v. *United States*, 287 U. S. 124; *Sgro* v. *United States*, 287 U. S. 206, it was not to be expected that this Court should sanction searches on arrest that can be justified as reasonable only if securing evidence for purposes of the trial is the test of reasonableness for purposes of the Fourth Amendment. Such a view presupposes that the Fourth Amendment is obsolete and makes of the particularity of requirement for search warrants a mocking redundancy.

A final point. In this case the arrest was based on two misdemeanors, the sale of gasoline without the requisite coupons and the sale of gasoline at a price over the O. P. A. ceilings. For neither of these offenses were coupons "instruments of the crime" in any sense in which

that term is properly used. The exceptional right to search on arrest does not in any event extend to a search for articles necessary to the commission of a crime other than that for which the arrest was made. The officers could not have made an arrest of Davis for illegal possession of coupons, for which he was later tried, on mere suspicion. That crime, like the others, was only a misdemeanor, and no arrest can be made for a misdemeanor without a warrant unless it be committed in the presence of officers. Prior to the search, the officers had no basis for stating that he was committing the crime of illegal possession of the coupons in their presence.

It is too often felt, though not always avowed, that what is called nice observance of these constitutional safeguards makes apprehension and conviction of violators too difficult. Want of alertness and enterprise on the part of the law enforcers too often is the real obstruction to law enforcement. The present case affords a good instance.[9] The situation bears close resemblance to what

[9] The petitioner's gas station was under suspicion for some weeks; yet action was finally taken as described in this opinion. Petitioner was arrested when he arrived at the gas station for sales above ceiling prices and sales without coupons. No arraignment was made for these offenses—instead the officers engaged in a search of the premises, which included the essentially forced entry into the petitioner's office. He was then taken to the local O. P. A. headquarters. After several hours of questioning at O. P. A. headquarters, Davis was released. Not until one month later was the petitioner re-arrested and arraigned, and then on a charge entirely different from those on which the original arrest was made. The Emergency Price Control Act, 56 Stat. 23, 50 U. S. C. App. §§ 901 *et seq.*, made adequate provision for effective enforcement of the statute. So far as securing documents and papers are concerned, the Administrator is equipped with the subpoena power, § 202 (c), (d), (e); in addition, the Administrator has the power to seek injunction against the acts which the petitioner was accused of committing, § 205 (a); and by appropriate proceedings the Administrator may seek the withdrawal of the license which the petitioner required to operate his business, § 205 (f).

Judge Learned Hand said on another occasion. "We are told that unless such evidence will serve, it will be impossible to suppress an evil of large proportion in the residential part of Brooklyn. Perhaps so; any community must choose between the impairment of its power to punish crime and such evils as arise from its uncontrolled prosecution. But the danger is not certain, for the officers could have applied for a warrant which—as was at least intimated in Taylor v. United States—might then have been valid. It takes time to break up a still and take the parts away; if the attempt were made, it would discover itself immediately. One or more officers could have watched, while the others went to a judge or commissioner, whose action would at least have put a different face upon their subsequent proceedings." *United States* v. *Kaplan*, 89 F. 2d 869, 871.

The Court in this case gives a new label to an old practice and to an old claim by police officials. But it happens that the old practice and the old claim now refurbished in a new verbal dress were the very practice and claim which infringed liberty as conceived by those who framed the Constitution and against which they erected the barriers of the Fourth Amendment. I am constrained to believe that today's decision flows from a view of the Fourth Amendment that is unmindful of the history that begot it and of the purpose for which it was included in the Bill of Rights. And the view of the Amendment which the Court rejects is confirmed by an impressive body of the laws of Congress and of the decisions of this Court. Stern enforcement of the criminal law is the hallmark of a healthy and self-confident society. But in our democracy such enforcement presupposes a moral atmosphere and a reliance upon intelligence whereby the effective administration of justice can be achieved with due regard for those civilized standards in the use of the criminal law which are formulated in our Bill of Rights. If great prin-

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ciples sometimes appear as finicky obstructions in bringing a criminal to heel, this admonition of a wise judge gives the final answer: "Such constitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go pari passu with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past. Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition." Learned Hand, J., in *United States* v. *Kirschenblatt,* 16 F. 2d 202, 203.

APPENDIX.

SEARCH AND SEIZURE UNDER WARRANT.*

A. *Place to be searched.*

Act of July 31, 1789, 1 Stat. 29, 43 (dwelling house, store, building, or other place, by day); Act of August 4, 1790, 1 Stat. 145, 170 (dwelling house, store, building, or other place, by day); Act of March 3, 1791, 1 Stat. 199, 207 (any place, by day); Act of March 2, 1799, 1 Stat. 627, 677–78

*Congress has passed numerous statutes authorizing inspection of defined premises and seizures without warrants. These are all very particularized acts, relating mostly to the inspection of vessels and vehicles and the seizure of various types of contraband goods. Most of this legislation comes within the exceptions historically recognized at the time of the adoption of the Fourth Amendment as to recapture of stolen goods and search of vehicles and vessels because of their fugitive nature. In such a mass of legislation, it would not be surprising if some of the specific acts fell afoul of the considerations which invalidated the legislation in the *Boyd* case. 116 U. S. 616. What is significant about this legislation is the recognition by Congress of the necessity for specific Congressional authorization even for the search of vessels and other moving vehicles and the seizures of goods technically contraband.

(dwelling house, store, building, or other place, by day); Act of April 18, 1806, 2 Stat. 379, 380 (dwelling house, store, building, or other place, by day); Act of March 1, 1809, 2 Stat. 528, 530 (dwelling house, store, building, or other place); Act of March 3, 1815, 3 Stat. 231, 232 (dwelling house, store, or other building, by day) (no warrant necessary to search a vehicle); Act of March 3, 1863, 12 Stat. 737, 740 (any place or premises); Act of February 28, 1865, 13 Stat. 441, 442 (buildings near boundary lines); Act of July 13, 1866, 14 Stat. 98, 152 (any premises); Act of March 2, 1867, 14 Stat. 546, 547 (any premises); Act of March 3, 1873, 17 Stat. 598, 599 (no limitation on scope); Act of April 25, 1882, 22 Stat. 49 (dwelling house, store-building, or other place, by day); Act of February 10, 1891, 26 Stat. 742, 743 (any house, store, building, boat, or other place, by day); Act of August 27, 1894, 28 Stat. 509, 549–50 (no limitation on scope); Act of July 24, 1897, 30 Stat. 151, 209 (no limitation on scope); Act of March 3, 1899, 30 Stat. 1253, 1326 (any place in Alaska); Act of March 3, 1901, 31 Stat. 1189, 1337 (no limitation on scope); Act of August 5, 1909, 36 Stat. 11, 86 (no limitation on scope); Act of February 14, 1917, 39 Stat. 903, 906–907 (room, house, building, or other place in Alaska); Act of June 15, 1917, 40 Stat. 217, 228 (by day or, on certain conditions, night); Act of July 3, 1918, 40 Stat. 755, 756 (any place); Act of October 28, 1919, 41 Stat. 305, 308 (see Act of June 15, 1917, *supra*); Act of September 21, 1922, 42 Stat. 858, 937, 983 (dwelling house by day, and any store or other place by night or day); Act of June 7, 1924, 43 Stat. 650, 651 (no limitation on scope); Act of April 23, 1928, 45 Stat. 448, 449 (no limitation on scope); Act of February 18, 1929, 45 Stat. 1222, 1225 (see Act of July 3, 1918, *supra*); Act of June 17, 1930, 46 Stat. 590, 752 (dwelling house, by day, store, or other building or place); Act of July 2, 1930, 46 Stat. 845, 846 (no limi-

tation on scope); Act of June 15, 1935, 49 Stat. 378, 381 (no limitation on scope); Act of August 27, 1935, 49 Stat. 872, 874–875 (see Act of June 15, 1917, *supra*); Act of April 5, 1938, 52 Stat. 198, 199 (any place in District of Columbia); Act of February 10, 1939, 53 Stat. 1, 436 (no limitation on scope); Act of June 28, 1940, 54 Stat. 670, 671 (by day or, on certain conditions, night); Act of July 1, 1943, 57 Stat. 301, 304 (no limitation on scope); Act of February 26, 1944, 58 Stat. 100, 102 (any person, vessel, or place).

B. *Objects of Search and Seizure.*

Act of July 31, 1789, 1 Stat. 29, 43 (goods subject to duty); Act of August 4, 1790, 1 Stat. 145, 170 (goods subject to duty); Act of March 3, 1791, 1 Stat. 199, 207 (liquors fraudulently deposited, hid, or concealed); Act of March 2, 1799, 1 Stat. 627, 677–78 (goods subject to duty); Act of April 18, 1806, 2 Stat. 379, 380 (articles imported from Great Britain); Act of March 1, 1809, 2 Stat. 528, 530 (articles imported from Great Britain or France); Act of March 3, 1815, 3 Stat. 231, 232 (articles subject to duty); Act of March 3, 1863, 12 Stat. 737, 740 (invoices, papers, and books relating to customs frauds); Act of February 28, 1865, 13 Stat. 441, 442 (dutiable goods); Act of July 13, 1866, 14 Stat. 98, 152 (fraud on the revenue); Act of July 18, 1866, 14 Stat. 178, 187 (fraud on the revenue); Act of March 2, 1867, 14 Stat. 546, 547 (invoices, books, and papers relating to customs frauds); Act of March 3, 1873, 17 Stat. 598, 599 (obscene literature, literature about contraceptives, contraceptive materials); Act of April 25, 1882, 22 Stat. 49 (merchandise on which duty is unpaid); Act of February 10, 1891, 26 Stat. 742, 743 (counterfeit money, coins, etc., and materials used for their manufacture); Act of August 27, 1894, 28 Stat. 509, 549–50 (obscene and immoral literature and articles, lottery tickets);

Act of July 24, 1897, 30 Stat. 151, 209 (obscene and immoral articles and literature, contraceptive and abortive materials, lottery tickets); Act of March 3, 1899, 30 Stat. 1253, 1327 (embezzled or stolen property; articles used to commit a felony; property to be used to commit a crime); Act of March 3, 1901, 31 Stat. 1189, 1337 (stolen or embezzled goods, counterfeit coins, etc., and materials used to make them, literature of obscene nature, immoral articles, gambling equipment, lottery tickets); Act of August 5, 1909, 36 Stat. 11, 86 (obscene or immoral literature, or articles, drugs, objects for abortion, lottery tickets); Act of February 14, 1917, 39 Stat. 903, 906–907 (illegally held liquor); Act of June 15, 1917, 40 Stat. 217, 228 (stolen or embezzled property; property used in commission of a felony; property used to aid unlawfully a foreign government); Act of July 3, 1918, 40 Stat. 755, 756 (illegally secured migratory birds or bird products); Act of October 28, 1919, 41 Stat. 305, 308 (alcoholic beverages); Act of September 21, 1922, 42 Stat. 858, 937, 983 (obscene literature, drugs for abortion, contraceptive items, lottery tickets; illegal imports); Act of June 7, 1924, 43 Stat. 650, 651 (wild life and fish improperly taken from refuge); Act of April 23, 1928, 45 Stat. 448, 449 (migratory birds improperly taken from bird refuge); Act of February 18, 1929, 45 Stat. 1222, 1225 (see Act of July 3, 1918, *supra*); Act of June 17, 1930, 46 Stat. 590, 752 (merchandise on which duties unpaid); Act of July 2, 1930, 46 Stat. 845, 846 (illegally caught black bass); Act of June 15, 1935, 49 Stat. 378, 381 (illegally captured game and wild life and products thereof shipped in interstate commerce); Act of August 27, 1935, 49 Stat. 872, 874-75 (illegally possessed liquor); Act of April 5, 1938, 52 Stat. 198, 199 (lottery tickets, gaming devices, books for recording gambling transactions, stolen and embezzled property, forged and counterfeit materials, equipment used for counterfeiting,

obscene and immoral literature and materials); Act of February 10, 1939, 53 Stat. 1, 436 (frauds on the revenue); Act of June 28, 1940, 54 Stat. 670, 671 (subversive materials); Act of July 1, 1943, 57 Stat. 301, 304 (Alaskan game illegally taken and equipment used to make captures); Act of February 26, 1944, 58 Stat. 100, 102 (illegally taken seal products and equipment used to aid in the takings).

C. *Requirements for issuance of warrant.*

Act of July 31, 1789, 1 Stat. 29, 43 (suspicion of concealment of goods, application on oath or affirmation before justice of the peace); Act of August 4, 1790, 1 Stat. 145, 170 (suspicion of concealment, application on oath or affirmation before justice of the peace); Act of March 3, 1791, 1 Stat. 199, 207 (oath or affirmation, establishing grounds for reasonable cause for suspicion, before U. S. judge or justice of the peace); Act of March 2, 1799, 1 Stat. 627, 677–78 (suspicion of concealment, application, on oath, to justice of the peace); Act of April 18, 1806, 2 Stat. 379, 380 (same); Act of March 1, 1809, 2 Stat. 528, 530 (same); Act of March 3, 1815, 3 Stat. 231, 232 (suspicion of concealment, proper application, on oath, to any judge or justice of the peace); Act of March 3, 1863, 12 Stat. 737, 740 (affidavit establishing fraud or attempted fraud to satisfaction of U. S. district judge); Act of February 28, 1865, 13 Stat. 441, 442 (oath showing belief or reason to believe that smuggled goods are kept on the premises); Act of July 13, 1866, 14 Stat. 98, 152 (oath in writing before U. S. circuit or district judge or commissioner, setting forth belief or reason to believe fraud on revenue committed on premises); Act of July 18, 1866, 14 Stat. 178, 187 (may be issued by any district judge); Act of March 2, 1867, 14 Stat. 546, 547 (complaint and affidavit, to satisfaction of U. S. district judge, of customs fraud); Act of March 3, 1873, 17 Stat. 598, 599 (written complaint of violation of statute, before U. S. district or circuit judge,

setting forth belief or basis for belief, to satisfaction of judge, supported by oath or affirmation); Act of April 25, 1882, 22 Stat. 49 (proper application, on oath, to justice of the peace, district judge of cities, police justice, or U. S. district or circuit judge); Act of February 10, 1891, 26 Stat. 742, 743 (proper oath or affirmation, showing probable cause for belief that statute is being violated); Act of August 27, 1894, 28 Stat. 509, 549–50 (complaint in writing, founded on knowledge or belief, setting forth grounds for belief, supported by oath or affirmation, to the satisfaction of U. S. district or circuit judge); Act of July 24, 1897, 30 Stat. 151, 209 (complaint in writing of violation of act, to satisfaction of U. S. district or circuit judge, founded on knowledge or belief, setting forth basis for belief, and supported by oath or affirmation); Act of March 3, 1899, 30 Stat. 1253, 1327 (probable cause, shown by affidavit, naming or describing person, describing the property and the place to be searched, to the satisfaction of an examining magistrate); Act of March 3, 1901, 31 Stat. 1189, 1337 (complaint, under oath, before police court or justice of the peace, setting forth belief and cause for belief of concealment in any place of specified articles, describing the place to be searched and the property to be seized); Act of August 5, 1909, 36 Stat. 11, 86 (complaint in writing before U. S. circuit or district judge of violation of act, to the satisfaction of the judge, setting forth grounds for belief and supported by oath or affirmation, a warrant may issue "conformably to the Constitution"); Act of February 14, 1917, 39 Stat. 903, 906–907 (charge, on oath or affirmation, before Alaskan district attorney, of violation of prohibition laws; place where violation occurred to be specifically described); Act of June 15, 1917, 40 Stat. 217, 228–29 (affidavits or depositions, setting forth facts establishing grounds or probable cause for belief that grounds exist, before U. S. or State judge, or U. S. commis-

sioner); Act of July 3, 1918, 40 Stat. 755, 756 (proper oath or affirmation before U. S. judge or commissioner, showing probable cause of violation of the statute); Act of October 28, 1919, 41 Stat. 305, 308 (see Act of June 15, 1917, *supra*); Act of September 21, 1922, 42 Stat. 858, 937, 983 (complaint in writing before U. S. district judge, alleging violation of statute, founded on probable cause and supported by oath or affirmation and conformable to the requirements of the Constitution; cause to suspect presence of dutiable goods, application under oath before justice of the peace, local, State, or federal judges, or U. S. commissioner); Act of June 7, 1924, 43 Stat. 650, 651 (proper oath or affirmation before U. S. judge or commissioner showing probable cause of violation); Act of April 23, 1928, 45 Stat. 448, 449 (proper oath or affirmation, before U. S. judge or commissioner, showing probable cause of violation of statute); Act of February 18, 1929, 45 Stat. 1222, 1225 (see Act of July 3, 1918, *supra*); Act of June 17, 1930, 46 Stat. 590, 752 (suspicion of concealment of dutiable goods, application under oath to any justice of the peace, local, State, or federal judge, or U. S. commissioner); Act of July 2, 1930, 46 Stat. 845, 846 (proper oath or affirmation before U. S. judge or commissioner establishing probable cause that statute was violated); Act of June 15, 1935, 49 Stat. 378, 381 (proper oath or affirmation before U. S. judge or commissioner establishing probable cause that statute violated); Act of August 27, 1935, 49 Stat. 872, 874-75 (see Act of June 15, 1917, *supra*); Act of April 5, 1938, 52 Stat. 198, 199 (complaint under oath, before the police court for the District of Columbia, or U. S. commissioner, setting forth belief or cause for belief, particularly describing the place to be searched, the articles to be seized); Act of February 10, 1939, 53 Stat. 1, 436 (oath in writing before U. S. district judge or commissioner, setting forth reason to believe that

fraud on revenue committed or being committed); Act of June 28, 1940, 54 Stat. 670, 671 (see Act of June 15, 1917, *supra*); Act of July 1, 1943, 57 Stat. 301, 304 (proper oath or affirmation, showing probable cause of violation of Alaskan game laws, before U. S. judge or commissioner); Act of February 26, 1944, 58 Stat. 100, 102 (oath or affirmation before U. S. judge or commissioner, showing probable cause of violation of statute).

MR. JUSTICE RUTLEDGE, dissenting.

I am substantially in accord with the views expressed by MR. JUSTICE FRANKFURTER in his exhaustive opinion as to the controlling principles which should govern in the disposition of this case. Perhaps it should be added that the evidence does not clearly show that the officer who flashed the light into the window was in fact attempting to open it by force or to do more than observe the interior. But the situation was such that his action clearly created in Davis' mind the impression that he either was entering by force or intended to do so. It therefore must be taken, I think, that Davis' so-called consent was induced by this apparent compulsion, the very kind of thing the Fourth Amendment was designed to prevent. There was no such consent as would legalize the entry and search.

Moreover, whatever may be the scope of search incident to lawful arrest for a misdemeanor, I know of no decision which goes so far as to rule that this right of search extends to breaking and entering locked premises by force. That was not done here. But the search followed on consent given in the reasonable belief that it was necessary to avoid the breaking and entry. I think it was therefore in no better case legally than if in fact the breaking and forceable entry had occurred. The search was justified neither by consent nor by the doctrine of reasonable search as incident to a lawful arrest.

ZAP *v.* UNITED STATES.

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

No. 489. Argued February 5, 6, 1946.—Decided June 10, 1946.

1. Petitioner was under contract to do experimental work for the Navy. Pursuant to the terms of the contract and authority delegated to them under § 10 (1) of the Act of July 2, 1926, and § 1301 of the Second War Powers Act, agents of the Federal Bureau of Investigation were auditing his books and records at his place of business during business hours with the consent and cooperation of his employees. One of the agents requested, and was given by petitioner's bookkeeper, a certain cancelled check, which was later admitted in evidence over petitioner's objection in a trial which resulted in his conviction for defrauding the Government by means of that check. *Held:* This did not violate his rights under the Fourth and Fifth Amendments. Pp. 628–630.
2. When petitioner, in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claims to privacy which he otherwise might have had as respects business documents related to those contracts. P. 628.
3. The powers of inspection were not transcended, since the inspection was made during regular hours, at the place of business, with the full cooperation of petitioner's staff, and without force or threat of force. P. 628.
4. As a result of its contract with petitioner and the relevant statutes, the Government had authority to inspect petitioner's books and records and to utilize agents of the Federal Bureau of Investigation for this purpose. Pp. 628, 629.
5. The search being lawful, the agents could testify as to the facts about which they had obtained knowledge, including the facts disclosed by the check. P. 629.
6. To require reversal merely because the check itself was admitted in evidence would be to exalt a technicality to constitutional levels. P. 630.
7. It was in the sound discretion of the District Court to admit the check in evidence. P. 630.

151 F. 2d 100, affirmed.

Petitioner was convicted of defrauding the Government in violation of § 35 (A) of the Criminal Code. The Circuit Court of Appeals affirmed. 151 F. 2d 100. This Court granted certiorari limited to the question whether books and records relating to his contract with the Navy Department were properly admitted as evidence at his trial. 326 U. S. 802. *Affirmed,* p. 630.

Morris Lavine argued the cause and filed a brief for petitioner.

Ralph F. Fuchs argued the cause for the United States. With him on the brief were *Solicitor General McGrath, Robert S. Erdahl* and *Beatrice Rosenberg.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case is here on a petition for a writ of certiorari from a judgment affirming the conviction of petitioner for violation of § 35 (A) of the Criminal Code, 18 U. S. C. § 80.[1] 151 F. 2d 100.

[1] "Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Petitioner entered into contracts with the Navy Department under which he was to do experimental work on airplane wings and to conduct test flights. He was to be paid on a cost-plus-fixed-fee basis. He arranged with a pilot to make certain test flights and paid him about $2,500. Prior to the test flights, he had the pilot endorse a blank check, telling him that it was to be used to defray the expenses of the test. He then filled in the test pilot's name as payee and $4,000 as the amount of the check. The check was posted in petitioner's books of account as a payment to the test pilot. Later petitioner presented to the Navy Department a voucher for work under his contract. Supporting the claim was a document in which he certified that he had paid the test pilot $4,000.

Congress has provided for the inspection and audit of books and records of contractors such as petitioner.[2] The

[2] Sec. 10 (l) of the Act of July 2, 1926, 44 Stat. 787, 10 U. S. C. § 310 (l) provides: "The manufacturing plant, and books, of any contractor for furnishing or constructing aircraft, aircraft parts, or aeronautical accessories, for the War Department or the Navy Department, or such part of any manufacturing plant as may be so engaged, shall at all times be subject to inspection and audit by any person designated by the head of any executive department of the Government."

Title XIII, § 1301 of the Second War Powers Act of March 27, 1942, 56 Stat. 185, 50 U. S. C. App. Supp. IV, § 643 provides: "The provisions of section 10 (l) of an Act approved July 2, 1926 (44 Stat. 787; 10 U. S. C. § 310 (l)) (giving the Government the right to inspect the plant and audit the books of certain Contractors), shall apply to the plant, books, and records of any contractor with whom a defense contract has been placed at any time after the declaration of emergency on September 8, 1939, and before the termination of the present war: *Provided,* That, for the purpose of this title, the term 'defense contract' shall mean any contract, subcontract, or order placed in furtherance of the defense or war effort: *And provided further,* That the inspection and audit authorized herein, and the determination whether a given contract is a 'defense contract' as defined above, shall be made by a governmental agency or officer designated by the President, or by the Chairman of the War Production Board." See H.

inspection and audit were authorized to be made "by a governmental agency or officer designated by the President, or by the Chairman of the War Production Board." [3] Certain officials of the Government, including the Secretary of the Navy, were authorized to exercise the power; and they were also delegated the power to "authorize such officer or officers or civilian officials of their respective departments or agencies to make further delegations of such powers and authority within their respective departments and agencies." [4] And petitioner's contract with the Navy Department provided: "The accounts and records of the contractor shall be open at all times to the Government and its representatives, and such statements and returns relative to costs shall be made as may be directed by the Government."

For several weeks in 1942, agents of the Federal Bureau of Investigation conducted an audit of petitioner's books and records at his place of business and during business hours. They acted under the auspices and by the authority of an accountant and a cost inspector of the Navy Department under whose jurisdiction petitioner's books and records had been placed for purposes of audit and inspection. During part of this period, petitioner was absent. But while he was away, his employees granted the agents admission and cooperated with them by supplying records and furnishing information. When petitioner returned to the city, he made some protest against the examination. But the agents did not desist and continued to make the examination with the assistance of petitioner's employees. The $4,000 check was requested and it was given to one of the agents by petitioner's book-

Rep. No. 1765, 77th Cong., 2d Sess., pp. 12–13; S. Rep. No. 989, 77th Cong., 2d Sess., p. 9.

[3] See § 1301 *supra*, note 2.

[4] Executive Order No. 9127, issued April 10, 1942, 7 Fed. Reg. 2753.

keeper. It appears that the check was retained by the agent [5] and was introduced at the trial. The trial judge denied a motion to suppress the evidence. At the trial, petitioner did not object to the admission of the check in evidence but later moved to have it stricken on the ground that it had been illegally obtained. The single question to which we limited the grant of the petition for a writ of certiorari is the propriety of the action of the District Court in allowing the check to be admitted.

As we have pointed out in *Davis* v. *United States, ante,* p. 582, the law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments. But those rights may be waived. And when petitioner, in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts. Whatever may be the limits of that power of inspection, they were not transcended here. For the inspection was made during regular hours at the place of business. No force or threat of force was employed. Indeed, the inspection was made with the full cooperation of petitioner's staff. There is some suggestion that the search was unreasonable because made by agents of the Federal Bureau of Investigation who were not persons authorized to conduct those examinations. But they acted under the auspices and with the authority of representatives of the Navy Department who were authorized to inspect. The inspection was nevertheless an inspection by the Navy, though its officials were aided by agents of another department.[6] Moreover, the right to inspect

[5] We accept that version of the episode. The other version is that the check was obtained under a search warrant. But the warrant was admittedly defective. So we treat the case as one where the check was seized without a warrant.

[6] See *Cravens* v. *United States,* 62 F. 2d 261, 265.

granted by the contracts was not limited to inspections by the Navy but extended to inspections by any authorized representatives of the Government, among whom the agents of the Federal Bureau of Investigation are included.

The agents, therefore, were lawfully on the premises. They obtained by lawful means access to the documents. That much at least was granted by the contractual agreement for inspection. They were not trespassers. They did not obtain access by force, fraud, or trickery. Thus the knowledge they acquired concerning petitioner's conduct under the contract with the Government was lawfully obtained. Neither the Fourth nor Fifth Amendment would preclude the agents from testifying at the trial concerning the facts about which they had lawfully obtained knowledge. See *Paper* v. *United States,* 53 F. 2d 184, 185; *In re Sana Laboratories, Inc.,* 115 F. 2d 717, 718. Even though it be assumed in passing that the taking of the check was unlawful, that would not make inadmissible in evidence the knowledge which had been legally obtained. *United States* v. *Lee,* 274 U. S. 559, 563. The agents did not become trespassers *ab initio* when they took the check. See *McGuire* v. *United States,* 273 U. S. 95. Had the check been returned to petitioner on the motion to suppress, a warrant for it could have been immediately issued.[7] Or, during the inspection, the agents could have taken photostats or made copies of the check and offered them in evidence without producing the originals. *Lisansky* v. *United States,* 31 F. 2d 846, 850–851. *Darby* v. *United States,* 132 F. 2d 928, 929. The agreement to allow an inspection carried consequences at least so great. The question therefore is a narrow one. It is whether the check itself could be introduced at the trial.

[7] The Search Warrant Act, 40 Stat. 228, 18 U. S. C. § 612, permits the issuance of a search warrant for property used "as the means of committing a felony . . ."

Weeks v. *United States,* 232 U. S. 383, held that private property obtained as a result of an unlawful search and seizure could not be used as evidence in a criminal prosecution of the owner. As explained in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392, the evidence so obtained is suppressed on the theory that the Government may not profit from its own wrongdoing. But as stated in *McGuire* v. *United States, supra,* p. 99, "A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule." To require reversal here would be to exalt a technicality to constitutional levels. The search and the discovery were wholly lawful. A search warrant would be merely the means of insuring the production in court of the primary source of evidence otherwise admissible. Though consent to the inspection did not include consent to the taking of the check, there was no wrongdoing in the method by which the incriminating evidence was obtained. The waiver of such rights to privacy and to immunity as petitioner had respecting this business undertaking for the Government made admissible in evidence all the incriminating facts. We cannot extend the rule of the *Weeks* case so far as to bar absolutely the check itself. It was in the sound discretion of the District Court to admit it.

Affirmed.

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

MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE concur, dissenting.

The views expressed in my dissenting opinion in *Davis* v. *United States,* decided this day, *ante,* p. 594, likewise compel me to dissent in this case.

The petitioner is an aeronautical engineer. He made a contract with the Navy Department to perform experimental work. In June, 1942, the Navy agreed that Zap should carry out test flights to determine the value of his experimental work. The tests were to be paid for by the Navy on a cost-plus-a-fixed-fee basis. Zap estimated that the cost of these flights would be $4,000, but he made arrangements for the tests at a fee of $2,500. Prior to the flights, the test pilot indorsed a blank check which he returned to the petitioner. The petitioner's auditor instructed the bookkeeper to make the check for $4,000 and deposit it in the petitioner's account. The check was posted on the petitioner's books for payment to the pilot, though in fact the pilot received only $2,500.

In October, 1942, petitioner presented a voucher to the Navy for reimbursement for the money laid out in making the tests. The voucher was supported by a reference to the check for $4,000. From October 20, to December 1, 1942, two F. B. I. agents conducted an audit of the petitioner's books and papers, under the auspices of an accountant and inspector of the Navy. During this investigation one of the F. B. I. agents demanded and received the cancelled check for $4,000 made out to the pilot and endorsed by him. The agent retained the check. On December 1, 1942, one of the agents swore out an affidavit on the basis of which a search warrant was issued for the books and papers of the petitioner, and these books and papers were taken under the warrant. The warrant, it is conceded, was defective, inasmuch as the affidavit failed to show the necessary probable cause for the belief that the petitioner had committed an offense to warrant the seizure.

The petitioner was convicted of defrauding the Government. Criminal Code, § 35 (A), 35 Stat. 1088, 1095, 40 Stat. 1015, 48 Stat. 996, 52 Stat. 197, 18 U. S. C. § 80. He made a timely motion to suppress the cancelled check

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and other records. The motion was denied, the documents were admitted in evidence, conviction and its affirmance followed. 151 F. 2d 100. The sole question before us is the validity of the seizure.

I agree that the Government had authority, as a result of its contract with the petitioner and the relevant statutes, to inspect the petitioner's books and records, 44 Stat. 780, 787, 10 U. S. C. § 310 (l), 56 Stat. 176, 185, 50 U. S. C. App. § 643, and that the Navy Department could utilize members of the F. B. I. for this purpose. Accordingly, the search was legal and the inspectors could testify to what they had gleaned from the inspection. But, as is pointed out in my dissent in *Davis* v. *United States,* decided this day, *ante,* p. 594, the constitutional prohibition is directed not only at illegal searches. It likewise condemns invalid seizures. And that is the issue here. The legality of a search does not automatically legalize every accompanying seizure.

The Government argues very simply that the seizure was authorized since the seized items were uncovered in a lawful search. But this is to overlook what we ruled in *Marron* v. *United States,* 275 U. S. 192, 196: "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." If where a search instituted under the legal process of a warrant, which also authorizes seizure, does not permit seizure of articles other than those specified, statutory and contractual authority merely to search cannot be considered sufficient to grant that power. The Government relies on a doctrine quite inapposite here. If, in the course of a valid search, materials are uncovered, the very possession or concealment of which is a crime, they may be seized. But to seize for evidentiary use

papers the possession of which involves no infringement of law, is a horse of a different color.

Petitioner's right to possession was clearly recognized by the agents when they sought a warrant for the purpose of securing the evidence. That warrant was defective, however, and could not authorize the seizure. The Government deems this a "technical error." It is a "technicality" of such substance that this Court has frequently announced the duty to suppress evidence obtained by such defective warrants. *Cf. United States* v. *Berkeness,* 275 U. S. 149; *Grau* v. *United States,* 287 U. S. 124; *Sgro* v. *United States,* 287 U. S. 206; *Nathanson* v. *United States,* 290 U. S. 41. The fact that this evidence might have been secured by a lawful warrant seems a strange basis for approving seizure without a warrant. The Fourth Amendment stands in the way.

I would reverse the judgment.

BIHN *v.* UNITED STATES.

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

No. 675. Argued March 26, 1946.—Decided June 10, 1946.

1. Petitioner and one Bennett were tried before a jury for a conspiracy to violate the statute and regulations governing the rationing of gasoline. It was charged that petitioner would steal gasoline ration coupons from the bank where she was employed, transfer them to Bennett and share with him the proceeds of their sale. The evidence was conflicting and the case against petitioner was a close one. It appeared that she and three others had access to the box from which the coupons were stolen. Over objection of her counsel, the judge charged the jury: "Did she steal them? Who did if she didn't? You are to decide that." She was convicted. *Held* that the probabilities of confusion in the minds of the jurors as to the burden of proof were so great and the charge was so vital to the crucial issue in the case as to constitute prejudicial error, and the conviction is reversed. Pp. 636–639.

2. An erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial. P. 638.
3. It is not enough for this Court to conclude that guilt may be deduced from the whole record, since such a course would lead to serious intrusions on the historic functions of the jury under our system of government. *Bollenbach* v. *United States*, 326 U. S. 607. Pp. 638, 639.

152 F. 2d 342, reversed.

Petitioner was convicted under § 37 of the Criminal Code of a conspiracy to violate the statute and regulations governing the rationing of gasoline. The Circuit Court of Appeals affirmed. 152 F. 2d 342. This Court granted certiorari. 327 U. S. 771. *Reversed*, p. 639.

Henry K. Chapman argued the cause for petitioner. With him on the brief was *David V. Cahill*.

John J. Cooney argued the cause for the United States. With him on the brief were *Solicitor General McGrath*, *Robert S. Erdahl* and *Leon Ulman*.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner and one Bennett were convicted of a conspiracy [1] to violate the statute and regulations governing the rationing of gasoline.[2] It was charged that between July 1, 1943 and September 6, 1944 petitioner would steal gasoline ration coupons from the First National Bank of Poughkeepsie, New York, where she was employed, transfer them to Bennett, and share with Bennett the

[1] Criminal Code § 37, 18 U. S. C. § 88.

[2] § 2 (a) of the Act of June 28, 1940, as amended, 54 Stat. 676, 55 Stat. 236, 56 Stat. 177, 50 U. S. C. App., Supp. IV, § 633; § 2.6 of General Ration Order No. 8, as amended, 8 Fed. Reg. 9626, 9 Fed. Reg. 1325, 2746.

proceeds of the sale. The case was tried to a jury. Petitioner alone appealed to the Circuit Court of Appeals, which sustained the judgment of conviction, one judge dissenting. 152 F. 2d 342. The sole question presented below and here is whether a portion of the charge constituted reversible error. We granted the petition for a writ of certiorari because the charge given raised an important question in the administration of the federal criminal laws.

The crucial issue, so far as petitioner's case was concerned, was whether she stole the ration coupons from the bank.

Bennett did not take the stand. Statements made by him out of court were introduced. They implicated petitioner in the scheme. But they were admissible against Bennett alone, not against petitioner. And the trial judge so ruled. Two of Bennett's relatives—his mother-in-law and sister-in-law—testified concerning conversations they had had with petitioner. Their versions of the conversations implicated petitioner in the scheme. Petitioner's version was different. The conflict in testimony presented a question of credibility for the jury. Bearing on that was the possible bias of those witnesses, traceable in part to their hostility to petitioner on account of the fact that she apparently had been on intimate terms with Bennett prior to his marriage.

There was no direct evidence that petitioner had stolen the coupons. There was, however, other evidence from which such an inference could be drawn. It assumed a place of considerable importance at the trial. And the alleged error in the charge relates to it.

Petitioner handled ration coupons which merchants deposited with the bank. The ration coupons were received by tellers for deposit. After the coupons had been received for deposit by the tellers, petitioner checked the

deposits against the deposit slips and kept the rationing records. After counting the coupons and making the entries, she placed the coupons in a steel file which was locked. The keys to the file were kept in her desk, which was not locked. At regular intervals petitioner would take the accumulated ration coupons and box them for transmission to the Office of Price Administration. She would also prepare a form showing the contents of the box. In preparing this form, she would not recount the coupons but would compile the figures from the daily records which had been prepared as the coupons were deposited. On September 5, 1944, petitioner prepared a box for transmission to the Office of Price Administration, sealed it, and turned it over to the cashier of the bank. The accompanying form represented on its face that the box contained gasoline ration coupons for some 156,000 gallons. Its examination showed a shortage of some 37,000 gallons. Petitioner had a good record at the bank. The accounts which she kept were kept well and accurately. She was not the only one who had access to the coupons in the steel file. At least four other employees of the bank had equal access to that file. One of these was a lady with whom, according to petitioner's testimony, Bennett had a rather intimate acquaintance.

The case against petitioner was therefore a close one. Plainly there was sufficient evidence for submission of the case to the jury. But since one of four other persons might have purloined the coupons, reasonable doubt as to petitioner's guilt might readily be inferred.

It was against this background that the trial judge charged the jury:

> "Who would have a motive to steal them? Did she take these stamps? You have a right to consider that. She is not charged with stealing, but with conspiracy to do all these things, and you have a right

to consider whether she did steal them, on the question of intent. *Did she steal them? Who did if she didn't? You are to decide that.*" (Italics added.)

Counsel excepted to the charge on the ground that it was not "the jury's duty to find out who did steal the stamps." No modification of the charge was made.

We assume that the charge might not be misleading or confusing to lawyers. But the probabilities of confusion to a jury are so likely (cf. *Shepard* v. *United States,* 290 U. S. 96, 104) that we conclude that the charge was prejudicially erroneous.

Instructions to acquit, if there was reasonable doubt as to petitioner's guilt, were given in other parts of the charge. Those were general instructions. They would be adequate, standing alone. But on the crucial issue of the trial—whether petitioner or one of four other persons stole the coupons from the bank—no such qualification was made; and the question was so put as to suggest a different standard of guilt. As stated by Judge Frank in his dissenting opinion below: "Literally interpreted, the judge's charge told them that this was not sufficient to justify acquittal, for it was their 'duty' (a) to decide that appellant committed the theft unless (b) they decided that some other specific person did. So interpreted, this charge erred by putting on appellant the burden of proving her innocence by proving the identity of some other person as the thief." 152 F. 2d, p. 348. Or to put the matter another way, the instruction may be read as telling the jurors that, if petitioner by her testimony had not convinced them that someone else had stolen the ration coupons, she must have done so. So read, the instruction sounds more like comment of a zealous prosecutor rather than an instruction by a judge who has special responsibilities for assuring fair trials of those accused of crime. See *Quercia* v. *United States,* 289 U. S. 466, 469.

The "harmless error" statute [3] (Judicial Code § 269, 28 U. S. C. § 391) means that a criminal appeal should not be turned into a quest for error. It does not mean that portions of the charge are to be read in isolation to the full charge and magnified out of all proportion to their likely importance at the trial. *Boyd* v. *United States*, 271 U. S. 104, 107. Yet as stated in *McCandless* v. *United States*, 298 U. S. 342, 347–348, "an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial." It seems plain that the inflection or tone of voice used in giving the challenged instruction could make it highly damaging. And in any event the probabilities of confusion in the minds of the jurors seem so great, and the charge was so important to the vital issue in the case, that we conclude that prejudicial error was committed. We certainly cannot say from a review of the whole record that lack of prejudice affirmatively appears. While there was sufficient evidence for the jury, the case against petitioner was not open and shut. Since the scales were quite evenly balanced, we feel that the jury might have been influenced by the erroneous charge. Hence we cannot say it was not prejudicial and hence treat it as a minor aberration of trivial consequence. Nor is it enough for us to conclude that guilt may be deduced from the whole record.

[3] "On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

The Federal Rules of Criminal Procedure, effective March 21, 1946, provide that "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Rule 52 (a). This is merely a restatement of existing law and effects no change in the "harmless error" rule.

Such a course would lead to serious intrusions on the historic functions of the jury under our system of government. See *Bollenbach* v. *United States*, 326 U. S. 607.

Reversed.

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

MR. JUSTICE BLACK, dissenting.

The jury found this defendant guilty beyond a reasonable doubt after the trial judge had charged that: "A defendant is not required to establish his innocence but the Government must establish guilt beyond a reasonable doubt. If the facts and circumstances surrounding the case are as consistent with innocence as with guilt, he is not guilty." Six other times the judge explicitly charged the jury to the same effect: The defendant's innocence is presumed; she need not prove it; the burden is on the Government to prove her guilt beyond a reasonable doubt. Yet the Court now reverses on the ground that the jury might conceivably have taken three sentences in the trial judge's charge to mean that the defendant must prove innocence, which conceivably might have led the jury to believe that the court might have intended to withdraw his seven explicit instructions to the contrary. The three sentences were: "Did she steal them? Who did if she didn't? You are to decide that." Instructions such as these as to who stole the coupons were necessary because of the petitioner's defense that somebody else had taken them. The trial judge was obviously telling the jury not to ignore the petitioner's defense. No reference was made to burden of proof and no ordinary juror, unskilled in legal dialectics, would have suspected the latent ambiguity which the Court has discovered. Of course, hypercritical

scrutiny of each word and sentence in every charge when considered alone would always reveal dual meanings. The sentences here in question, like the sentences in every charge, should be given a common sense interpretation in their relationship to all instructions and the issues raised. When so considered, it is impossible for me to believe that the jury was confused as to burden of proof. Seven correct explicit instructions should not be considered neutralized by legalistic inferences established by purely formal analysis.

MR. JUSTICE REED and MR. JUSTICE BURTON join in this dissent.

PINKERTON ET AL. *v.* UNITED STATES.

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

No. 719. Argued May 1, 1946.—Decided June 10, 1946.

1. Where an indictment charges both a conspiracy to engage in a course of criminal conduct and a series of substantive offenses committed pursuant to the conspiracy, the substantive offenses are not merged into the conspiracy; and, upon conviction, the accused may be punished both for the conspiracy and for the substantive offenses. *Braverman* v. *United States,* 317 U. S. 49, distinguished. Pp. 642, 643.
2. The plea of double jeopardy is no defense to a conviction for both offenses. P. 643.
3. It is not material that overt acts charged in the conspiracy count are also charged and proved as substantive offenses. P. 644.
4. A party to a continuing conspiracy may be responsible for substantive offenses committed by a co-conspirator in furtherance of the conspiracy, even though he does not participate in the substantive offenses or have any knowledge of them. *United States* v. *Sall,* 116 F. 2d 745, overruled. Pp. 645–648.

151 F. 2d 499, affirmed.

Petitioners were convicted of a conspiracy to violate the Internal Revenue Code and of several substantive violations of the Code and were sentenced both for the conspiracy and for the substantive offenses. The Circuit Court of Appeals affirmed. 151 F. 2d 499. This Court granted certiorari. 327 U. S. 772. *Affirmed*, p. 648.

John S. Tucker, Jr. argued the cause for petitioners. With him on the brief was *Thomas E. Skinner.*

W. Marvin Smith argued the cause for the United States. With him on the brief were *Solicitor General McGrath, Robert S. Erdahl* and *Leon Ulman.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Walter and Daniel Pinkerton are brothers who live a short distance from each other on Daniel's farm. They were indicted for violations of the Internal Revenue Code. The indictment contained ten substantive counts and one conspiracy count. The jury found Walter guilty on nine of the substantive counts and on the conspiracy count. It found Daniel guilty on six of the substantive counts and on the conspiracy count. Walter was fined $500 and sentenced generally on the substantive counts to imprisonment for thirty months. On the conspiracy count he was given a two year sentence to run concurrently with the other sentence. Daniel was fined $1,000 and sentenced generally on the substantive counts to imprisonment for thirty months. On the conspiracy count he was fined $500 and given a two year sentence to run concurrently with the other sentence. The judgments of conviction were affirmed by the Circuit Court of Appeals.[1] 151 F. 2d

[1] The court held that two of the counts under which Walter was convicted and one of the counts under which Daniel was convicted were barred by the statute of limitations and that as to them the

499. The case is here on a petition for a writ of certiorari, which we granted because one of the questions presented involved a conflict between the decision below and *United States* v. *Sall,* 116 F. 2d 745, decided by the Circuit Court of Appeals for the Third Circuit.

A single conspiracy was charged and proved. Some of the overt acts charged in the conspiracy count were the same acts charged in the substantive counts. Each of the substantive offenses found was committed pursuant to the conspiracy. Petitioners therefore contend that the substantive counts became merged in the conspiracy count, and that only a single sentence not exceeding the maximum two year penalty provided by the conspiracy statute (Criminal Code § 37, 18 U. S. C. § 88) could be imposed. Or to state the matter differently, they contend that each of the substantive counts became a separate conspiracy count but, since only a single conspiracy was charged and proved, only a single sentence for conspiracy could be imposed. They rely on *Braverman* v. *United States,* 317 U. S. 49.

In the *Braverman* case the indictment charged no substantive offense. Each of the several counts charged a conspiracy to violate a different statute. But only one

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demurrer should have been sustained. But each of the remaining substantive counts on which the jury had returned a verdict of guilty carried a maximum penalty of three years' imprisonment and a fine of $5,000. Int. Rev. Code, § 3321, 26 U. S. C. § 3321. Hence the general sentence of fine and imprisonment imposed on each under the substantive counts was valid. It is settled law, as stated in *Claassen* v. *United States,* 142 U. S. 140, 146-147, "that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only."

The same rule obtains in the case of concurrent sentences. *Hirabayashi* v. *United States,* 320 U. S. 81, 85 and cases cited.

conspiracy was proved. We held that a single conspiracy, charged under the general conspiracy statute, however diverse its objects may be, violates but a single statute and no penalty greater than the maximum provided for one conspiracy may be imposed. That case is not apposite here. For the offenses charged and proved were not only a conspiracy but substantive offenses as well.

Nor can we accept the proposition that the substantive offenses were merged in the conspiracy. There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. See *United States* v. *Katz,* 271 U. S. 354, 355–356; *Gebardi* v. *United States,* 287 U. S. 112, 121–122. Another is where the definition of the substantive offense excludes from punishment for conspiracy one who voluntarily participates in another's crime. *Gebardi* v. *United States, supra.* But those exceptions are of a limited character. The common law rule that the substantive offense, if a felony, was merged in the conspiracy,[2] has little vitality in this country.[3] It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established. *Clune* v. *United States,* 159 U. S. 590, 594–595. A conviction for the conspiracy may be had though the substantive offense was completed. See *Heike* v. *United States,* 227 U. S. 131, 144. And the plea of double jeopardy is no defense to a conviction for both offenses. *Carter* v.

[2] See May's Law of Crimes (4th ed. 1938), § 126; 17 Corn. L. Q. (1931) 136; *People* v. *Tavormina,* 257 N. Y. 84, 89–90, 177 N. E. 317.

[3] The cases are collected in 37 A. L. R. 778, 75 A. L. R. 1411.

McClaughry, 183 U. S. 365, 395. It is only an identity of offenses which is fatal. See *Gavieres* v. *United States,* 220 U. S. 338, 342. Cf. *Freeman* v. *United States,* 146 F. 2d 978. A conspiracy is a partnership in crime. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 253. It has ingredients, as well as implications, distinct from the completion of the unlawful project. As stated in *United States* v. *Rabinowich,* 238 U. S. 78, 88:

> "For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered."

And see *Sneed* v. *United States,* 298 F. 911, 912–913; *Banghart* v. *United States,* 148 F. 2d 521.

Moreover, it is not material that overt acts charged in the conspiracy counts were also charged and proved as substantive offenses. As stated in *Sneed* v. *United States, supra,* p. 913, "If the overt act be the offense which was the object of the conspiracy, and is also punished, there is not a double punishment of it." The agreement to do an unlawful act is even then distinct from the doing of the act.[4]

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[4] The addition of a conspiracy count may at times be abusive and unjust. The Conference of Senior Circuit Judges reported in 1925:

> "We note the prevalent use of conspiracy indictments for converting a joint misdemeanor into a felony; and we express our conviction that both for this purpose and for the purpose—or at least with the effect—of bringing in much improper evidence, the conspiracy statute is being much abused.
>
> "Although in a particular case there may be no preconcert of plan, excepting that necessarily inherent in mere joint action,

It is contended that there was insufficient evidence to implicate Daniel in the conspiracy. But we think there was enough evidence for submission of the issue to the jury.

There is, however, no evidence to show that Daniel participated directly in the commission of the substantive offenses on which his conviction has been sustained,[5] although there was evidence to show that these substantive offenses were in fact committed by Walter in furtherance of the unlawful agreement or conspiracy existing between the brothers. The question was submitted to the jury on the theory that each petitioner could be found guilty of the substantive offenses, if it was found at the time those offenses were committed petitioners were parties to an unlawful conspiracy and the substantive offenses charged were in fact committed in furtherance of it.[6]

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it is difficult to exclude that situation from the established definitions of conspiracy; yet the theory which permits us to call the aborted plan a greater offense than the completed crime supposes a serious and substantially continued group scheme for cooperative law breaking. We observe so many conspiracy prosecutions which do not have this substantial base that we fear the creation of a general impression, very harmful to law enforcement, that this method of prosecution is used arbitrarily and harshly. Further the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant." Annual Report of the Attorney General for 1925, pp. 5–6.

But we do not find that practice reflected in this present case.

[5] This question does not arise as to Walter. He was the direct actor in some of the substantive offenses on which his conviction rests. So the general sentence and fine are supportable under any one of those. See note 1, *supra*.

[6] The trial court charged: ". . . after you gentlemen have considered all the evidence in this case, if you are satisfied from the evidence beyond a reasonable doubt that at the time these particular substantive offenses were committed, that is, the offenses charged in the first ten counts of this indictment if you are satisfied from the evidence beyond a reasonable doubt that the two defendants were in an unlawful

Daniel relies on *United States* v. *Sall, supra.* That case held that participation in the conspiracy was not itself enough to sustain a conviction for the substantive offense even though it was committed in furtherance of the conspiracy. The court held that, in addition to evidence that the offense was in fact committed in furtherance of the conspiracy, evidence of direct participation in the commission of the substantive offense or other evidence from which participation might fairly be inferred was necessary.

We take a different view. We have here a continuous conspiracy. There is here no evidence of the affirmative action on the part of Daniel which is necessary to establish his withdrawal from it. *Hyde* v. *United States,* 225 U. S. 347, 369. As stated in that case, "Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law. As the offense has not been terminated or accomplished he is still offending. And we think, consciously offending, offending as certainly, as we have said, as at the first moment of his confederation, and consciously through every moment of its existence." *Id.,* p. 369. And so long as the partnership in crime continues, the partners act for each other in carrying it forward. It is settled that "an overt act of one partner may be the act of all without

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conspiracy, as I have heretofore defined unlawful conspiracy to you, then you would have a right, if you found that to be true to your satisfaction beyond a reasonable doubt, to convict each of these defendants on all these substantive counts, provided the acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy or object of the unlawful conspiracy, which you have found from the evidence existed." Daniel was not indicted as an aider or abettor (see Criminal Code, § 332, 18 U. S. C. 550), nor was his case submitted to the jury on that theory.

any new agreement specifically directed to that act." *United States* v. *Kissel,* 218 U. S. 601, 608. Motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective. *Wiborg* v. *United States,* 163 U. S. 632, 657–658. A scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy. *Cochran* v. *United States,* 41 F. 2d 193, 199–200. Yet all members are responsible, though only one did the mailing. *Cochran* v. *United States, supra; Mackett* v. *United States,* 90 F. 2d 462, 464; *Baker* v. *United States,* 115 F. 2d 533, 540; *Blue* v. *United States,* 138 F. 2d 351, 359. The governing principle is the same when the substantive offense is committed by one of the conspirators in furtherance of the unlawful project. *Johnson* v. *United States,* 62 F. 2d 32, 34. The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle. That principle is recognized in the law of conspiracy when the overt act of one partner in crime is attributable to all. An overt act is an essential ingredient of the crime of conspiracy under § 37 of the Criminal Code, 18 U. S. C. § 88. If that can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense.

A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the

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scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement. But as we read this record, that is not this case.

Affirmed.

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

MR. JUSTICE RUTLEDGE, dissenting in part.

The judgment concerning Daniel Pinkerton should be reversed. In my opinion it is without precedent here and is a dangerous precedent to establish.

Daniel and Walter, who were brothers living near each other, were charged in several counts with substantive offenses, and then a conspiracy count was added naming those offenses as overt acts. The proof showed that Walter alone committed the substantive crimes. There was none to establish that Daniel participated in them, aided and abetted Walter in committing them, or knew that he had done so. Daniel in fact was in the penitentiary, under sentence for other crimes, when some of Walter's crimes were done.

There was evidence, however, to show that over several years Daniel and Walter had confederated to commit similar crimes concerned with unlawful possession, transportation, and dealing in whiskey, in fraud of the federal revenues. On this evidence both were convicted of conspiracy. Walter also was convicted on the substantive counts on the proof of his committing the crimes charged. Then, on that evidence without more than the proof of Daniel's criminal agreement with Walter and the latter's overt acts, which were also the substantive offenses charged, the court told the jury they could find Daniel guilty of those substantive offenses. They did so.

I think this ruling violates both the letter and the spirit of what Congress did when it separately defined the three classes of crime, namely, (1) completed substantive offenses; [1] (2) aiding, abetting or counseling another to commit them; [2] and (3) conspiracy to commit them.[3] Not only does this ignore the distinctions Congress has prescribed shall be observed. It either convicts one man for another's crime or punishes the man convicted twice for the same offense.

The three types of offense are not identical. *Bollenbach* v. *United States,* 326 U. S. 607, 611; *United States* v. *Sall,* 116 F. 2d 745. Nor are their differences merely verbal. *Ibid.* The gist of conspiracy is the agreement; that of aiding, abetting or counseling is in consciously advising or assisting another to commit particular offenses, and thus becoming a party to them; that of substantive crime, going a step beyond mere aiding, abetting, counseling to completion of the offense.

These general differences are well understood. But when conspiracy has ripened into completed crime, or has advanced to the stage of aiding and abetting, it becomes easy to disregard their differences and loosely to treat one as identical with the other, that is, for every purpose except the most vital one of imposing sentence. And

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[1] These of course comprehend the vast variety of offenses prescribed by federal law, conspiracies for accomplishing which may be charged under the catchall conspiracy statute, note 3.

[2] "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." 18 U. S. C. § 550.

[3] "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both." 18 U. S. C. § 88.

thus the substance, if not the technical effect, of double jeopardy or multiple punishment may be accomplished. Thus also may one be convicted of an offense not charged or proved against him, on evidence showing he committed another.

The old doctrine of merger of conspiracy in the substantive crime has not obtained here. But the dangers for abuse, which in part it sought to avoid, in applying the law of conspiracy have not altogether disappeared. Cf. *Kotteakos* v. *United States, post,* p. 750. There is some evidence that they may be increasing. The looseness with which the charge may be proved, the almost unlimited scope of vicarious responsibility for others' acts which follows once agreement is shown, the psychological advantages of such trials for securing convictions by attributing to one proof against another, these and other inducements require that the broad limits of discretion allowed to prosecuting officers in relation to such charges and trials be not expanded into new, wider and more dubious areas of choice. If the matter is not generally of constitutional proportions, it is one for the exercise of this Court's supervisory power over the modes of conducting federal criminal prosecutions within the rule of *McNabb* v. *United States,* 318 U. S. 332.

I think that power should be exercised in this case with respect to Daniel's conviction. If it does not violate the letter of constitutional right, it fractures the spirit. *United States* v. *Sall, supra.* I think the ruling in that case was right, and for the reasons stated.[4] It should be

[4] In the substantially identical situation presented in the *Sall* case as to the indictment and the proof, the Government argued that the conviction on the substantive counts should stand because the proof that the accused had entered the conspiracy amounted to proof that he had "aided and abetted" the commission of the substantive crimes within the meaning of 18 U. S. C. § 550. The court rejected the idea,

followed here. Daniel has been held guilty of the substantive crimes committed only by Walter on proof that he did no more than conspire with him to commit offenses of the same general character. There was no evidence that he counseled, advised or had knowledge of those particular acts or offenses. There was, therefore, none that he aided, abetted or took part in them. There was only evidence sufficient to show that he had agreed with Walter at some past time to engage in such transactions generally. As to Daniel this was only evidence of conspiracy, not of substantive crime.

The Court's theory seems to be that Daniel and Walter became general partners in crime by virtue of their agreement and because of that agreement without more on his part Daniel became criminally responsible as a principal for everything Walter did thereafter in the nature of a criminal offense of the general sort the agreement contemplated, so long as there was not clear evidence that Daniel had withdrawn from or revoked the agreement. Whether or not his commitment to the penitentiary had that effect, the result is a vicarious criminal responsibility as broad as, or broader than, the vicarious civil liability of a partner for acts done by a co-partner in the course of the firm's business.

Such analogies from private commercial law and the law of torts are dangerous, in my judgment, for transfer to the criminal field. See Sen. Rep. No. 163, 72d Cong., 1st Sess., 20. Guilt there with us remains personal, not vicarious, for the more serious offenses. It should be kept so. The effect of Daniel's conviction in this case, to

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apparently now accepted here, that "aiding and abetting" and "conspiring" are, and are intended by Congress to be, the same thing, differing only in the form of the descriptive words. But if that is the only difference, then conviction for both "offenses" on account of the same act is clearly double punishment.

repeat, is either to attribute to him Walter's guilt or to punish him twice for the same offense, namely, agreeing with Walter to engage in crime. Without the agreement Daniel was guilty of no crime on this record. With it and no more, so far as his own conduct is concerned, he was guilty of two.

In another aspect of the case, this effect is thrown into even clearer light. The indictment here was filed after a prior one for conspiracy alone had been dismissed. This in turn came after petitioners had been tried, convicted and had been successful in securing reversal on appeal for errors in the charge. *Pinkerton* v. *United States,* 145 F. 2d 252. Following this reversal they were reindicted and tried in the present case. The Government now says, as to the plea of double jeopardy on this account (which the trial court overruled on demurrer), that the two indictments were for different conspiracies since the first one charged a different period of time as covered by the conspiracy; charged 16 as compared with 19 overt acts in the second; and an additional object was added in the latter, that is, intent to violate another section of the revenue act. In other words, there were two different conspiracies by virtue of these minute differences in the detail of the allegations. Hence, there was no double jeopardy by the second indictment.

But later, in support of the conviction here, relative to the bearing of the various statutes of limitations upon proof of the overt acts, charged also as substantive offenses, the Government points out that the earlier indictment was framed on the assumption that a three-year statute of limitations applied to the conspiracy as first charged; and the convictions were reversed for failure of the trial court to instruct the jury on that basis. Then the District Attorney discovered the decision in *Braverman* v. *United States,* 317 U. S. 49, 54–55, and decided to revamp the

indictment to include details making the six-year period applicable. He did so, and added the substantive counts because, so it is said, in the view that a six-year period applied he felt there were enough substantive offenses within that time which he could successfully prove to justify including them.

It would seem, from this history, that to sustain this conviction as against the plea of former jeopardy by virtue of the earlier indictment and what followed, the Government stands, and must stand, upon the idea that two separate and distinct conspiracies were charged, one by the first and one by the later indictment. See *United States* v. *Oppenheimer,* 242 U. S. 85, 87–88. But to sustain Daniel's conviction for the substantive offenses, via the conspiracy route, there was only a single continuing conspiracy extending over the longer period, in the course of which Walter committed crimes, which were also overt acts, some of them running back of the period charged in the former indictment, others being the same but later acts which it had charged as overt acts against both.

For these now Daniel is held responsible, not merely as a conspirator, as the prior indictment charged, but as both a conspirator and a substantive offender.

What this lacks by way of being put twice in jeopardy for the same offense, I am unable to understand. For not only has Daniel been convicted for conspiracy for the same overt acts, and illegal ends, as the first indictment charged. He has had those acts converted into substantive offenses. I do not think the prosecutor's technical, and it would seem insubstantial, variations in the details of the indictment should be permitted to achieve so much.[5]

[5] The situation is essentially the same as when crimes are defined with such minute distinction as to make them different only in the most technical sense. See *District of Columbia* v. *Buckley,* 128 F. 2d 17, concurring opinion at 21; cf. *Ex parte Nielsen,* 131 U. S. 176; *In re Snow,* 120 U. S. 274.

This, of course, should not relieve Walter of the conviction for the substantive offenses. But his sentence for conspiracy should be annulled. So also should Daniel's sentence on all counts.

MR. JUSTICE FRANKFURTER, reserving judgment on the question of double jeopardy, agrees in substance with the views expressed in this dissent.

KNAUER *v.* UNITED STATES.

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

No. 510. Argued March 28, 29, 1946.—Decided June 10, 1946.

1. In a proceeding under § 338 of the Nationality Act of 1940 to revoke an order admitting petitioner to citizenship and to cancel his certificate of naturalization on the ground of fraud in their procurement, there was solid, convincing evidence that, before the date of his naturalization, at that time, and subsequently, he was a thoroughgoing Nazi and a faithful follower of Adolph Hitler. *Held*. The conclusion is irresistible that, when petitioner forswore allegiance to the German Reich, he swore falsely; and the revocation of the decree of naturalization is sustained. Pp. 660–669, 674.
2. The standard of proof required in such proceedings is strict. *Schneiderman* v. *United States*, 320 U. S. 118; *Baumgartner* v. *United States*, 322 U. S. 665. P. 657.
3. In reviewing such a proceeding, this Court does not accept even concurrent findings of the two lower courts as conclusive, but reexamines the facts to determine whether the United States has carried the burden of proving its case by "clear, unequivocal, and convincing" evidence, which does not leave "the issue in doubt." *Id*. Pp. 657, 658.
4. Citizenship obtained through naturalization is not a second-class citizenship. P. 658.
5. It carries with it the privileges of full participation in the affairs of our society, including the right to speak freely, to criticize officials and administrators, and to promote changes in our laws, including the very Charter of our Government. P. 658.

6. Great tolerance and caution are necessary lest good faith exercise of the rights of citizenship be turned against the naturalized citizen and used to deprive him of the cherished status. P. 658.
7. Ill-tempered expressions, extreme views, even the promotion of ideas which run counter to our American ideals, are not to be given disloyal connotations in the absence of solid, convincing evidence that that is their significance. P. 658.
8. Utterances made in years subsequent to the oath of allegiance are not readily to be charged against the state of mind existing when the oath was administered. P. 659.
9. The fundamental question is whether the new citizen still takes his orders from, or owes his allegiance to, a foreign chancellory. P. 659.
10. Membership in the German-American Bund is not in itself sufficient to prove fraud which would warrant revocation of a decree of naturalization. P. 669.
11. The issue of fraud in the oath of allegiance taken by an alien upon admission to citizenship cannot become *res judicata* in the order admitting him to citizenship; since it was not in issue and neither was adjudicated nor could have been adjudicated in the naturalization proceedings. P. 671.
12. When an alien takes the oath of allegiance with reservations or does not in good faith forswear loyalty and allegiance to the old country, the decree of naturalization is obtained by a fraud on the naturalization court; and this is a proper ground for cancellation of the naturalization. Pp. 671–673.
13. There can be no doubt of the power of Congress to provide for the cancellation of certificates of naturalization on the ground of fraud in their procurement. Pp. 673, 674.

149 F. 2d 519, affirmed.

A District Court cancelled petitioner's certificate of naturalization and revoked the order admitting him to citizenship on the ground that they had been procured by fraud. The Circuit Court of Appeals affirmed. 149 F. 2d 519. This Court granted certiorari. 326 U. S. 714. *Affirmed*, p. 674.

Ode L. Rankin argued the cause and filed a brief for petitioner.

Frederick Bernays Wiener argued the cause for the United States. With him on the brief were *Solicitor General McGrath, Robert S. Erdahl* and *Beatrice Rosenberg.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Knauer is a native of Germany. He arrived in this country in 1925 at the age of 30. He had served in the German army during World War I and was decorated. He had studied law and economics in Germany. He settled in Milwaukee, Wisconsin, and conducted an insurance business there. He filed his declaration of intention to become a citizen in 1929 and his petition for naturalization in 1936. He took his oath of allegiance and was admitted to citizenship on April 13, 1937. In 1943 the United States instituted proceedings under § 338 (a) of the Nationality Act of 1940, 54 Stat. 1137, 1158, 8 U. S. C. § 738 (a), to cancel his certificate of naturalization [1] on the ground that it had been secured by fraud in that (1) he had falsely and fraudulently represented in his petition that he was attached to the principles of the Constitution and (2) he had taken a false oath of allegiance. The District Court was satisfied beyond a reasonable doubt that Knauer practiced fraud when he obtained his certificate of naturalization. It found that he had not been and is not attached to the principles of the Constitution and that he took a false oath of allegiance. It accordingly

[1] Sec. 338 (a) of the Nationality Act of 1940 provides:

"It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured."

entered an order cancelling his certificate and revoking the order admitting him to citizenship. The Circuit Court of Appeals affirmed. 149 F. 2d 519. The case is here on a petition for a writ of certiorari which we granted to examine that ruling in light of our decisions in *Schneiderman* v. *United States,* 320 U. S. 118, and *Baumgartner* v. *United States,* 322 U. S. 665.

I. In the oath of allegiance which Knauer took, he swore that he would "absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to the German Reich," that he would "support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic"; that he would "bear true faith and allegiance to the same" and that he took "this obligation freely without any mental reservation or purpose of evasion." [2] The first and crucial issue in the case is whether Knauer swore falsely and committed a fraud when he promised under oath to forswear allegiance to the German Reich and to transfer his allegiance to this nation. Fraud connotes perjury, falsification, concealment, misrepresentation. When denaturalization is sought on this (*Baumgartner* v. *United States, supra*) as well as on other grounds (*Schneiderman* v. *United States, supra*), the standard of proof required is strict. We do not accept even concurrent findings of two lower courts as conclusive. *Baumgartner* v. *United States, supra,* pp. 670–671. We reexamine the facts to determine whether the United States has carried its burden of proving by "clear, unequivocal, and convincing" evidence, which does not leave "the issue in doubt," that the citizen

[2] Since 1795 an alien seeking admission to citizenship in this country has been required to swear that he renounced allegiance to all foreign powers, including his native land. 1 Stat. 103, 414; 2 Stat. 153, 154; R. S. 2165; 34 Stat. 596, 598; 54 Stat. 1137, 1157.

who is sought to be restored to the status of an alien obtained his naturalization certificate illegally. *Schneiderman* v. *United States, supra,* p. 158.

That strict test is necessary for several reasons. Citizenship obtained through naturalization is not a second-class citizenship. It has been said that citizenship carries with it all of the rights and prerogatives of citizenship obtained by birth in this country "save that of eligibility to the Presidency." *Luria* v. *United States,* 231 U. S. 9, 22. There are other exceptions of a limited character.[3] But it is plain that citizenship obtained through naturalization carries with it the privilege of full participation in the affairs of our society, including the right to speak freely, to criticize officials and administrators, and to promote changes in our laws including the very Charter of our Government. Great tolerance and caution are necessary lest good faith exercise of the rights of citizenship be turned against the naturalized citizen and be used to deprive him of the cherished status. Ill-tempered expressions, extreme views, even the promotion of ideas which run counter to our American ideals, are not to be given disloyal connotations in absence of solid, convincing evidence that that is their significance. Any other course would run counter to our traditions and make denaturalization proceedings the ready instrument for political persecutions. As stated in *Schneiderman* v. *United States, supra,* p. 159, "Were the law otherwise, valuable rights would rest upon a slender reed, and the security of the status of our naturalized citizens might depend in

[3] Thus a naturalized citizen must wait seven years before he is eligible to sit in the House (Article I, § 2) and nine years before he can enter the Senate. Article I, § 3. Furthermore, a naturalized citizen may lose his American citizenship by residing abroad for stated periods. §§ 404–406. Nationality Act of 1940, 54 Stat. 1137, 1170, 8 U. S. C. §§ 804–806. See *Perkins* v. *Elg,* 307 U. S. 325, 329.

considerable degree upon the political temper of majority thought and the stresses of the times."

These are extremely serious problems. They involve not only fundamental principles of our political system designed for the protection of minorities and majorities alike. They also involve tremendously high stakes for the individual. For denaturalization, like deportation, may result in the loss "of all that makes life worth living." *Ng Fung Ho* v. *White,* 259 U. S. 276, 284. Hence, where the fate of a human being is at stake, we must not leave the presence of his evil purpose to conjecture. Cf. *Bridges* v. *Wixon,* 326 U. S. 135, 149. Furthermore, we are dealing in cases of this kind with questions of intent. Here it is whether Knauer swore falsely on April 13, 1937. Intent is a subjective state, illusory and difficult to establish in absence of voluntary confession. What may appear objectively to be false may still fall short of establishing an intentional misrepresentation which is necessary in order to prove that the oath was perjurious. And as *Baumgartner* v. *United States, supra,* indicates, utterances made in years subsequent to the oath are not readily to be charged against the state of mind existing when the oath was administered. 322 U. S. p. 675. Troubled times and the emotions of the hour may elicit expressions of sympathy for old acquaintances and relatives across the waters. "Forswearing past political allegiance without reservation and full assumption of the obligations of American citizenship are not at all inconsistent with cultural feelings imbedded in childhood and youth." *Baumgartner* v. *United States, supra,* p. 674. Human ties are not easily broken. Old social or cultural loyalties may still exist, though basic allegiance is transferred here. The fundamental question is whether the new citizen still takes his orders from, or owes his allegiance to, a foreign chancellory. Far more is required to establish that fact

than a showing that social and cultural ties remain. And even political utterances, which might be some evidence of a false oath if they clustered around the date of naturalization, are more and more unreliable as evidence of the perjurious falsity of the oath the further they are removed from the date of naturalization.

We have read with care the voluminous record in this case. We have considered the evidence which antedates Knauer's naturalization (April 13, 1937), the evidence which clusters around that date, and that which follows it. We have considered Knauer's versions of the various episodes and the versions advanced by the several witnesses for the United States. We have considered the testimony and other evidence offered by each in corroboration or impeachment of the other's case. We have considered the appraisal of the veracity of the witnesses by the judge who saw and heard them and have given it that "due regard" required by the Rules of Civil Procedure. Rule 52 (a). We conclude with the District Court and the Circuit Court of Appeals that there is solid, convincing evidence that Knauer before the date of his naturalization, at that time, and subsequently was a thoroughgoing Nazi and a faithful follower of Adolph Hitler. The conclusion is irresistible, therefore, that when he forswore allegiance to the German Reich he swore falsely. The character of the evidence, the veracity of the witnesses against Knauer as determined by the District Court, the corroboration of challenged evidence presented by the Government, the consistent pattern of Knauer's conduct before and after naturalization convince us that the two lower courts were correct in their conclusions. The standard of proof, not satisfied in either the *Schneiderman* or *Baumgartner* cases, is therefore plainly met here.

We will review briefly what we, as well as the two lower courts, accept as the true version of the facts.

As early as 1931, Knauer told a newly arrived immigrant who came from the same town in Germany that in his opinion the aim of Hitler and the Nazi party was good, that it would progress, and that it was necessary to have the same party in this country because of the Jews and the Communists. During the same period, he told another friend repeatedly that he was opposed to any republican form of government and that Jewish capital was to blame for Germany's downfall. He visited Germany for about six months in 1934 and while there read Hitler's Mein Kampf. On his return he said with pride that he had met Hitler, and that he had been offered a post with the German government at 600 marks per month, that Hitler was the savior of Germany, that Hitler was solving the unemployment problem while this country was suffering from Jewish capitalism, that the Hitler youth organization was an excellent influence on the children of Germany. On occasions in 1936 and 1937 he was explosive in his criticism of those who protested against the practices and policies of Hitler.

The German Winter Relief Fund was an official agency of the German government for which German consulates solicited money in the United States. In the winter of 1934–1935 Knauer was active in obtaining contributions to the Fund and forwarded the money collected to the German consulate in Chicago.

The German-American Bund had a branch in Milwaukee. Its leader was George Froboese—midwestern gauleiter and later national leader. The Bund taught and advocated the Nazi philosophy—the leadership principle, racial superiority of the Germans, the principle of the totalitarian state, Pan-Germanism and of Lebensraum (living space). It looked forward to the day when the Nazi form of government would supplant our form of government. It emphasized that allegiance and devotion to Hitler were superior to any obligation to the United

States.[4] Knauer denied that he was a member of the Bund. But the District Court found to the contrary[5] on evidence which is solid and convincing.

Knauer participated in Bund meetings in 1936. In the summer of 1936 he and his family had a tent at the Bund camps. In the fall of 1936 he enrolled his young daughter in the Youth Movement of the Bund—a group organized to instill the Nazi ideology in the minds of children of German blood. They wore uniforms, used the Nazi salute, and were taught songs of allegiance to Hitler. Knauer attended meetings of this group.

The Federation of German-American Societies represented numerous affiliated organizations consisting of Americans of German descent and sought to coordinate their work. It was the policy of the Bund to infiltrate older German societies. This effort was made as respects

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[4] A number of denaturalization cases in the District Court raised the question as to the nature of the Bund. All of them were consolidated for trial on that single issue, including Knauer's case. At the conclusion of the consolidated trial on that issue, Knauer's case was separately tried. But the findings as to the nature of the Bund were made on the basis of evidence in the consolidated trial. The consolidation of the cases was challenged and upheld in the Circuit Court of Appeals. 149 F. 2d p. 520. No such error is alleged here.

These findings by the District Court as to the nature of the Bund are likewise not challenged here. For similar findings respecting the nature of the Bund see *United States* v. *Schuchhardt*, 49 F. Supp. 567, 569; *United States* v. *Ritzen*, 50 F. Supp. 301, 302; *United States* v. *Haas*, 51 F. Supp. 910, 911; *United States* v. *Wolter*, 53 F. Supp. 417, 418–425; *United States* v. *Sautter*, 54 F. Supp. 22; *United States* v. *Holtz*, 54 F. Supp. 63, 66–70; *United States* v. *Baecker*, 55 F. Supp. 403, 404–408; *United States* v. *Bregler*, 55 F. Supp. 837, 839–840; *United States* v. *Wilmovski*, 56 F. Supp. 63, 64; *United States* v. *Claassen*, 56 F. Supp. 71, 72.

[5] "I find as a fact that the defendant was a member of the Milwaukee unit of the Bund; that he was so considered by its officers and members; that most of his interests and activities were in behalf of the Bund; and that, though completely aware of its aims and purposes, he deliberately vigorously promoted the objects of the Bund."

the Federation. Knauer assisted Froboese and others between 1933 and 1936 in endeavoring to have the swastika displayed at celebrations of the Federation. In 1935 Knauer reprimanded a delegate to the Federation for passing out pamphlets opposing the Nazi government in Germany. At a meeting of the Federation in 1935, Knauer moved to have the Federation recognize the swastika as the flag of the German Reich. The motion failed to carry. In 1936 the swastika flag was raised at a German Day celebration without approval of the Federation. A commotion ensued in which Bundists in uniform participated, as a result of which the swastika flag was torn down. At the next meeting of the Federation, Knauer proposed a vote indicating approval of the showing of the swastika flag. The motion failed and a vote of censure of the chairman was passed. The chairman resigned. Thereupon Froboese and others proposed the formation of the German-American Citizens Alliance to compete with the Federation. It was organized early in 1937. The constitution and articles of incorporation of the Alliance provided that all of its assets on dissolution were to become the property of a German government agency for the dissemination of propaganda in foreign countries—the Deusches Auslands-Institut. The Alliance was a front organization for the Bund. It was designed to bring into its ranks persons who were sympathetic with the objectives of the Bund but who did not wish to be known as Bund members.

On February 22, 1937—less than two months before Knauer took his oath of naturalization—he was admitted to membership in the Alliance and became a member of its executive committee. His first action as a member was to volunteer the collection of newspaper articles that attacked the Alliance, Germany, and German-Americans. In 1937 and in the ensuing years, Knauer wrote many letters and telegrams to those who criticized the Bund

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or the German government. In 1938 Knauer was elected vice-president of the Alliance and subsequently presided over most of its meetings. He was the dominant figure in the Alliance. In May 1937 the German consul presented to the Alliance the swastika flag which had been torn down at the Federation celebration the year before. Not long after his naturalization Knauer urged that the Alliance sponsor a solstice ceremony, a solemn rite at which a wooden swastika is burned to symbolize the unity of German people everywhere. In August 1937 the Alliance refused to participate in an affair sponsored by a group which would not fly the swastika flag. In May 1938 Knauer at a meeting of the Alliance read a leaflet entitled "America, the Garbage Can of the World." In 1939 he arranged for public showings of films distributed by an official German propaganda agency and depicting the glories of Nazism.[6]

There was an intimate cooperation between the Alliance and the Bund. The Bund camp was used for Alliance affairs and it was available to Alliance members. The Alliance supported various Bund programs. It supported the Youth Group of the Bund and the Bund's solstice celebration. In 1939 the Youth Group of the Bund held a benefit performance for the Alliance. In 1940 it ad-

[6] In 1937 he said to one witness, an American of German ancestry, "Now, isn't that wonderful what Hitler did over there? Don't you like it? When the American Government would take the same line, then it goes in Germany like Hitler did, that will be fine."

Before and after his naturalization he continuously preached the Nazi concept of racial unity among those of German blood. In 1937 he addressed members of the Alliance on the subject of the German volk, saying "With the rise and fall of the German nation, we rise and fall."

In 1940 he said in conversation with another witness, in reply to the witness' remark that he was an American citizen, "I am a German-American." When told that there was no hyphen in the word, he

mitted the Youth Group of the Bund at the request of Froboese. Knauer consistently defended the Bund when it was criticized, when it was denied the use of a park or a hall, when its members were arrested or charged with offenses. In spite of the fact that Knauer knew the real aims and purposes of the Bund and was aware of its connection and Froboese's connection with the German government, he consistently came to its defense. Thus when a Wisconsin judge freed disturbers of a Bund meeting, he wrote the judge saying that the judge's remarks against the Bund were a "slander of a patriotic American organization." He subscribed to the official Bund newspaper and to a propaganda magazine issued and circulated by an agency of the German government. He held shares in the holding company of the Bund camp which was started in 1939. A photograph taken at the dedication of the new Bund camp in 1939 shows Knauer among a group of prominent Bund leaders with arm upraised in the Nazi salute. He owned a cottage at the Bund camp. He used the Nazi salute at the beginning and end of his speeches and at the Bund meetings.

In May 1938 Knauer and Froboese formed the American Protective League with a secret list of members. Knauer was elected a director. A constitution and by-

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replied, "I lean toward and favor the Germans." When asked if he would fight for America if the Germans invaded this country, he refused to answer, saying, "I am a German-American."

In 1941 the Wisconsin Federation of German-American Societies pledged itself to uphold the Constitution of the United States, to maintain the democratic form of government, and to fight the totalitarian form of government and everything it stood for. Knauer issued an appeal to German-Americans, stating that that declaration constituted open warfare against the then German government and was a plan to create discord among Germans and to induce those in Germany to revolt against the German Reich.

laws were adopted and copies mailed by Knauer and Froboese to Hitler. One Buerk was a German agent operating in this country and later indicted for failing to register as such. In 1939 the German consulate in Chicago supervised the recruiting of skilled workers in that region for return to Germany for work in German industries. The German consul, Buerk, Froboese and Knauer conducted the recruiting. Knauer participated actively in interviewing candidates. At intervals farewell parties were given by Knauer and Froboese to the returning workers and their families.

Important evidence implicating Knauer in promoting the cause of Hitler in this country was given by a Mrs. Merton. She testified that, prompted solely by patriotic motives, she entered the employ of Froboese in 1938 in order to obtain evidence against the Bund and its members. The truth of her testimony was vigorously denied by Knauer. But the District Court believed her version, as did the Circuit Court of Appeals. And we are persuaded on a close reading of the record not only that her testimony was strongly corroborated but also that Knauer's attempts to discredit her testimony do not ring true.[7]

Her testimony may be summarized as follows: She acted as secretary to Froboese in 1938. During the period of her employ Froboese and Knauer worked closely to-

[7] The people whom Mrs. Merton at the time of her work for Froboese told of her mission corroborated her. One of them on occasion took her to the Froboese home and saw her enter. At the time of the trial Froboese was dead. Mrs. Froboese denied that Mrs. Merton had ever worked for Froboese or that she had ever seen her. The testimony of another witness, however, related a conversation with Mrs. Froboese in which she said that a Mrs. Merton had worked for Froboese. Knauer persistently denied that he ever saw or knew Mrs. Merton. But Mrs. Merton's husband and a neighbor identified Knauer as the man who called on Mrs. Merton at her home one day.

gether on Bund matters. He helped Froboese in the preparation of articles for the Bund newspaper, of speeches, and of Bund correspondence. He helped Froboese prepare resolutions to be offered at the 1938 Bund convention calling for a white-gentile-ruled America. When Froboese left the city to attend the convention, he told her to contact Knauer for advice concerning Bund matters. Letters signed by Froboese and Knauer jointly were sent to Hitler and other Nazi officials. One contained a list of 700 German nationals. One was the constitution and by-laws of the American Protective League which we have already mentioned. One to Hess said they had to lay low for awhile, that there was an investigation on. A birthday greeting to Hitler from Froboese and Knauer closed with the phrase, "In blind obedience we follow you." Knauer told her never to reveal that the Alliance and the Bund were linked together. One day she asked Knauer what the Bund was. His reply was that the Bund "was the Fuehrer's grip on American democracy." She reminded Knauer that he was an American citizen. He replied, "That is a good thing to hide behind."

We have given merely the highlights of the evidence. Much corroborative detail could be added. But what we have related presents the gist of the case against Knauer. If isolated parts of the evidence against Knauer were separately considered, they might well carry different inferences. His alertness to rise to the defense of Germans or of Americans of German descent could well reflect, if standing as isolated instances, attempts to protect a minority against what he deemed oppressive practices. Social and cultural ties might be complete and adequate explanations. Even utterances of a political nature which reflected tolerance or approval of the Nazi program in Germany might carry no sinister connotation, if they were considered by themselves. For many native-borns in this country did not awaken to the full implications of the

Nazi program until war came to us. And as we stated in *Schneiderman* v. *United States, supra,* p. 139: "Whatever attitude we may individually hold toward persons and organizations that believe in or advocate extensive changes in our existing order, it should be our desire and concern at all times to uphold the right of free discussion and free thinking to which we as a people claim primary attachment."

But we have here much more than political utterances, much more than a crusade for the protection of minorities. This record portrays a program of action to further Hitler's cause in this nation—a program of infiltration which conforms to the pattern adopted by the Nazis in country after country. The ties with the German Reich were too intimate, the pattern of conduct too consistent, the overt acts too plain for us to conclude that Knauer was merely exercising his right of free speech either to spread tolerance in this country or to advocate changes here.

Moreover, the case against Knauer is not constructed solely from his activities subsequent to April 13, 1937—the date of his naturalization. The evidence prior to his naturalization, that which clusters around that date, and that which follows in the next few years is completely consistent. It conforms to the same pattern. We do not have to guess whether subsequent to naturalization he had a change of heart and threw himself wholeheartedly into a new cause. We have clear, convincing, and solid evidence that at all relevant times he was a thoroughgoing Nazi bent on sponsoring Hitler's cause here. And this case, unlike the *Baumgartner* case, is not complicated by the fact that when the alien took his oath Hitler was not in power. On April 13, 1937, Hitler was in full command. The evidence is most convincing that at that time, as well as later, Knauer's loyalty ran to him, not to this country.

The District Court properly ruled that membership in the Bund was not in itself sufficient to prove fraud which would warrant revocation of a decree of naturalization. Otherwise, guilt would rest on implication, contrary to the rule of the *Schneiderman* and *Baumgartner* cases. But we have here much more than that. We have a clear course of conduct, of which membership in the Bund was a manifestation, designed to promote the Nazi cause in this country. This is not a case of an underling caught up in the enthusiasm of a movement, driven by ties of blood and old associations to extreme attitudes, and perhaps unaware of the conflict of allegiance implicit in his actions. Knauer is an astute person. He is a leader—the dominating figure in the cause he sponsored, a leading voice in the councils of the Bund, the spokesman in the program for systematic agitation of Nazi views. His activities portray a shrewd, calculating, and vigilant promotion of an alien cause. The conclusion seems to us plain that when Knauer forswore allegiance to Hitler and the German Reich he swore falsely.[8]

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[8] The following finding of the District Court is a fair conclusion from this record:

> "The attachment of the defendant Knauer in the year 1931 to the aims and objects of Hitler's National Socialist movement, his allegiance and attachment to the Third Reich as manifested by his statements and his frequent use of the Nazi salute in public, his devotion to and promotion of the display of the swastika flag and ceremonies using it in symbolic pledge of fidelity to the Reich, his fierce concern over the good name and honor of the German race, his bitter and acrimonious denunciation of everything which interfered with or stood in the way of the fortunes of the German Reich, his belief in and advocacy of the German racial concept of duty and obligation of all Germans to the fatherland regardless of citizenship, his belief in and attachment to the principles and concepts of National Socialism, his espousal of the aims and objects of the German-American Bund and his active participation therein for the promotion of its aims and objects, his promotion and domination of the German-American Citizens Alliance to further the aims and objects of the Bund, his uninterrupted effort by word and deed to polit-

II. It is said, however, that the issue of fraud may not be tried in this case. An analogy is sought to be drawn to those cases where relief against a prior judgment, on the ground that perjured testimony was introduced at the trial, was denied. *United States* v. *Throckmorton,* 98 U. S. 61, 66. And see *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U. S. 399, 421. But that rule goes no further than to say that the issue of fraud can become *res judicata* in the judgment sought to be set aside. We need not consider the extent to which a decree of naturalization may constitute a final determination of issues of fact, the establishment of which Congress has made conditions precedent to naturalization.[9] Those facts relate

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ically activate our German-American people in the interests of the German Reich, his persistent efforts among German-Americans, by means of charitable programs, speeches and movie films, to revive in them a feeling of fidelity and loyalty to the German Reich, the assistance he rendered to the consular representatives of the Reich in the attainment of matters advancing German interests, his fervent devotion and blind attachment to the Fuehrer at a time when the German Reich was hostile to the United States, his lack of affection for or devotion to the United States, his cynical evaluation of his own American citizenship, as well as the evidence in its entirety, can be interpreted only as establishing, and I so find, that the defendant at the time he filed his petition for naturalization did not in good faith intend to renounce absolutely and forever all allegiance and fidelity to the German Reich, and at the time of his naturalization and at all times thereafter the defendant did not in fact renounce and abjure all allegiance and fidelity to the German Reich, but intended to retain and did retain allegiance and fidelity to the German government."

[9] At the time of Knauer's naturalization the Act provided:

"No alien shall be admitted to citizenship unless (1) immediately preceding the date of his petition the alien has resided continuously within the United States for at least five years and within the county where the petitioner resided at the time of filing his petition for at least six months, (2) he has resided continuously within the United States from the date of his petition up to the time of his admission to citizenship, and (3) during all the periods referred to in this subdivision he has behaved as a person of good moral character, attached to the principles of the Constitution of the United States, and well

to the past—to behavior and conduct. But the oath is in a different category. It relates to a state of mind and is a promise of future conduct. It is the final act by which an alien acquires the status of citizen. It requires forswearing of allegiance in good faith and with no mental reservations. The oath being the final step, no evidence is heard at that time. It comes after the matters in issue have been resolved in favor of the applicant for citizenship. Hence, no opportunity exists for the examiner or the judge to determine if what the new citizen swore was true, was in fact false. Hence, the issue of fraud in the oath cannot become *res judicata* in the decree sought to be set aside. For fraud in the oath was not in issue in the proceedings and neither was adjudicated nor could have been adjudicated.

Moreover, when an alien takes the oath with reservations or does not in good faith forswear loyalty and allegiance to the old country, the decree of naturalization is obtained by deceit. The proceeding itself is then founded on fraud. A fraud is perpetrated on the naturalization court. We have recently considered the broad powers of equity to set aside a decree for fraud practiced on the court which granted it. *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U. S. 238. The present suit is an equity suit. *Luria* v. *United States, supra,* pp. 27–28. But we need not consider in this case what the historic powers of equity might be in this situation. For Congress has provided that fraud is a basis for cancellation of certificates of natural-

disposed to the good order and happiness of the United States. At the hearing of the petition, residence in the county where the petitioner resides at the time of filing his petition, and the other qualifications required by this subdivision during such residence, shall be proved by the oral testimony of at least two credible witnesses, citizens of the United States, in addition to the affidavits required by this Act to be included in the petition." § 6 (b) of the Act of March 2, 1929, 45 Stat. 1512, 1513–1514 which replaced § 4, subdivision Fourth, a similar provision of the Act of June 29, 1906, 34 Stat. 596, 598.

ization in proceedings instituted by the United States.[10] The legislative history of that enactment shows that false swearing was one of the evils included in the statutory grounds for denaturalization.[11] That power was granted

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[10] By § 15 of the Act of June 29, 1906, 34 Stat. 601, it was provided:

"That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. . . ."

It was held in *United States* v. *Ness*, 245 U. S. 319, 325, that this statutory power to cancel certificates of naturalization is broader than that afforded in equity, independently of statute, to set aside judgments.

[11] H. Rep. No. 1789, 59th Cong., 1st Sess., p. 2:

"The conditions that have been revealed by special investigations of the frauds committed against the naturalization laws render wholly unnecessary any argument upon the necessity at this time of fully exercising all the authority in naturalization matters conferred by the Constitution upon Congress."

. . . . . .

"The worst and most glaring frauds have consisted in perjury, false impersonation, and the sale and use of false and counterfeit certificates of naturalization."

As stated by a sponsor of the measure on the floor of the House:

"The boon of American citizenship must not be cheapened by lax and unconventional methods of courts and public officers who administer the law, but once granted it should endure for all time. It is conferred by the Federal Constitution and by laws authorized by the Constitution. When citizenship is once legally granted, of course it can not be invalidated, and it ought not to be, but no one questions that it is within the power of the Government to provide for the cancellation of certificates of citizens that have been fraudulently obtained. A certificate tainted with fraud is in the sense of the law no certificate at all." 40 Cong. Rec. p. 7040.

The Court noted in *United States* v. *Ness*, 245 U. S. 319, 324, that "widespread frauds in naturalization," including "the prevalence of perjured testimony in cases of this character," led to the passage of this legislation.

to give added protection against fraud committed on the naturalization courts. *United States* v. *Ness,* 245 U. S. 319, 324, 327. Cancellation of a certificate on the grounds of fraud includes cancellation for falsely swearing that the applicant forswore allegiance to his native country. Though the making of a false oath be called intrinsic fraud (see *United States* v. *Throckmorton, supra*), it is within the reach of the statute.

We have no doubt of the power of Congress to provide for denaturalization on the ground of fraud. The Constitution grants Congress power "To establish an uniform Rule of Naturalization . . ." Article I, § 8. The power of denaturalization comes from that provision and the "necessary and proper" Clause in Article I, § 8. See *Tutun* v. *United States,* 270 U. S. 568, 578. We do not have here a case where, after an alien has been naturalized, Congress provides new grounds which are invoked for cancellation of his certificate. Fraud—the basis of revocation with which we are now concerned—was a statutory ground for denaturalization when Knauer took his oath. Moreover, we are not faced with the question of what limits there may be to conditions for denaturalization which Congress may provide. A certificate obtained by fraud is clearly within the reach of congressional power. As stated in *Johannessen* v. *United States,* 225 U. S. 227, 241: "An alien has no moral nor constitutional right to retain the privileges of citizenship if, by false evidence or the like, an imposition has been practiced upon the court, without which the certificate of citizenship could not and would not have been issued." And see *Luria* v. *United States, supra,* pp. 23–24; *United States* v. *Ness, supra,* p. 327. To hold otherwise would be an anomaly. It would in effect mean that where a person through concealment, misrepresentation or deceit perpetrated a fraud on the naturalization court, the United States would be

remediless to correct the wrong. That would indeed put a premium on the successful perpetration of frauds against the nation. We cannot conclude that Congress, which may withhold the right of naturalization (*Tutun* v. *United States, supra,* p. 578), is so powerless. We adhere to the prior rulings of this Court that Congress may provide for the cancellation of certificates of naturalization on the ground of fraud in their procurement and thus protect the courts and the nation against practices of aliens who by deceitful methods obtain the cherished status of citizenship here, the better to serve a foreign master.

Since fraud in the oath of allegiance which Knauer took is sufficient to sustain the judgment below, we do not reach the other questions which have been argued.

Affirmed.

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

MR. JUSTICE BLACK, concurring.

I am satisfied beyond all reasonable doubt, from the testimony and admissions of the petitioner himself, made in open court, that he had never at any time, either before or after his naturalization, deviated from his wholehearted allegiance to, and constant service of, the German Nazi Government.

I realize, as the dissent in this case emphasizes, the dangers inherent in denaturalizations. Had this judgment rested on the petitioner's mere philosophical or political beliefs, expressed or unexpressed, I should not concur in its affirmance. But petitioner's admissions as to his own conduct leave me in no doubt at all that he was, even in obtaining naturalization, serving the German Government with the same fanatical zeal which motivated

the saboteurs sent to the United States to wage war. I am unable to say that Congress is without constitutional power to authorize courts, after fair trials like this one, to cancel citizenship obtained by the methods and for the purposes shown by this record.

MR. JUSTICE RUTLEDGE, dissenting.

For reasons I have suggested elsewhere,[1] but which now are squarely involved, I cannot bring myself to concur in this judgment.

My concern is not for Paul Knauer. The record discloses that he has no conception of, much less attachment to, basic American principles or institutions. He was a thorough-going Nazi, addicted to philosophies altogether hostile to the democratic framework in which we believe and live. Further, he was an active promoter of movements directed to securing acceptance of those ideas here and incorporating them in our institutions. And in this case, by contrast with those of *Schneiderman* and *Baumgartner*,[2] it would be hard to say that the evidence would not sustain a finding that he falsely took the oath of allegiance or that he never in his heart renounced his prime fealty to Adolph Hitler and Nazi Germany. Nor, in my opinion, can it be thought unequal to supporting a conclusion that, from a time prior to his admission to citizenship in 1935 until at any rate the assault on Pearl Harbor, Knauer was in the active service of the Nazi regime, promoting its cause here, and also for a short time in Germany, as the object of his first loyalty.

If therefore in any case a naturalized citizen's right and status can be revoked, by the procedure followed here

[1] *Schneiderman* v. *United States*, 320 U. S. 118, concurring opinion at 165.

[2] See note 1; *Baumgartner* v. *United States*, 322 U. S. 665.

or perhaps at all, it would be in such a case as this. But if one man's citizenship can thus be taken away, so can that of any other. And even in this case it would be in large part for his political convictions and acts done openly in espousal of them. Not merely Knauer's rights, but those of millions of naturalized citizens in their status and all that it implies of security and freedom, are affected by what is done in this case. By the outcome they are made either second-class citizens or citizens having equal rights and equal security with others.

No native-born American's birthright could be stripped from him for such a cause or by such a procedure as has been followed here. Nor could he be punished with banishment. To suffer that great loss he must forfeit citizenship by some act of treason or felony and be adjudged guilty by processes of law consistent with all the great protections thrown around such trials. Not yet has attempt been made to do this otherwise. Nor in my opinion could it be done, except for some such cause or by any less carefully safeguarded procedure.

In no instance thus far has our system tolerated destruction of that right of the native-born, except by voluntary surrender, on account of convictions held, views expressed, or acts done in promoting their acceptance falling short of treason as defined in the Constitution [3] or conviction for felony. Nor has it thus far brought about that extinction by forms of trial other than those provided for such offenses. Moreover, even in such cases, although the penalty may be death or loss of the rights of citizenship, we have not yet imposed those penalties altogether foreign to our institutions, namely, deportation and exile. For one cause and one only have they been provided, namely, the loss of the naturalized citizen's status.

[3] Constitution, Art. III, § 3. See *Cramer* v. *United States*, 325 U. S. 1.

I do not find warrant in the Constitution for believing that it contemplates two classes of citizens, excepting only for two purposes. One is to provide how citizenship shall be acquired, Const., Art. I, § 8; Amend. XIV, § 1, the other to determine eligibility for the presidency. Const., Art. II, § 1. The latter is the only instance in which the charter expressly excludes the naturalized citizen from any right or privilege the native-born possesses.[4] *Luria* v. *United States*, 231 U. S. 9, 22. I do not think there is any other in which his status is, or can be made, inferior.

Congress, it is true, is empowered to lay down the conditions for admission of foreign-born persons to citizenship. In this respect it has wide authority. But it is not unlimited. Nor is Congress given power to take away citizenship once it is conferred, other than for some sufficient act of forfeiture taking place afterward. Naturalized citizens are no more free to become traitors or criminals than others and may be punished as they are when they commit the same offense. But any process which takes away their citizenship for causes or by procedures not applicable to native-born citizens places them in a separate and an inferior class. That dilemma is inescapable, though it is one not heretofore faced squarely. Unless it is the law that there are two classes of citizens, one superior, the other inferior, the status of no citizen can be annulled for causes or by procedures not applicable to all others.

To say that Congress can disregard this fact and create inequalities of status as between native and foreign-born citizens by attaching conditions to their admission, to be applied retroactively after that event, is only to say in

[4] Cf. Constitution, Art. I, § 3; Art. I, § 2, providing respectively that no person shall be a Senator who shall not have been nine years a citizen and, in the case of Representatives, seven years.

other words that Congress by using that method can create different, and inferior, classes of citizens. We have heretofore pointed out why citizens with strings attached to their citizenship, for its revocation, can be neither free nor secure in their status. *Schneiderman* v. *United States,* 320 U. S. 118, and concurring opinion at 165. All that is said there, in that respect, applies here or to any procedure by which citizenship may be annulled. In my opinion the power to naturalize is not the power to denaturalize. The act of admission must be taken as final, for any cause which may have existed at that time. Otherwise there cannot but be two classes of citizens, one free and secure except for acts amounting to forfeiture within our tradition; the other, conditional, timorous and insecure because blanketed with the threat that some act or conduct, not amounting to forfeiture for others, will be taken retroactively to show that some prescribed condition had not been fulfilled and be so adjudged. I do not think such a difference was contemplated when Congress was authorized to provide for naturalization and the terms on which it should be granted.

But if I may be wrong in this, certainly so drastic a penalty as denaturalization, with resulting deportation and exile and all the attendant consequences, should not be imposed by any procedure less protective of the citizen's most fundamental right, comprehending all others, than must be employed to take away the native-born citizen's status or the lesser rights of the foreign-born citizen. If strings may be attached to citizenship and pulled retroactively to annul it, at the least this should be done only by those forms of proceeding most fully surrounded with the constitutional securities for trial which are among the prized incidents of citizenship. It is altogether anomalous that those safeguards are thrown about the foreign-born

citizen when, for some offense, his liberty even for brief periods is at stake, but are withdrawn from him when all that gives substance to that freedom is put in jeopardy.

The right of citizenship is the most precious of all. The penalty of denaturalization is always harsh. Often it is more drastic than any other. It is also unique for this situation. For the required measure of security, the native-born citizen can be deprived of his status only by the rigidly safeguarded trial for treason or for conviction of a criminal offense which brings loss of rights as a citizen. To those procedures, with the same penalties and for the same causes, the foreign-born citizen is subject; but also by them he is protected. He should not be less secure when it is sought to annul his citizenship than when the effort is to bring about its forfeiture. Nor, in either event, should his procedural safeguards be less than when the same consequence, in substance, is inflicted upon the citizen native born.

The procedure prescribed for and followed in this case was not in accord with those standards. I think nothing less is adequate, or consistent with the constitutional status of citizenship, for the purpose of taking it away.

If this means that some or even many disloyal foreign-born citizens cannot be deported, it is better so than to place so many loyal ones in inferior status. And there are other effective methods for dealing with those who are disloyal, just as there are for such citizens by birth.

Accordingly, I would reverse the judgment.

MR. JUSTICE MURPHY joins in this dissent.

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ANDERSON ET AL. *v.* MT. CLEMENS POTTERY CO.

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

No. 342. Argued January 29, 1946.—Decided June 10, 1946.

Respondent produces pottery for interstate commerce. Its employees enter the plant and punch time clocks during a period of 14 minutes before the regular starting time for productive work. They walk from the time clocks to their places of work within the plant and make various preparations for the start of productive work. After the regular quitting time, they were allowed a 14-minute period to punch out and leave the plant. They were compensated for their time from the next even quarter hour after punching in until the next even quarter hour prior to punching out. Similar provision was made for punching out and in before and after the lunch hour. Thus an employee might be credited with as much as 56 minutes per day less than the time recorded by the time clocks. Employees brought suit under § 16 (b) of the Fair Labor Standards Act to recover amounts allegedly owing to them under the overtime provisions of § 7 (a) of the Act. *Held:*

1. An employee who brings suit under § 16 (b) for unpaid minimum wages or overtime compensation, together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated. P. 686.

2. This burden is met by proof that he has in fact performed work for which he was not properly compensated and by sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. P. 687.

3. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. P. 687.

4. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate. Pp. 688, 693.

5. An employer who has not kept the records required by § 11 (c) cannot be heard to complain that damages assessed against him lack the precision of measurement that would be possible had he kept such records. P. 688.

6. The findings of a special master on the purely factual issue of the amount of actual productive work performed, being supported by substantial evidence and not clearly erroneous, should have been accepted by the District Court; and it erred in rejecting these findings and creating a formula of compensation based on a contrary view. Rule 53 (e) (2) of the Federal Rules of Civil Procedure. P. 689.

7. Since there was no requirement that an employee check in or be on the premises at any particular time during the 14-minute interval, the time clock records could not form the sole basis of determining the statutory workweek. Pp. 689–690.

8. Time necessarily spent by the employees in walking to work on the employer's premises is working time within the scope of § 7 (a), and must be compensated accordingly, regardless of contrary custom or contract. However, application of the *de minimis* rule is not precluded where the minimum walking time is such as to be negligible. Pp. 691–692.

9. Time necessarily spent by employees in preliminary activities after arriving at their places of work—such as putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger cots, preparing the equipment for productive work, turning on switches for lights and machinery, opening windows, and assembling and sharpening tools—must be included within the workweek and compensated accordingly. However, application of the *de minimis* rule to insubstantial and insignificant periods of time spent in such activities is not precluded. Pp. 692–693.

10. Unless the employer can provide accurate estimates as to the amount of time spent in such activities in excess of the productive working time, it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence. P. 693.

11. As to waiting time before and after the shift periods, the findings of the special master, that the employees had not proved that they were in fact forced to wait or that they were not free to spend such time on their own behalf, were supported by substantial evidence and must be sustained. P. 694.

149 F. 2d 461, reversed.

Employees brought suit in the District Court against their employer to recover sums claimed to be due them under the Fair Labor Standards Act. The District Court

gave judgment in favor of the employees. 60 F. Supp. 146. The Circuit Court of Appeals reversed and ordered the suit dismissed. 149 F. 2d 461. This Court granted certiorari. 326 U. S. 706. *Reversed and remanded,* p. 694.

Edward Lamb argued the cause for petitioners. With him on the brief was *Lee Pressman.*

Frank E. Cooper and *Bert V. Nunneley* argued the cause and filed a brief for respondent.

Solicitor General McGrath, William S. Tyson and *Bessie Margolin* filed a brief for the Wage and Hour Administrator, United States Department of Labor, as *amicus curiae,* in support of petitioners.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Several important issues are raised by this case concerning the proper determination of working time for purposes of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*

The Mt. Clemens Pottery Company, the respondent, employs approximately 1,200 persons at its pottery plant at Mt. Clemens, Michigan; about 95% of them are compensated upon a piece work basis. The plant covers more than eight acres of ground and is about a quarter of a mile in length. The employees' entrance is at the northeast corner. Immediately adjacent to that entrance are cloak and rest rooms where employees may change to their working clothes and place their street clothes in lockers. Different shifts begin at different times during the day, with whistles frequently indicating the starting time for productive work. The whistles which blow at 6:55 and 7:00 a. m., however, are the most commonly used. An

interval of 14 minutes prior to the scheduled starting time for each shift permits the employees to punch time clocks, walk to their respective places of work and prepare for the start of productive work. Approximately 200 employees use each time clock during each 14-minute period and an average of 25 employees can punch the clock per minute. Thus a minimum of 8 minutes is necessary for the employees to get by the time clock. The employees then walk to their working places along clean, painted floors of the brightly illuminated and well ventilated building. They are free to take whatever course through the plant they desire and may stop off at any portion of the journey to converse with other employees and to do whatever else they may desire. The minimum distances between time clocks and working places, however, vary from 130 feet to 890 feet, the estimated walking time ranging from 30 seconds to 3 minutes. Some of the estimates as to walking time, however, go as high as 6 to 8 minutes. Upon arriving at their places of work, the employees perform various preliminary duties, such as putting on aprons and overalls, removing shirts, taping or greasing their arms, putting on finger cots, preparing the equipment for productive work, turning on switches for lights and machinery, opening windows and assembling and sharpening tools. Such activities, it is claimed, consume 3 or 4 minutes at the most. The employees are also allowed a 14-minute period at the completion of the established working periods to leave the plant and punch out at the time clocks.

Working time is calculated by respondent on the basis of the time cards punched by the clocks. Compensable working time extends from the succeeding even quarter hour after employees punch in to the quarter hour immediately preceding the time when they punch out. Thus an employee who punches in at 6:46 a. m., punches out at 12:14 p. m., punches in again at 12:46 p. m. and finally

punches out at 4:14 p. m. is credited with having worked the 8 hours between 7 a. m. and 12 noon and between 1 p. m. and 4 p. m.—a total of 56 minutes less than the time recorded by the time clocks.

Seven employees and their local union, on behalf of themselves and others similarly situated, brought this suit under § 16 (b) of the Fair Labor Standards Act, alleging that the foregoing method of computation did not accurately reflect all the time actually worked and that they were thereby deprived of the proper overtime compensation guaranteed them by § 7 (a) of the Act. They claimed *inter alia* that all employees worked approximately 56 minutes more per day than credited by respondent and that, in any event, all the time between the hours punched on the time cards constituted compensable working time.

The District Court referred the case to a special master. After hearing testimony and making findings, the master recommended that the case be dismissed since the complaining employees "have not established by a fair preponderance of evidence" a violation of the Act by respondent. He found that the employees were not required to, and did not, work approximately 56 minutes more per day than credited to them. He further found that the employees "have not sustained their burden to prove that all the time between the punched entries on the clock was spent in working and that conversely none of the time in advance of the starting time spent by employees arriving early was their own time." Production work, he concluded, "did not regularly commence until the established starting time; and, if in some instances it was commenced shortly prior thereto, it was counterbalanced by occasions when it was started after the hour and by admitted occasions when it was stopped several minutes before quitting time."

As to the time between the punching of the clocks and the start of the productive work, the master made the following determinations:

(1) The time spent in walking from the time clocks to the places of work was not compensable working time in view of the established custom in the industry and in respondent's plant to that effect.

(2) The time consumed in preliminary duties after arriving at the places of work was not compensable here since the employees had produced no reliable evidence from which the amount of such work could be determined with reasonable definiteness.

(3) The time spent in waiting before and after the shift periods was not compensable since the employees failed to prove that if they came in early enough to have waiting time they were required to do so or were not free to spend such time on their own behalf.

The District Court agreed "in the main" with the master's findings and conclusions with one exception. It felt that the evidence demonstrated that practically all of the employees had punched in, walked to their places of work and were ready for productive work at from 5 to 7 minutes before the scheduled starting time, "and it does not seem probable that with compensation set by piece work, and the crew ready, that these employees didn't start to work immediately." The court accordingly established a formula, applicable to all employees, for computing this additional time spent in productive work. Under the formula, 5 minutes were allowed for punching the clock and 2 minutes for walking from the clock to the place of work—a total of 7 minutes which were not to be considered as working time. All minutes over those 7 as shown by the time cards in the morning and all over 5 at the beginning of the afternoon were to be computed as part of the hours worked. The court found no evidence of productive work

after the scheduled quitting time at noon or night. In other words, working time under this formula extended from the time punched in the morning, less 7 minutes, to the scheduled quitting time at noon and from the time punched at the beginning of the afternoon, less 5 minutes, to the scheduled quitting time for the day. No reason was given for the 2-minute differential between the morning and afternoon punch-ins. The use of this formula led the District Court to enter a judgment against respondent in the amount of $2,415.74 plus costs. 60 F. Supp. 146.

Only the respondent appealed. The Sixth Circuit Court of Appeals made a careful examination of the master's findings and conclusions, holding that they were all supported by substantial evidence and were not clearly erroneous. It stated that the District Court erred in failing to accept the finding of the master that productive work did not actually start until the scheduled time and that the formula devised for computing additional productive work was unsustainable because based upon surmise and conjecture. The Circuit Court of Appeals further held that the burden rested upon the employees to prove by a preponderance of the evidence that they did not receive the wages to which they were were entitled under the Act and to show by evidence rather than conjecture the extent of overtime worked, it being insufficient for them merely to offer an estimated average of overtime worked. The cause of action accordingly was ordered to be dismissed. 149 F. 2d 461.

But we believe that the Circuit Court of Appeals, as well as the master, imposed upon the employees an improper standard of proof, a standard that has the practical effect of impairing many of the benefits of the Fair Labor Standards Act. An employee who brings suit under § 16 (b) of the Act for unpaid minimum wages or unpaid overtime compensation, together with liquidated dam-

ages, has the burden of proving that he performed work for which he was not properly compensated. The remedial nature of this statute and the great public policy which it embodies, however, militate against making that burden an impossible hurdle for the employee. Due regard must be given to the fact that it is the employer who has the duty under § 11 (c) of the Act to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence

to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate. See Note, 43 Col. L. Rev. 355.

The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of § 11 (c) of the Act. And even where the lack of accurate records grows out of a bona fide mistake as to whether certain activities or non-activities constitute work, the employer, having received the benefits of such work, cannot object to the payment for the work on the most accurate basis possible under the circumstances. Nor is such a result to be condemned by the rule that precludes the recovery of uncertain and speculative damages. That rule applies only to situations where the fact of damage is itself uncertain. But here we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute. The damage is therefore certain. The uncertainty lies only in the amount of damages arising from the statutory violation by the employer. In such a case "it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts." *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 563. It is enough under these circumstances if there is a basis for a reasonable inference as to the extent of the damages. *Eastman Kodak Co.* v. *Southern Photo Co.*, 273 U. S. 359, 377–379; *Palmer* v. *Connecticut R. Co.*, 311 U. S. 544, 560–561; *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 263–266.

We therefore turn to the facts of this case to determine what the petitioning employees have proved and are entitled to in light of the foregoing considerations:

(1) On the issue as to the extent of the actual productive work performed, we are constrained to agree with the special master that it began and ended at the scheduled hours. This was purely a factual issue. The master made his findings in this respect through the weighing of conflicting evidence, the judging of the reliability of witnesses and the consideration of the general conduct of the parties to the suit. The master thereby concluded that productive work did not begin before the scheduled hours except in a few instances which were counterbalanced by occasions when work began after the scheduled hours or ended before the scheduled cessation of productive work. Our examination of the record leads us to acquiesce in these findings since they are supported by substantial evidence and are not clearly erroneous. And the court below correctly held that the District Court erred in failing to accept these findings and in creating a formula of compensation based upon a contrary view. Rule 53 (e) (2) of the Federal Rules of Civil Procedure. See *Tilghman* v. *Proctor,* 125 U. S. 136, 149–150; *Davis* v. *Schwartz,* 155 U. S. 631, 636–637.

(2) The employees did not prove that they were engaged in work from the moment when they punched in at the time clocks to the moment when they punched out. They were required to be ready for work at their benches at the scheduled starting times. They were given 14-minute periods in which to punch the time clocks, walk to the places of work and prepare for productive labors. But there was no requirement that an employee check in or be on the premises at any particular time during that 14-minute interval. As noted by the District Court, there was no evidence "that if the employee didn't get there by 14 minutes to seven he was fired and there is much testimony to prove that stragglers came in as late as one minute to seven." 60 F. Supp. at 149. Indeed, it would have been impossible for all members of a par-

ticular shift to be checked in at the same time in view of the rate at which the time clocks were punched. The first person in line at the clock would be checked in at least 8 minutes before the last person. It would be manifestly unfair to credit the first person with 8 minutes more working time than credited to the last person due to the fortuitous circumstance of his position in line.

Moreover, it is generally recognized that time clocks do not necessarily record the actual time worked by employees. Where the employee is required to be on the premises or on duty at a different time, or where the payroll records or other facts indicate that work starts at an earlier or later period, the time clock records are not controlling. Only when they accurately reflect the period worked can they be used as an appropriate measurement of the hours worked. In this case, however, the evidence fails to indicate that the time clock records did so mirror the working time. They did not show the time during which the employees were compelled to be on the premises or at any prescribed place of work. They thus could not form the sole basis of determining the statutory workweek. See Interpretative Bulletin No. 13, paragraphs 2 and 3, issued by the Administrator of the Wage and Hour Division, U. S. Department of Labor; Wage and Hour Manual, Cumulative Edition, 1944–1945, p. 234.

(3) The employees did prove, however, that it was necessary for them to be on the premises for some time prior and subsequent to the scheduled working hours. The employer required them to punch in, walk to their work benches and perform preliminary duties during the 14-minute periods preceding productive work; the same activities in reverse occurred in the 14-minute periods subsequent to the completion of productive work. Since the statutory workweek includes all time during which

an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace, the time spent in these activities must be accorded appropriate compensation.

No claim is here made, though, as to the time spent in waiting to punch the time clocks and we need not explore that aspect of the situation. See *Cameron* v. *Bendix Aviation Corp.*, 65 F. Supp. 510. But the time necessarily spent by the employees in walking to work on the employer's premises, following the punching of the time clocks, was working time within the scope of § 7 (a). *Ballard* v. *Consolidated Steel Corp.*, 61 F. Supp. 996; *Ulle* v. *Diamond Alkali Co.*, 8 WHR 1042. Such time was under the complete control of the employer, being dependent solely upon the physical arrangements which the employer made in the factory. Those arrangements in this case compelled the employees to spend an estimated 2 to 12 minutes daily, if not more, in walking on the premises. Without such walking on the part of the employees, the productive aims of the employer could not have been achieved. The employees' convenience and necessity, moreover, bore no relation whatever to this walking time; they walked on the employer's premises only because they were compelled to do so by the necessities of the employer's business. In that respect the walking time differed vitally from the time spent in traveling from workers' homes to the factory. *Dollar* v. *Caddo River Lumber Co.*, 43 F. Supp. 822; *Walling* v. *Peavy-Wilson Lumber Co.*, 49 F. Supp. 846. Cf. *Commissioner* v. *Flowers*, 326 U. S. 465. It follows that the time spent in walking to work on the employer's premises, after the time clocks were punched, involved "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer

and his business." *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590, 598; *Jewell Ridge Corp.* v. *Local,* 325 U. S. 161, 164–166. Work of that character must be included in the statutory workweek and compensated accordingly, regardless of contrary custom or contract.

But under the conditions prevalent in respondent's plant, compensable working time was limited to the minimum time necessarily spent in walking at an ordinary rate along the most direct route from time clock to work bench. Many employees took roundabout journeys and stopped off en route for purely personal reasons. It would be unfair and impractical to compensate them for doing that which they were not required to do. Especially is this so in view of the fact that precise calculation of the minimum walking time is easily obtainable in the ordinary situation.

We do not, of course, preclude the application of a *de minimis* rule where the minimum walking time is such as to be negligible. The workweek contemplated by § 7 (a) must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved. The *de minimis* rule can doubtless be applied to much of the walking time involved in this case, but the precise scope of that application can be determined only after the trier of facts makes more definite findings as to the amount of walking time in issue.

(4) The employees proved, in addition, that they pursued certain preliminary activities after arriving at their places of work, such as putting on aprons and overalls,

removing shirts, taping or greasing arms, putting on finger cots, preparing the equipment for productive work, turning on switches for lights and machinery, opening windows and assembling and sharpening tools. These activities are clearly work falling within the definition enunciated and applied in the *Tennessee Coal* and *Jewell Ridge* cases. They involve exertion of a physical nature, controlled or required by the employer and pursued necessarily and primarily for the employer's benefit. They are performed solely on the employer's premises and are a necessary prerequisite to productive work. There is nothing in such activities that partakes only of the personal convenience or needs of the employees. Hence they constitute work that must be accorded appropriate compensation under the statute. See *Walling* v. *Frank,* 62 F. Supp. 261; *Philpott* v. *Standard Oil Co.,* 53 F. Supp. 833. Here again, however, it is appropriate to apply a *de minimis* doctrine so that insubstantial and insignificant periods of time spent in preliminary activities need not be included in the statutory workweek.

The master did not deny that such activities must be included within the employees' compensable workweek or that the evidence demonstrated that the employees did in fact engage in such activities. He denied recovery solely because the amount of time taken up by the activities and the proportion of it spent in advance of the established starting time had not been proved by the employees with any degree of reliability or accuracy. But, as previously noted, the employees cannot be barred from their statutory rights on such a basis. Unless the employer can provide accurate estimates, it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence as to the amount of time spent in these activities in excess of the productive working time.

(5) As to waiting time before and after the shift periods, the special master found that the employees had not proved that they were in fact forced to wait or that they were not free to spend such time on their own behalf. This was also a question of fact and the presence of substantial evidence to support the master's finding precludes any different result.

Thus we remand the case for the determination of the amount of walking time involved and the amount of preliminary activities performed, giving due consideration to the *de minimis* doctrine and calculating the resulting damages under the Act. We have considered the other points raised by the petitioners but find no errors.

Reversed and remanded.

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

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

The opinion of the Court in this case has gone far toward affirming the Circuit Court of Appeals. I believe it should go the rest of the way.

This Court has agreed largely with the Court of Appeals in holding that the District Court was in error in not accepting the master's findings of fact in the face of Rule 53 (e) (2) of the Federal Rules of Civil Procedure which requires that: "In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous." 28 U. S. C. following § 723 (c).

This Court, accordingly, agrees that the trial court must accept as findings of fact in this case that the productive work performed by the employees began and ended at the regularly scheduled hours of work, on the even quarter-hours; that the time clocks were not controlling in

establishing the exact minute of starting or stopping work; that the time spent in punching time clocks did not constitute compensable work; and that the "waiting time," if any, before and after the shift periods was not compensable time.

This Court also agrees that the District Court was in error in creating a formula of compensation not in accordance with the findings of the master.

The only questions remaining are whether the moments spent in walking from the time clocks to the employees' respective places of productive work within the plant, and the minutes sometimes spent by some of the employees in miscellaneous "preliminary activities" before the scheduled starting times, must be added, as a matter of law "regardless of contrary custom or contract," to the compensatory time of "the statutory week," and, if so, how such additional time can be proved to have been so used in order to make it the basis for additional compensation.

The master determined that the time spent in walking from the time clocks to the places of work was not compensable working time in view of the established custom in the industry and in the plant. Moreover, the employees were free to take whatever course through the plant they desired and to stop off at any point to talk with other employees or to do whatever else they liked. Some workers came to the time clocks as late as one minute before the time to reach their place of productive work. The so-called "preliminary activities" are identified in this case as those of "putting on aprons and overalls, removing shirts, taping or greasing their arms, putting on finger cots, preparing the equipment for productive work, turning on switches for lights and machinery, opening windows and assembling and sharpening tools." The master found that the employees had not offered proof of the time used for these purposes with a sufficient degree

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of reliability or accuracy for it to become the basis for recovery of overtime compensation. The employer would have still greater difficulty in keeping an accurate record of the time spent by each employee in such activities. These activities are of such a nature that the knowledge of them and the time spent in doing them rests particularly with the employees themselves. Such activities are of quite a different character from those made the basis of compensable time in the coal mine portal-to-portal cases. *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590; *Jewell Ridge Corp.* v. *Local,* 325 U. S. 161.

Some idea of the shortness of the time and the smallness of the compensation involved in the "preliminary activities," in comparison with the cumbersomeness of any system for accurately recording the time spent in doing them, is apparent from the formula to which the District Court resorted in attempting to reach its solution of the difficulty. Under that formula, for example, the District Court found no basis for compensation for such activities after the scheduled quitting time. Compensable time spent in such activities was limited to a short period before the scheduled hours of beginning productive work in the morning and again on resuming work after lunch. Employees were allowed, or encouraged, to come to the plant 14 minutes ahead of the quarter hour at which their scheduled productive work began. The District Court estimated that, on an average, seven minutes should be allowed, each morning, for punching a time clock and walking from it to the employee's place of productive work. As to the "walking time" the court said, "the preparation even after punching the clock wouldn't take more than one or one and a half minutes and to the farthest point in the plant from the time clock wouldn't take more than 2 minutes." 60 F. Supp. 146, 149. If an employee came to the plant 14 minutes ahead

of time, this left a maximum of seven minutes, plus "walking time," as the basis for a compensatory claim. The compensatory time in many cases would be much less. Similarly, under the District Court formula, employees returning to work after lunch were estimated to consume five minutes in punching the clock and walking to their places of productive work. This would leave a maximum of nine minutes, plus "walking time." At that hour of the day the workers already would be in their work clothes and there rarely would be more than a minute or two required for the preliminary activities for which compensation was claimed.

The amounts at issue, therefore, might not average as much as five to ten minutes a day a person and would not apply at all to many of the employees. None of this time would have been spent at productive work. The futility of requiring an employer to record these minutes and the unfairness of penalizing him, for failure to do a futile thing, by imposing arbitrary allowances for "overtime" and liquidated damages is apparent.

While conditions vary widely and there may be cases where time records of "preliminary activities" or "walking time" may be appropriate, yet here we have a case where the obvious, long established and simple way to compensate an employee for such activities is to recognize those activities in the rate of pay for the particular job. These items are appropriate for consideration in collective bargaining.

To sustain the position of the Court in requiring these additional moments to be recorded and computed as overtime, it is necessary to hold that Congress, in using the word "workweek," meant to give that word a statutory meaning different from its commonly understood reference to the working hours between "starting" and "quitting" time—or from "whistle to whistle." There is no evidence

that Congress meant to redefine this common term and to set aside long established contracts or customs which had absorbed in the rate of pay of the respective jobs recognition of whatever preliminary activities might be required of the worker by that particular job. For example, if the plant be one located at an inconvenient place, or if the workers have to change into working clothes at the plant, or have to grease or tape their arms before going to work, these are items peculiar to the job, and compensation for them easily can be made in the rate of pay per hour, per week or per piece, and all special stop-watch recording of them eliminated.

In interpreting "workweek" as applied to the industries of America, it is important to consider the term as applicable not merely to large and organized industries where activities may be formalized and easily measured on a split-second basis. The term must be applied equally to the hundreds of thousands of small businesses and small plants employing less than 200, and often less than 50 workers, where the recording of occasional minutes of preliminary activities and walking time would be highly impractical and the penalties of liquidated damages for a neglect to do so would be unreasonable. Such a universal requirement of recording would lead to innumerable unnecessary minor controversies between employers and employees. "Workweek" is a simple term used by Congress in accordance with the common understanding of it. For this Court to include in it items that have been customarily and generally absorbed in the rate of pay but excluded from measured working time is not justified in the absence of affirmative legislative action.

For these reasons, I believe that the judgment of the Court of Appeals should be affirmed.

UNITED STATES *v.* ANDERSON.

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

No. 447. Argued March 26, 1946.—Decided June 10, 1946.

1. In a criminal prosecution under § 11 of the Selective Training and Service Act, for refusal of the defendant to submit to induction into the armed forces, the venue is properly laid in the judicial district where the act of refusal occurred, rather than in the district where the draft board which issued the order is located. P. 704.
2. In a prosecution under § 11 of the Selective Training and Service Act for refusal to submit to induction, a judgment of the District Court sustaining a demurrer to the indictment on the ground of improper venue is appealable directly to this Court under the Criminal Appeals Act. Pp. 700–702.

60 F. Supp. 649, reversed.

A demurrer to an indictment of the appellee for a violation of the Selective Training and Service Act was sustained by the District Court. 60 F. Supp. 649. The Government appealed directly to this Court under the Criminal Appeals Act. *Reversed,* p. 706.

Nathan T. Elliff argued the cause for the United States. With him on the brief were *Solicitor General McGrath* and *Robert S. Erdahl.*

No appearance for appellee.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

On the merits the issue is narrow, namely, whether in a criminal prosecution under § 11 of the Selective Training and Service Act, 54 Stat. 885, 894, 50 U. S. C. App. § 311, for refusal to submit to induction, the venue is properly laid in the judicial district where the act of refusal occurred

rather than in the district where the draft board which issued the order is located.

The facts in the case are simple. A draft board in the City of Spokane, Washington, had jurisdiction over appellee. He obeyed an order to report for induction issued by this board and, with others selected, went from Spokane to Fort Lewis, Washington. At Fort Lewis he refused to take the oath of induction unless assured that Army regulations requiring vaccination would be waived. The assurance was refused. He was not inducted and returned to Spokane. Later he was indicted in the District Court for the Western District of Washington, where Fort Lewis is located, for his refusal to submit to induction.

Appellee demurred to the indictment. One ground was that the court had "no jurisdiction of the defendant or the subject matter of the action." The District Court took judicial notice that, although Fort Lewis was within its territorial jurisdiction, the City of Spokane was located within the Eastern District of Washington. Believing the proper venue was the district where the draft board was located, the court concluded that in these circumstances it had no jurisdiction over the offense. Accordingly, it sustained the demurrer.[1] 60 F. Supp. 649.

The United States has appealed directly to this Court under the Criminal Appeals Act.[2] We postponed determination of our jurisdiction to the hearing on the merits.

The Criminal Appeals Act permits a direct appeal by the United States from district courts in criminal cases:

> "From a decision or judgment quashing, setting aside, or sustaining a demurrer or plea in abatement

[1] Subsequently on rehearing the District Court again sustained the demurrer on the ground that "this court has no jurisdiction of the defendant, nor of the subject matter of this action."

[2] 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.

> to any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded."

We think the Government is correct in availing itself of the right to appeal. Ordinarily when a district court sustains a demurrer to an indictment on the ground of improper venue the Government may appeal directly to this Court. Compare *United States* v. *Johnson,* 53 F. Supp. 596, with *United States* v. *Johnson,* 323 U. S. 273; *United States* v. *Lombardo,* 228 F. 980, with *United States* v. *Lombardo,* 241 U. S. 73; see *United States* v. *Freeman,* 239 U. S. 117; *United States* v. *Midstate Horticultural Co.,* 306 U. S. 161. This is true at any rate where the statute itself contains a venue provision. Cf., however, *United States* v. *Johnson, supra.*

Section 11 of the Selective Training and Service Act [3] provides that offenses such as the one with which appellee

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[3] Section 11 of the Selective Training and Service Act of 1940 (54 Stat. 894, 50 U. S. C. App. § 311) provides:

> "Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, *or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations*

was charged shall be tried "in the district court of the United States having jurisdiction thereof." [4] The District Court determined that it did not have "jurisdiction" of the offense. In doing so it necessarily construed the Act.[5] For in this case, as in *United States* v. *Midstate Horticultural Co., supra,* the statute under which the indictment was returned "provides expressly for the jurisdiction over offenses created by it . . . ." [6]

Accordingly this Court has jurisdiction of the appeal. We therefore pass to consideration of the merits.

The "jurisdictional" provision in § 11 is apparently derived from the Selective Draft Act of 1917, 40 Stat. 76.[7]

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made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, 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, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. . . ." (Emphasis added.)

[4] The Government suggests that this is not a "mere venue provision" but "prescribes a non-waivable territorial jurisdiction limitation." We need not decide that question in this case.

[5] This is true, even though the District Court looked to the regulations promulgated under the Act as aids in interpretation. To what sources a court may go for its conclusions is not important, for purposes of the Criminal Appeals Act, so long as the end result is a construction of the statute.

[6] *United States* v. *Midstate Horticultural Co.,* 306 U. S. 161, 163, note 2. That case turned on a not very dissimilar provision. *Id.* at 164–165. Cf. note 4.

[7] No discussion of the provision is to be found in the legislative history of the Selective Training and Service Act. The bills introduced in the Senate and the House contained the same language employed in the Act as it was finally passed. S. 4164, 76th Cong., 3d Sess., introduced at 86 Cong. Rec. 8680; H. R. 10132, 76th Cong., 3d Sess., introduced at 86 Cong. Rec. 8908.

Section 6 of that statute provided that those charged with offenses under or against the Act "shall, if not subject to military law, be guilty of a misdemeanor, and *upon conviction in the district court of the United States having jurisdiction thereof,* be punished by imprisonment for not more than one year . . . ." (Emphasis added.) The legislative history of the 1917 Act shows that the bills originally introduced in the Senate and House of Representatives read somewhat differently. The language was "upon conviction in the proper district court of the United States." However, the Committee on Military Affairs of the House of Representatives recommended the change in phraseology,[8] and both the House and the Senate accepted the change.[9]

There is nothing in either the statute or the legislative history to show an intention on the part of Congress to depart from the Sixth Amendment's command that trials shall be in the "State and district wherein the crime shall have been committed . . . ." Exactly the contrary was the purpose and effect of the provision.

Since the statute does not indicate where Congress considered the place of committing the crime to be, compare *Armour Packing Co.* v. *United States,* 209 U. S. 56, with *United States* v. *Johnson, supra,* the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it. Cf. *United States* v. *Bowman,* 260 U. S. 94, 97–98.

Although Anderson reported to Fort Lewis in accordance with the draft board's order and, so far as appears,

[8] H. R. Rep. No. 17, 65th Cong., 1st Sess., 1.

[9] The House of Representatives passed the bill with the provision as recommended by the Committee on Military Affairs. The Senate passed it with the provision in its original form but subsequently a conference committee adopted the House version. H. R. Rep. No. 49, 65th Cong., 1st Sess.

observed it in every other respect except the final step of taking the oath and thus submitting to induction, cf. *Estep* v. *United States*, 327 U. S. 114; *Billings* v. *Truesdell*, 321 U. S. 542; *Falbo* v. *United States*, 320 U. S. 549, the District Court concluded that the Act, together with the regulations, "clearly fixes the jurisdiction of the courts in reference to violations such as here involved, as being in the place where the local draft board is located." It supported this conclusion by inference from various regulations.[10]

We think the District Court was in error. Nothing in the Act apart from § 11, or in the regulations relied on, even purports to deal with venue or jurisdiction for the trial of violations, or justifies an inference that any effort was made to fix the place for all such trials in the district where the draft board is located.[11] We need not inquire how far this might have been done, if attempted. But obviously, in view of the Sixth Amendment's provision, no such over-all effort could be effective as to any violation taking place outside that district. The constitutional

[10] The regulations upon which the District Court relied in part, with special emphasis on § 613.14, are not pertinent. As the Government says, they relate "to the performance of the administrative functions of the Selective Service System and are not directed in any sense to the question of venue" or jurisdiction of the courts to try offenses arising under the Act.

The District Court also thought some support for its ruling could be derived from the decisions in *United States* v. *Collura*, 139 F. 2d 345, and *United States* v. *Van Den Berg*, 139 F. 2d 654, although not regarding either as directly in point.

[11] It was noted in the petition for rehearing in the District Court, however, that the Department of Justice in 1942 had instructed United States Attorneys that, in cases of failure to report for induction, "venue is in the district where the subject was ordered to report," apparently without regard to whether he had ever been present physically there.

specification is geographic; and the geography prescribed is the district or districts [12] within which the offense is committed. This may or may not be the place where the defendant resides; where the draft board is located; or where the duty violated would be performed, if performed in full. The places of residence,[13] of the draft board's location, of final and complete performance,[14] all may be situated in districts different from that where the criminal act is done. When they so differ, it is the latter, not any of the former, which determines the jurisdiction.[15]

It is, of course, necessary in order to decide where the crime is committed to ascertain what duty it was, the failure to perform which constitutes the crime, and also what acts of the defendant constituted the violation. Difficulties at times arise in these respects, especially where the crime consists merely in omitting to do something which is commanded to be done.[16]

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[12] Within the doctrine of continuing offenses, as to which trial constitutionally may be had in one or another of the districts in which the offense is carried on. *Armour Packing Co.* v. *United States,* 209 U. S. 56; cf. *United States* v. *Johnson,* 323 U. S. 273.

[13] Cf. *Haas* v. *Henkel,* 216 U. S. 462; *Andrade* v. *United States,* 16 F. 2d 776; *United States* v. *Jordan,* 22 F. 2d 702; *United States* v. *Mayer,* 22 F. 2d 827.

[14] Compare the cases holding that when an omission to act is the crime, the venue is the jurisdictional locality where the act should have been performed, e. g., *Regina* v. *Milner,* 2 Car. & K. 309, 175 Eng. Rep. 128; *New York Cent. & H. R. R. Co.* v. *United States,* 166 F. 267, 269; *State* v. *Yocum,* 182 Ind. 478, 106 N. E. 705; *State* v. *Brewster,* 87 N. J. L. 75, 93 A. 189; *State* v. *Peabody,* 25 R. I. 544, 56 A. 1028; 1 Bishop, New Criminal Procedure (2d ed.) § 53 (5). See *United States* v. *Lombardo,* 241 U. S. 73; *Rumely* v. *McCarthy,* 250 U. S. 283; *United States* v. *Van Den Berg,* 139 F. 2d 654, 656.

[15] *Haas* v. *Henkel,* 216 U. S. 462.

[16] Cf. authorities cited in note 14.

In this case, however, the problem is not difficult. For the duty was clear and precise, as were the place of performance and the place of refusal to perform; and the two places were identical.

The duty was to submit to induction. In the facts here, it was to take the oath. The place where this was required to be done was Fort Lewis and nowhere else. The place where appellee refused, flatly and unequivocally, to take it and thereby to submit to induction was likewise Fort Lewis. Until that refusal, as the Government says, he had violated no provision of the law or of any regulation. It was his right under the *Falbo, Billings* and *Estep* decisions to exhaust the entire administrative process up to the final step before induction, as he did. Then for the first time he declined to go forward as he was required to do. This refusal was his crime. It took place at Fort Lewis. The District Court accordingly had jurisdiction.

We express no opinion concerning whether appellee's continued failure, after returning to Spokane, to take the oath would have conferred jurisdiction within that district under the idea of continuing offense. Nor need we express views concerning any other situation not involved in the facts, for example, such as would be presented on the present indictment if appellee had never left Spokane or reported at Fort Lewis.

The judgment is

Reversed.

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

HUST *v.* MOORE-McCORMACK LINES, INC.

CERTIORARI TO THE SUPREME COURT OF OREGON.

No. 625. Argued April 22, 29, 1946.—Decided June 10, 1946.

1. A seaman employed on a ship owned by the United States and operated for the War Shipping Administration by a private company "as its agent and not as an independent contractor" under the standard form of General Agent Service Agreement was injured a few days before the effective date of the Clarification Act of March 24, 1943, due to the negligent operation of the ship. *Held:* He is entitled to sue the operating company for damages in a state court and to have a jury trial under § 33 of the Merchant Marine Act of 1920 (the Jones Act), even if he was technically an employee of the United States. Pp. 715–734.
2. The purpose of the Suits in Admiralty Act was to expand, not to restrict, the rights of seamen. To interpret it as intended to displace the settled scheme of private rights of seamen during a period of temporary governmental control of the entire merchant marine would be to pervert its whole purpose, create numerous uncertainties, and cause the loss of substantive rights long enjoyed by seamen. Pp. 715–723.
3. Even if the seaman was an employee of the United States, this did not remit him exclusively to the Suits in Admiralty Act for remedy to enforce the substantive rights given by the Jones Act or deprive him of all remedies against the operating "agent" for such injuries as he incurred. Pp. 723, 724.
4. An application of the common law rules of private agency to defeat the Jones Act cannot be justified in this temporary situation, since neither Congress nor the President intended to take away the normally applicable rights and remedies of seamen when the maritime industry was transferred temporarily to governmental control for the duration of the war emergency. Pp. 724, 725, 730, 731.
5. Nothing in the Jones Act, the Suits in Admiralty Act, the War Powers Act of 1941, or the Executive Orders by which the maritime industry was transferred to governmental control compels a contrary conclusion. P. 725.

6. That the wartime transfer of the merchant marine from private to government control was not intended to deprive the seaman of his right to sue under the Jones Act is confirmed by the Clarification Act. One primary occasion for the passage of the Clarification Act was to save the seaman's rights rather than to take them away. Pp. 725–734.
7. In its retroactively operating provisions, here applicable, the Clarification Act gives the seaman an election between enforcing his rights in the usual manner and asserting them against the United States under the Suits in Admiralty Act. It would nullify this election to hold that the seaman's only remedy for injuries incurred before the Clarification Act became effective was under the Suits in Admiralty Act. Pp. 729, 730.
8. The mere fact that the standard form of General Agent Service Agreement was changed so as to omit the provision for the operating agent to man the ship did not deprive seamen of the long-established scheme of rights and remedies provided by law or reduce them to the single mode of enforcement under the Suits in Admiralty procedure. Pp. 730, 731.

176 Ore. 662, 158 P. 2d 275, reversed.

A seaman injured aboard a ship owned by the United States brought suit and obtained a judgment for damages in an Oregon court under § 33 of the Merchant Marine Act of 1920 (the Jones Act) against a steamship company which was operating the ship for the Government under the standard form of General Agent Service Agreement with the War Shipping Administration. The Supreme Court of Oregon reversed. 176 Ore. 662, 158 P. 2d 275. This Court granted certiorari. 327 U. S. 771. *Reversed,* p. 734.

Abraham E. Freedman and *B. A. Green* argued the cause for petitioner. With them on the brief was *Edwin D. Hicks.*

Erskine Wood and *Erskine B. Wood* argued the cause and filed a brief for respondent.

Briefs were filed as *amici curiae* by *William L. Standard* and *Jacquin Frank* for the National Maritime Union of America; by *Silas B. Axtell* and *Myron Scott* for Josephine Fontao et al.; and by *Abraham E. Freedman, Milton M. Borowsky* and *Charles Lakatos* for the National Organization Marine Engineers Beneficial Association et al., urging reversal.

Solicitor General McGrath, Assistant Attorney General Sonnett, Ralph F. Fuchs and *Paul A. Sweeney* filed a brief for the United States as *amicus curiae,* urging affirmance.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

This case arises by virtue of the fact that during most of the Second World War substantially our entire merchant marine became part of a single vast shipping pool, said to have been the largest in history,[1] operated and controlled by the United States through the War Shipping Administration.[2] So huge an enterprise necessarily comprehended many intricate and complex readjustments from normal, peacetime shipping arrangements. These

[1] As of the date of Japanese surrender the War Shipping Administration operated or owned approximately 4300 merchant ships, as compared with the 1375 ships available for deep-sea service in the prewar American merchant marine. The number of men needed for the wartime merchant marine was approximately 220,000, as compared with the prewar requirement of 55,000 men. For further figures on the expansion of the merchant marine during the war, see Note (1946) 55 Yale L. J. 584, note 1 and authorities cited.

[2] On February 7, 1942, the President, acting by virtue of the authority vested in him "by the Constitution and Statutes of the United States, including the First War Powers Act, 1941" (50 U. S. C. App. § 601), established the War Shipping Administration. Exec. Order No. 9054, Feb. 7, 1942, 7 Fed. Reg. 837, as amended by Exec. Order No. 9244, Sept. 16, 1942, 7 Fed. Reg. 7327.

were executed largely through broad powers conferred upon the Administration.[3]

Eventually almost every vessel not immediately belonging to naval and other armed forces came under the Administration's authority. Otherwise than by direct construction and ownership, this was accomplished by transfer from private shipping interests to the Administration, pursuant to requisition or other arrangement.

Inevitably the industry's transfer from private to public control was achieved to a very great extent by making use not only of private property but also of private shipping men, both in management and for labor.[4] This too

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[3] The Executive Order provided that the Administrator of the War Shipping Administration should "control the operation, purchase, charter, requisition, and use of all ocean vessels under the flag or control of the United States . . . ." It also transferred to the War Shipping Administration "the functions, duties and powers conferred by law upon the United States Maritime Commission with respect to the operation, purchase, charter, insurance, repair, maintenance, and requisition of vessels and facilities required for the operation thereof . . ." under various specified statutes and executive orders "and under any other provisions of law, including Executive Orders . . . ."

The parties have not questioned the authority of the War Shipping Administration. The following statutes and executive orders relate to the authority exercised. § 902 (a), Merchant Marine Act of 1936, 46 U. S. C. § 1242 (a); § 902 (e), Merchant Marine Act of 1936, as amended, 46 U. S. C. § 1242 (e); § 207, Merchant Marine Act of 1936, as amended, 46 U. S. C. § 1117; §§ 1 and 2, Joint Resolution of February 6, 1941, 55 Stat. 5; Public Law 247, 77th Cong., 55 Stat. 669, 681; 50 U. S. C. App. § 1274; Exec. Order No. 9001, Dec. 27, 1941, 6 Fed. Reg. 6787, as amended by Exec. Order No. 9296, Jan. 30, 1943, 8 Fed. Reg. 1429.

[4] See H. Rep. No. 2572, 77th Cong., 2d Sess., 8: "The Administrator, in the conduct of his duties and functions, makes very extensive use of the private organizations including those engaged in merchant marine insurance and related activities, steamship operators, stevedore, and terminal facilities, freight forwarders, and freight brokers and agents. Special skill, knowledge, and experience are made available in this manner for use in the integrated war effort. This devel-

was brought about in various ways, but chiefly two for presently pertinent purposes. One was by time-chartering of privately owned vessels with crew, in which case the men remained the private employees of the vessel's owner. The other was by either bareboat-charter or outright ownership by the Administration. In such instances, as will appear, master and seamen became technically employees of the United States.[5]

The difference is important for the issues and the decision in this case. They concern the broad question whether seamen employed in the latter capacity, as members of the United States Merchant Marine,[6] lost during the period of such service prior to March 24, 1943,[7] some of the American seamen's ordinary and usual protections in respect to personal injury or death incurred in the course of employment, or retained those rights. Specifically, in this case the question is whether petitioner Hust retained the seaman's usual right to jury trial in a suit against the respondent, pursuant to the provisions of the Jones Act,[8] for personal injuries incurred in the course of his employment as a seaman on the S. S. Mark Hanna.

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opment confirms the wisdom of the congressional policy in the recent years of stimulating and assisting the development of such private merchant marine and insurance facilities at substantial Government cost. The policy has permitted a quick change-over from peacetime to wartime operations of the entire merchant marine without any substantial loss of efficiency or impairment of morale."

[5] See H. Rep. No. 2572, 77th Cong., 2d Sess., 8–10.

[6] The seamen employed on Government-operated vessels were, of course, in civilian, as opposed to military or naval, service. Cf. Hearings before the Committee on the Merchant Marine and Fisheries on H. R. 7424, 77th Cong., 2d Sess., 5–6.

[7] The effective date of the so-called Clarification Act, 50 U. S. C. App. § 1291, discussed at various points in this opinion. Relevant portions of the Act are set forth in the text herein at note 36 and in note 35.

[8] § 33, Merchant Marine Act of 1920, 46 U. S. C. § 688.

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This was a Government-owned Liberty ship operated under a so-called General Agent Service Agreement between respondent and the Administration.

The Mark Hanna had been torpedoed in the Atlantic Ocean on March 9, 1943. Early on the morning of the 17th, the day of Hust's injury, the vessel was being towed to port. He was ordered to go to the ship's locker in the forepeak of the second deck and bring out a mooring line to be used in towing. The electric bulb lighting the locker room had burned out and the room was dark. While crossing it to get the line, Hust fell through an unguarded hatch about twelve feet to the third deck. In landing he struck a steel manhole cover projecting some six inches above the deck, and incurred the injuries for which this suit was brought on September 24, 1943, in the Circuit Court for the County of Multnomah, State of Oregon.

The complaint alleged that Hust was respondent's employee, was injured through its negligence, and that the suit was brought pursuant to § 33 of the Merchant Marine Act of 1920. Trial before a jury brought a verdict and judgment for Hust. On appeal to the Supreme Court of Oregon the judgment was reversed and an order was entered for the cause to be remanded, with directions to enter judgment for the respondent notwithstanding the verdict. The Supreme Court held that, as a matter of law,[9] petitioner was an employee of the United States, not of respondent, and therefore he was not entitled to

[9] On special interrogatory the jury had found that Hust was respondent's employee on the date the injuries were incurred. The verdict was for $35,000, which the trial court indicated in its opinion was excessive in relation to the injuries incurred. But being of opinion that the question of liability should be settled by review, it declined to order remittitur and denied the motion for judgment *non obstante veredicto*, in effect reserving decision on the question of remittitur pending outcome of decision on appeal.

recover from it under the Jones Act for the injuries alleged and proved. 176 Ore. 662, 158 P. 2d 275. The importance of the question for the administration of the Act in application to persons situated similarly to the petitioner caused us to grant certiorari in order to review this ruling. 327 U. S. 771.

The Supreme Court of Oregon considered that the controlling question was whether Hust was respondent's employee when the injuries were incurred; and that "it must be assumed . . . that the case is governed by the rule of the common law" to determine this question and thus the outcome of the case. Accordingly it examined with great care the arrangements which had been made between respondent and the Government for operation of the Mark Hanna, with special reference to the provisions of the General Service Agreement [10] to which the Administration and respondent were parties. From this examination the court concluded that respondent was an agent of the Administration for only limited purposes, not including control, authority or principalship of the master and crew or responsibility for negligent occurrences taking place at sea and not attributable to the manner of discharging any duty of respondent while the

[10] Acting within its authority, cf. note 3, the Administration utilized these standard contracts for making arrangements with private steamship companies for the operation of many of these vessels. 46 C. F. R. (Cum. Supp.) § 306.44. They did not cover specific vessels. Under Article 1 of the agreement, the general agent agreed to "manage and conduct the business of vessels assigned to it by the United States from time to time."

In the instant case, the General Agent Service Agreement appears to have been given retroactive effect. The agreement states that it is "made as of October 19, 1941"; but that it was actually made as of that date is impossible, since the War Shipping Administration did not come into being until February 7, 1942. See note 1.

Some of the terms of the agreement are summarized in the text and notes 30, 40, 41.

vessel was in port.[11] Hence, applying the common-law "control" test,[12] the court came to its conclusion that Hust was not respondent's employee as that relation is contemplated in the Jones Act. The court also found that the so-called Clarification Act [13] in no way gave support to his view that he could recover from respondent under the Jones Act.[14]

It is around these questions and the effect for determining them of various authorities, particularly *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, that the controversy has revolved in the state courts and here. In connection with the bearing of the Clarification Act, it is of some importance to note that Hust's injuries were sustained

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[11] Cf. *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575. On the evidence of negligence presented here it was not shown that respondent had failed to perform any duty in outfitting the ship or otherwise in relation to the delinquencies alleged to have constituted causes of the injuries. These, so far as the record discloses, were attributable entirely to occurrences taking place after the ship had last put to sea.

[12] See *Labor Board* v. *Hearst Publications*, 322 U. S. 111, notes 27 and 19 and authorities cited.

[13] See note 7.

[14] Petitioner relies on the following cases as supporting his position: *Gay* v. *Pope & Talbot*, 183 Misc. 162, 47 N. Y. S. 2d 16; *McCormick* v. *Moore-McCormack Lines*, 54 F. Supp. 399; *Moss* v. *Alaska Packers Assn.*, 160 P. 2d 224, 1945 A. M. C. 493; *Bast* v. *American-Hawaiian S. S. Co.*, 1945 A. M. C. 503; *Schaller* v. *Matson Navigation Co.*, 43 N. Y. S. 2d 566.

Respondent relies upon *Algiere* v. *Cosmopolitan Shipping Co.*, 185 Misc. 271, 56 N. Y. S. 2d 361, 1945 A. M. C. 906; *Pedersen* v. *Stockard S. S. Corp.*, 268 App. Div. 992, 51 N. Y. S. 2d 675, 1945 A. M. C. 23; *Nielsen* v. *American President Lines*, 50 N. Y. S. 2d 249, 1944 A. M. C. 1169; *Steele* v. *American South African Line*, 62 F. Supp. 636; *Baker* v. *Moore-McCormack Lines*, 57 F. Supp. 207; *Conlon* v. *Hammond Shipping Co.*, 55 F. Supp. 635; *Williams* v. *American Foreign S. S. Corp.*, 1946 A. M. C. 98; *Ferris* v. *American South African Line*, 1945 A. M. C. 1296; *Walsh's Case*, 1945 A. M. C. 747; *Murray* v. *American Export Lines*, 53 F. Supp. 861; *Fox* v. *Alcoa S. S. Co.*, 143 F. 2d 667. See also Note (1946) 55 Yale L. J. 584.

only a few days before that Act became effective on March 24, 1943, and that it contained features relating to injuries like Hust's incurred between that date and October 1, 1941, retroactive in character.[15] It is, in part, concerning those features that argument has been most intense.

I.

At the outset it is important to state just what the decision may mean in consequences for injured seamen and their dependents as well as for the Government.

The Jones Act was the culmination of a long struggle by seamen to secure more adequate relief in case of injury or death, incurred in the course of employment, than had been afforded by preexisting law.[16] We do not stop to review that history. But the history of the Jones Act since its enactment has been distinctive in that, at all subsequent times, seamen have opposed substituting for its provisions other forms of relief which have been tendered as being more in accord with modern trends of legislation for these matters.[17] Wisely or unwisely, they have steadfastly preferred the traditional remedy of jury trial for negligence to workmen's compensation based on liability without fault. By 1942, when the Government took over the merchant marine, that remedy had become a thoroughly established incident of the seaman's contract of employment, as much so as the historic relief afforded by the general maritime law for maintenance and cure

[15] See text *infra* at note 36.

[16] See *Warner* v. *Goltra,* 293 U. S. 155; *Gerradin* v. *United Fruit Co.,* 60 F. 2d 927.

[17] See *Warner* v. *Goltra, supra,* at 159–160 and the cited legislative history. In the hearings on the Clarification Act the seamen again opposed being brought within a compensation act. See statement of the National Maritime Union, Hearings before the Committee on the Merchant Marine and Fisheries on H. R. 7424, 77th Cong., 2d Sess., 30–31.

or maritime tort.[18] It was one which attached to every seaman's contract.

Moreover, by § 1 of the Suits in Admiralty Act, like the Jones Act enacted in 1920 (41 Stat. 525, 46 U. S. C. § 741), arrest and seizure under judicial process were forbidden of vessels owned by the United States or a governmental corporation "or operated by or for the United States or such corporation"; and by § 2, in place of that right of seizure, "a libel in personam may be brought against the United States or against such [governmental] corporation" in cases where "if such vessel were privately owned or operated . . . a proceeding in admiralty could be maintained . . . ."

By the decision in *Johnson* v. *Fleet Corp.*, 280 U. S. 320, it was held that the remedies given by the Suits in Admiralty Act "are exclusive in all cases where a libel might be filed under it," that is, on "maritime causes of action covered by the Act." *Id.* at 327.

The *Johnson* ruling was made broadly to cover maritime causes of action which could be asserted in admiralty against the United States or governmental corporations and also against private operators for the Government.[19] *Fleet Corp.* v. *Lustgarten*, 280 U. S. 320, a companion

[18] The Jones Act is "an integral part of the maritime law . . . ." *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 248.

[19] Four different cases were disposed of in the single opinion, including in addition to the *Johnson* case *Fleet Corp.* v. *Lustgarten*. In that case the defendants were the Fleet Corporation and the Consolidated Navigation Company, which operated the vessel for the United States as agent pursuant to an agreement with the Shipping Board. The suit was by a seaman injured in the ship's service allegedly for negligent failure of the defendants to furnish him a safe place to work and, further, furnish medical treatment and care after the injuries were incurred. 280 U. S. at 323. The judgment for the plaintiff was reversed as to both defendants, no mention being made in the opinion of any difference between them for applicability of the Suits in Admiralty Act or otherwise.

case. But in *Brady* v. *Roosevelt S. S. Co., supra,* the *Johnson* (*Lustgarten*) ruling was modified, in accordance with the obvious scope and purpose of the Act, to restrict the exclusiveness of the statutory remedy provided to causes asserted against the Government or governmental corporations. The Act, it was held in effect, did not affect or exclude the seaman's rights, in admiralty or otherwise, against the private operator. It merely substituted one remedy against the Government for what was, in substance though not technically, another against it, that is, the libel *in personam* provided by § 2 for the libel *in rem* taken away by § 1.[20]

Prior to 1942, therefore, the privately employed seaman had not only his remedy under the Jones Act, but also his rights under the general maritime law enforceable in admiralty or by various forms of proceedings elsewhere. But even more favorably situated, under the *Brady* ruling, was the seaman employed on vessels owned by the United States and operated for it by private companies under arrangements with the Fleet Corporation or the Maritime Commission.[21] He had his exclusive remedy against the

[20] The Court held the *Johnson* ruling as to the Navigation Co. to be untenable, expressly stating "that the *Lustgarten* case so far as it would prevent a private operator from being sued under the circumstances of this case must be considered as no longer controlling." 317 U. S. at 578. See notes 19, 22.

It is to be noted that, although the decedent in the *Brady* case for whose death the suit was brought was not a seaman, Lustgarten was. In both cases the cause of action asserted was negligence or maritime tort.

[21] The United States Shipping Board was established by 39 Stat. 729 and 41 Stat. 989. Section 11 of the earlier statute, 39 Stat. at 731, authorized the United States Shipping Board to establish government-controlled corporations, and pursuant to this provision the United States Shipping Board Merchant Fleet Corporation was set up. See *Sloan Shipyards Corp.* v. *Merchant Fleet Corp.,* 258 U. S. 549, 564. By Executive Order No. 6166, June 10, 1933, § 12, the

Government or the appropriate governmental corporation, under the Suits in Admiralty Act, for all causes of action which could be maintained in admiralty if the vessel on which he was employed had been privately owned or operated; and, moreover, under the *Brady* ruling he retained his rights under maritime law against the private company operating the vessel as agent for the Government.[22] Although never specifically decided here, this was held in *Carroll* v. *United States,* 133 F. 2d 690, to include not only general maritime rights such as the *Brady* case involved, but also recovery under the Jones Act. The *Carroll* case was decided flatly on authority of the *Brady* decision and the result was fully justified

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functions of the United States Shipping Board, including those of the Emergency Fleet Corporation, were transferred to the Department of Commerce. Subsequently, by the Merchant Marine Act of 1936, 49 Stat. 1987, the United States Maritime Commission was created and the functions and duties of the former Shipping Board were transferred to it.

[22] Under the standard forms of contract utilized for these arrangements by the Shipping Board and later by the Maritime Commission, the private operator, though designated as "agent" somewhat in the manner of the Administration's General Service Agreement, undertook to "man the ship" along with other duties assumed. Under this provision the shipping company rather than the Government was regarded as the seaman's employer. Accordingly he had all the rights incident to the employment as against this operating "agent," notwithstanding the vessel was owned by the Government. The Suits in Admiralty Act was not intended to and did not touch those rights. As stated in the text, its remedies were added to them.

Because the General Service Agreement omits the explicit requirement that the "agent" shall "man the ship," it is strongly argued and the Oregon Supreme Court held that the relation between the respondent and the seaman here is basically different from that existing under the Maritime Commission's standard arrangements since, it is said, that omission destroys the employer-employee relation between the "agent" and the seaman, and creates another, entirely different, between the Government and the seaman. Cf. text *infra* at note 30.

both by its ruling and by the terms of the Suits in Admiralty Act.[23]

Now it is argued that this favored position was altogether inverted when the Government took over control of the entire merchant marine under its war powers in 1942. For it is maintained and the Oregon Supreme Court has held, in effect, that this transfer stripped seamen of many, if not all, of their protections, including the remedy under the Jones Act, for the duration of the war and six months.[24] True, the decision applies specifically only to Jones Act proceedings. But it is equally applicable to all other maritime rights and remedies dependent upon existence of the "employer-employee" relation, such as the right to maintenance and cure, etc. Whenever, in such cases, it might be found that technically the Government is the employer, the necessary result would be to remit the seaman to the "exclusive" right to sue under the procedure provided by the Suits in Admiralty Act. In short the combined effects of that Act and of the transfer of American shipping to governmental control, for the temporary period of the war, would be to confine merchant

[23] Cf. note 22. Effort has been made to restrict the scope of the *Brady* ruling, by regarding it as applicable only to the situation where the injury resulted from negligence of the private operating agency for which the Government or its sponsoring corporation would not be liable, in reliance upon the opinion's use of this situation to illustrate the fact that the Suits in Admiralty Act did not cut off general maritime rights and remedies against the operating agent. 317 U. S. at 581. But the ruling was broader both in rationalization and in result. The Court did not restrict possible recovery to such a situation in remanding the cause for determination of whether a cause of action had been made out.

[24] By which time the governmental pool presumably will have been dissolved, at any rate to the extent of returning many of the vessels comprising it to the private owners and operators. § 5, Clarification Act, 57 Stat. 51, 50 U. S. C. App. § 1295; Title IV, § 401, First War Powers Act, 55 Stat. 841, 50 U. S. C. App. § 621.

seamen altogether to suits under the Act, except in the cases of men employed on vessels under time-charter [25] and possibly as to injuries incurred by others through the general operating agent's failure to discharge some specific duty imposed by the General Service Agreement while the vessel is in port.[26] With those possible exceptions the various rights of seamen, enforceable by various proceedings in admiralty and at law, in state and federal courts, are swept into one hopper, the suit against the Government or governmental corporation under the Suits in Admiralty Act.

Such a result quite obviously would resurrect the *Lustgarten* (*Johnson*) ruling to override, in practical effect, that of the *Brady* decision for the duration of the war. Nor would only the forum and the procedure to be followed be affected. For, as the *Brady* opinion said of the *Lustgarten* ruling, the shorter limitations period of two years provided by the Suits in Admiralty Act would apply,[27] with the undoubted effect in many cases of barring recovery altogether. With a variety of rights established in law and custom, the sudden shift of all relief, except in the comparatively infrequent instances mentioned above, to the single forum and remedy could not but bring widespread surprise and resulting failure of substantive rights. Not only would wrong remedies be

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[25] Cf. text following note 4 *supra*. At the time of the Japanese surrender the total number of ships operated and owned by the War Shipping Administration was 4,363. Of these, 537 were time-chartered from private operators and 405 were bareboat-chartered from private operators; 3,101 were operated under a General Service Agreement. See also note 1.

[26] Such as, e. g., failing to provide needed repairs or supplies, but not including any act attributable to negligence on the part of the master or other members of the crew. Cf. note 23.

[27] 317 U. S. at 581, citing § 5 of the Act, and *Emergency Fleet Corp.* v. *Rosenberg Bros. & Co.*, 276 U. S. 202. The period provided under the Jones Act, for instance, is three years. 45 U. S. C. § 56.

asserted only to discover the fact too late, as in this case and others in relation to which briefs *amicus curiae* have been filed.[28] But at least some claimants, perhaps many, relying upon the longer period incorporated in the body of our law, would delay instituting suit beyond the shorter one allowed by the temporary expansion of the Suits in Admiralty Act to cover war conditions, and thus be trapped into loss of all remedy at a time when broad relief was needed more than ever.

There would be other uncertainties and complexities. Were respondent's position to prevail, a seaman would be forced to predict, before instituting his suit, whether at the end of the litigation it would turn out that the cause of action alleged should have been asserted against the Government or against the private operator. Thus, it might often be difficult to foretell whether the negligence alleged to have caused the injury would be attributed ultimately, as the proof should turn out, to some act of the master or a member of the crew, in which event only the Government, not the operating agent, would be liable, or to some default of that agent in discharging its specially limited but various duties, in which case it and at least in some instances not the Government [29] would be responsible. The only safe course for a claimant in doubt—and obviously many such situations might arise—would be to file two suits, one a libel *in personam* against the Government, the other an appropriate proceeding against

[28] One of the briefs *amicus curiae* states that the seaman's widow for whom it is filed has instituted suit against the shipping company within two years after her husband's death but that, inasmuch as no suit against the United States has been instituted within that period, if her cause of action against the shipping company will not lie, she will also be unable by virtue of the Statute of Limitations in the Suits in Admiralty Act to sue the United States.

[29] As in the case, suggested in the *Brady* opinion, in which the agent alone and not the principal would be liable. 317 U. S. at 581. See note 23.

the agent; and possibly even so the risk might remain that the division of remedies would result in loss of relief altogether.

In addition it should be mentioned that under the practice of the industry seamen frequently would move back and forth between vessels of the same owner moored side by side, from ships under time-charter to others under bareboat-charter to the Administration. With each such shift, under respondent's view of the law, responsibility for the seaman's injuries would shift from the agent to the Government or the other way around, with corresponding shuttling of remedy. The confusion thus resulting was one reason which led to adoption of the Clarification Act. S. Rep. No. 62, 78th Cong., 1st Sess., 5; H. Rep. No. 2572, 77th Cong., 2d Sess., 9, quoted *infra* at note 32.

These are at least some of the uncertainties and complexities which would result from acceptance of respondent's view. It is hardly too much to say that substantive rights would be lost in an incalculable number of cases by the disruption such an acceptance would bring for rights long settled. The result also would be to throw large additional numbers into confusion which in the end could only defeat many of them.

II.

We may assume that Congress could authorize so vast a disturbance to settled rights by clear and unequivocal command. It is not permissible to find one by implication. *Brady* v. *Roosevelt S. S. Co., supra,* at 580. Here the disruption, if it has occurred, has done so only as an implied result of the conjunction of the Suits in Admiralty Act's provisions with the Government's emergency action in taking over the shipping industry for war purposes.

Apart from resurrecting the *Lustgarten* ruling in the face of the *Brady* reversal, this result could be reached

only by finding that Congress, or Congress and the President, intended to bring it about by the exercise of their powers to bring the industry under governmental control. No other legislation, or executive action, remotely could be thought to have that effect.

Certainly this was not the purpose of the Suits in Admiralty Act. As we have said, its effect was to expand, not to restrict, the seaman's rights, as *Brady* decided. Moreover, it was not an emergency measure, adopted to promote the war effort. It was normal, peacetime legislation, fitting into a settled scheme of private rights. There can be no inference from its terms or history that it was intended to displace that scheme entirely or in large part, in normal times or in the emergency of war. To give its letter this effect, because the war brought about the temporary transfer of the industry to governmental control, would be to pervert its whole purpose.

We are told, however, that the Jones Act applies by its specific terms only in the presence of the relation of employer to employee, to give the latter a remedy for the employer's negligence; and, since the effect of the General Service Agreement was to make the seaman technically an employee of the United States, the necessary result was to remit him exclusively to the Suits in Admiralty Act for remedy to enforce the substantive right given by the Jones Act.

The premise is not controlling. We may accept the Oregon court's conclusion that technically the agreement made Hust an employee of the United States for purposes of ultimate control in the performance of his work, although the meticulous differences in this respect between its terms and the corresponding provisions of the Maritime Commission's standard contract make it hardly more than dubious that respondent did not stand *pro*

hac vice as employer with the Government.[30] But it does not follow from the fact that Hust was technically the Government's employee that he lost all remedies against the operating "agent" for such injuries as he incurred. This case, like *Labor Board* v. *Hearst Publications,* 322 U. S. 111, involves something more than mere application to the facts of the common-law test for ascertaining the vicarious responsibilities of a private employer for tortious conduct of an employee.

Here indeed is the respondent's fallacy, for it assumes the case would be controlled by the common-law rules of private agency.[31] It is true these are applied in the normal

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[30] See the concurring opinion of MR. JUSTICE DOUGLAS in this case; also note 10 *supra.* "These questions arise because of a *technical* status of such seamen as employees of the United States by virtue of their employment through the War Shipping Administration for service on such vessels." S. Rep. No. 62, 78th Cong., 1st Sess., 5. (Emphasis added.) The chief differences between the relationship of the managing agent in the *Brady* case to the seamen and the relationship of the respondent to the seamen are, as set out in the contracts, as follows:

Under the agreement in the *Brady* case the managing agent agreed to man the vessels. The licensed officers and chief steward, however, were subject to the approval of the owner, the United States, which also had the right to remove any employees "if it shall have reason to be dissatisfied."

Under the General Agent Service Agreement the shipping company does not agree to man the vessel. It agrees to procure the master, subject to the approval of the United States. The master is an agent and employee of the United States and has complete responsibility and authority with respect to the navigation and management of the vessel. The general agent agrees to procure officers and men through the usual channels and in accordance with the customary practices of commercial operators and to make them available to the master. It is provided that officers and members of the crew "shall be subject only to the orders of the Master."

[31] See text *supra* preceding note 10. The opinion stated: "We think it must be assumed in determining whether the plaintiff was

everyday applications of the Jones Act. But in those situations this is done to determine who comes within, who without, the covered class in the Act's normal operation, not to exclude that class entirely or in large part. Here the application is made to defeat the Act for all except the smaller number of men whom it was enacted to protect. No such application of the common-law "control" test can be justified in this temporary situation unless by inversion of that wisdom which teaches that "the letter killeth, but the spirit giveth life."

Not always does the law proceed in disregard of that truth. There was nothing to prevent Congress or the President, acting in exercise of their authority, from shifting the technical relation of employer and employee from the general agent to the Government, for purposes relevant to ultimate wartime control of marine employees, without at the same time disrupting their normally applicable rights and remedies. On the contrary, there was every reason why the change should be made without that consequence. No presumption can be indulged that any purpose existed to take away those protections when they were needed more than ever, nor any that so great a disruption would be made for only the emergency of the war period. Nothing in the Jones Act, the Suits in Admiralty Act, or in the War Powers Act of 1941 and the Executive Orders by which the industry's transfer was accomplished compels such a conclusion.

III.

Confirmation of this is furnished by the legislative history of the Clarification Act and by its retroactive provisions relative to the seaman's rights, including remedies

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an employee of the defendant that the case is governed by the rule of the common law." 176 Ore. 662, 669, 158 P. 2d 275, 278.

on account of personal injury and death. Indeed one primary occasion for enacting the Clarification Act was to save the seaman's rights in these respects rather than to take them away.[32]

It is true there was great concern for fear that those rights had been lost or seriously attenuated by the transfer to governmental control, particularly during the earlier stages of congressional consideration when the *Brady* decision had not removed the large cloud cast over them by the *Lustgarten* ruling. Nor did *Brady* remove all of the doubt in the minds of those sponsoring the bill, as

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[32] "The basic scope and philosophy of the measure is to preserve private rights of seamen while utilizing the merchant marine to the utmost for public wartime benefit. Except in rare cases the ships themselves are being operated as merchant vessels, and are therefore subject to the Suits in Admiralty Act in all respects. Granting seamen rights to sue under that act is therefore entirely consistent with the underlying pattern of the measure." S. Rep. No. 62, 78th Cong., 1st Sess., 11.

"Present-day operating conditions often make uncertain whether the vessel is a merchant or a public vessel. As a consequence the aforementioned rights [rights under the Jones Act and the general maritime law] of such seamen are frequently in doubt. In addition to these rights which, at times, are uncertain for the reasons mentioned, the seamen who are employees of the United States probably have rights under the United States Employees' Compensation Act in the event of injury or death. Such compensation benefits are not presently enjoyed by seamen under private employment. Thus vital differences in these rights are made to depend upon whether the seaman happens to be employed aboard a vessel time-chartered to the War Shipping Administration or owned by or bareboat-chartered to the War Shipping Administration. Since seamen constantly change from one vessel to another, their rights for death, injury, or illness also constantly change depending upon the relationship of the War Shipping Administration to the vessel. This fluctuation and lack of uniformity of rights leads to dependency of vital rights upon chance with a result of confusion and inequities. The bill is designed to remove this confusion and these inequities." H. Rep. No. 2572, 77th Cong., 2d Sess., 9.

the committee reports during the later stages of consideration disclose.[33] Hence, to make certain that the seamen would have at least the remedy provided by the Suits in Admiralty Act for enforcement of their substantive rights, as well as to take care of other important matters not affecting them,[34] the bill proceeded to enactment.

We need not determine in this case whether prospectively the Clarification Act affected rights of the seaman against the operating agent and others, or simply made sure that his rights were enforceable against the Government. We make no suggestion in that respect. For this case, on the facts, is not governed by the statute's prospective operation.[35] It may be noted however that, if

[33] See notes 36 and 37 and text.

[34] See §§ 3 and 4 of the Clarification Act. These relate to payment of just compensation for vessels requisitioned, war risk insurance, limitation of liability for the War Shipping Administration, and other miscellaneous matters. Section 1 of the Act provided that the seamen "because of the temporary wartime character of their employment by the War Shipping Administration" should not be considered as officers or employees of the United States for the purposes of various specified acts, including the United States Compensation Act.

[35] The provision principally affecting rights like those now in question was § 1: "(a) officers and members of crews (hereinafter referred to as 'seamen') employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to (1) laws administered by the Public Health Service and the Social Security Act, as amended by subsection (b) (2) and (3) of this section; (2) death, injuries, illness, maintenance and cure, loss of effects, detention, or repatriation, or claims arising therefrom not covered by the foregoing clause (1); and (3) collection of wages and bonuses and making of allotments, have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels. . . . Any claim referred to in clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions

respondent's contention were the law, the provisions of § 1, authorizing enforcement of the seaman's substantive rights for injury, maintenance and cure, etc., by the Suits in Admiralty Act remedy, would do no more than reaffirm what the latter Act had provided all along.

The Clarification Act, however, is not without important bearing for solution of the problem this case presents. For whatever the effect of its prospectively operating provisions upon the seaman's rights as against others than the Government, the bill in its final form contained a provision designed and effective to prevent the loss of such rights as petitioner now asserts.

Section 1 of the Act contains the following provision which is in terms applicable to this case:

> "Any claim, right, or cause of action of or in respect of any such seaman accruing on or after October 1, 1941, and prior to the date of enactment of this section may be enforced, and upon the election of the seaman or his surviving dependent or beneficiary, or his legal representative to do so shall be governed,

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of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act. Any claim, right, or cause of action of or in respect of any such seaman accruing on or after October 1, 1941, and prior to the date of enactment of this section may be enforced, and upon the election of the seaman or his surviving dependent or beneficiary, or his legal representative to do so shall be governed, as if this section had been in effect when such claim, right, or cause of action accrued, such election to be made in accordance with rules and regulations prescribed by the Administrator, War Shipping Administration. Rights of any seaman under the Social Security Act, as amended by subsection (b) (2) and (3), and claims therefor shall be governed solely by the provisions of such Act, so amended. When used in this subsection the term 'administratively disallowed' means a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration. . . ." 57 Stat. 45.

> as if this section had been in effect when such claim, right, or cause of action accrued, such election to be made in accordance with rules and regulations prescribed by the Administrator, War Shipping Administration." [36]

One obvious purpose of this provision was to extend retroactively to the seaman the benefit of the assured remedy against the Government given by § 1. But equally obvious is the intent to save such other rights as the seaman may have had and to give him an election between enforcing them in the usual manner and asserting them in a suit against the United States in the manner provided by § 1.

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[36] H. Rep. No. 2572, 77th Cong., 2d Sess., 15, states: "Special provision is made with respect to rights and with respect to claims and causes involved in section 1 (a) (2) and (3) which may have accrued on or after October 1, 1941, and prior to the date of enactment of the measure. Under this provision the seaman or other claimant may elect to enforce the claim as if section 1 had been in effect at the time the claim accrued. In exercising this option the claimant would, of course, accept the incidental consequences of such election, would be prevented from proceeding to secure double recovery under other procedure without regard to section 1, and would be bound by the applicable statutes or principles of limitations.

"Inasmuch as certain vessel operations on account of the Government were undertaken prior to the establishment of the War Shipping Administration by or through the Maritime Commission, the provisions of section 1 and all amendments therein are made applicable to the United States Maritime Commission with respect to the period beginning October 1, 1941, to the time of taking office of the Administrator, War Shipping Administration (February 11, 1942)."

And in S. Rep. No. 1813, 77th Cong., 2d Sess., 6, it was stated: "Section 1 makes full provision with respect to rights and claims which may have accrued during the early months of the war or its imminence, and prior to the enactment of the bill. This provision is necessary in view of vessel operations by or through the Maritime Commission in the period prior to taking office of the Administrator, War Shipping Administration (February 11, 1942)."

Uncertain in scope as the effects of the *Brady* decision were regarded to be, they were clearly recognized as holding that the seaman had rights against private operators arising after the transfer of governmental control.[37] Respondent's view of the law would nullify the election given. For in that view, even before the Clarification Act was adopted, the seaman's exclusive remedy for injuries incurred after the transfer was by suit under the Suits in Admiralty procedure. But § 1 expressly gives election between that identical remedy, as conferred by the Clarification Act, and preexisting remedies. It is too obvious to require statement that if the seaman's only remedy for injuries incurred before the Clarification Act became effective was under the Suits in Admiralty Act, as respondent contends, the election given by § 1 becomes no election whatever.

It is true that Congress did not enumerate the specific rights which it considered seamen to have prior to the Clarification Act and after the industry's transfer to governmental control. To have done so, in view of its own uncertainty in this respect, including the effects of the *Brady* decision, would have been hazardous. The intent is clear, nevertheless, in the retroactive provision to preserve all such rights and remedies as may have remained in existence unaffected by the transfer. For the reasons we have stated we think these included the remedy provided by the Jones Act as well as the substantive right.

The mere fact that the terms of the standard agreement were changed to omit the provision for manning the ship and substitute the provisions relating to employees con-

[37] Cf. S. Rep. No. 62, 78th Cong., 1st Sess., 8, 17; H. Rep. No. 107, 78th Cong., 1st Sess., 5, 29. These reports construe the effects of the *Brady* decision more narrowly than we have done in this case and than the decision justifies.

tained in the General Service Agreement was not, in these circumstances, enough to deprive seamen of that remedy. We do not think either Congress or the President intended to bring about such a result by the transfer of the industry to temporary governmental control. If this made them technically and temporarily employees of the United States, it did not sever altogether their relation to the operating agent, either for purposes of securing employment or for other important functions relating to it.[38] Nor did it disrupt the long-established scheme of rights and remedies provided by law to secure in various ways the seaman's personal safety, either to deprive him of those rights altogether [39] or to dilute or reduce them to the single mode of enforcement by the Suits in Admiralty Act procedure.

This result is in accord with the spirit and policy of other provisions of the General Service Agreement. The managing agent selected the men, and did so by the usual procedure of dealing with the duly designated collective bargaining agent. It delivered them their pay, although from funds provided by the Government. It was authorized specifically to pay claims not only for wages, but also for personal injury and death incurred in the course of employment, for maintenance and cure, etc.[40] It was

[38] See notes 39 and 40.

[39] On respondent's contention it is assumed that, before the Clarification Act took effect, the Government could be sued under the Suits in Admiralty Act for recovery in this and similar cases. Whether and how far that Act would have permitted suits by seamen injured in the course of their employment prior to the Clarification Act's effective date need not be determined in this case.

[40] "To the extent not recovered from insurance, the United States shall also reimburse the General Agent for all crew expenditures, accruing during the term hereof, in connection with the vessels hereunder, including, without limitation, all disbursements for or on

responsible for keeping the ship in repair and for providing the seaman's supplies. For all of these expenditures not covered by insurance the contract purported expressly to provide for indemnity from the Government.[41]

With so much of the former relation thus retained and so little of additional risk thrown on the operating agent, it would be inconsonant not only with the prevailing law, but also with the agreement's spirit and general purpose to observe and keep in effect the seaman's ordinary and usual rights except as expressly nullified, for us to rule that he was deprived of his long-existing scheme of remedies and remitted either to none or to a doubtful single mode of relief by suit against the Government *in personam* in admiralty. Our result also is in accord with the general policy of the Government and of the War Shipping Administration that those rights should be preserved and

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account of wages, extra compensation, overtime, bonuses, penalties, subsistence, repatriation, travel expense, loss of personal effects, *maintenance, cure,* vacation allowances, *damages or compensation for death or personal injury or illness,* and insurance premiums, required to be paid by law, custom, or by the terms of the ship's articles or labor agreements, or by action of the Maritime War Emergency Board . . . ." (Emphasis added.)

The General Agent Service Agreement provides that officers and members of the crew "shall be paid in the customary manner with funds provided by the United States hereunder." The proof at trial showed that petitioner was paid his wages by the ship's purser, the money being in envelopes bearing the name of respondent.

[41] See note 40. The General Agent Service Agreement also provides that the United States shall procure insurance against all insurance risks "of whatsoever nature or kind relating to the vessels assigned hereunder" and "shall defend, indemnify and save harmless the General Agent against and from any and all loss, liability, damage and expense . . . to the extent not covered or not fully covered by insurance."

Compare the provisions of §§ 2 and 3 of the Clarification Act with respect to insurance and compensation as they affect seamen.

maintained, as completely as might be possible under existing law, against impairment due to the transfer.[42]

A further word remains to be said about the legislative history of the Clarification Act in general. Both parties have relied strongly on excerpted portions thought to support their respective views. As is true with respect to all such materials, it is possible to extract particular segments from the immediate and total context and come out with road signs pointing in opposite directions. We do not undertake to illustrate the contrast from the history in this case. It can be said, however, with assurance that, taken as a whole, the committee reports in Congress, together with appended documents from various affected agencies and officials, are amorphous in relation to the crucial problem presented in this case. All of them give evidence of concern that rights may have been lost or rendered uncertain by the transfer, and that action should be taken by Congress to preserve the substantive rights intact and remedial ones at the least by extension of the Suits in Admiralty Act to cover them.

The entire history will be read in vain, however, for any clear expression of intent or purpose to take away rights, substantive or remedial, of which the seaman had not already been deprived, actually or possibly, by virtue of the transfer. Whether or not this conserving intent was made effective in the prospectively operating provisions of the Act, it is made clear beyond question in the retroactive ones. Congress was confessedly in a state of uncertainty. But, being so, it nevertheless had no purpose to destroy rights already accrued and in force, whether substantive or remedial in character. Its object, in this respect at the least, was to preserve them and at the same time to provide an additional assured remedy

[42] See notes 32, 40, 41.

in case what had been preserved might turn out for some reason to be either doubtful or lost.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

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

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK agrees, concurring.

While I have joined in the opinion of the Court, I add a few words to indicate that the result we have reached is consonant with the traditional rules of liability.

A charterer who obtains exclusive possession and management of the vessel from the owner is owner *pro hac vice* and subject to the responsibilities of ownership for the duration of the charter period. *Reed* v. *United States*, 11 Wall. 591, 600–601; *Leary* v. *United States*, 14 Wall. 607, 610; *United States* v. *Shea*, 152 U. S. 178. The question whether exclusive possession and management of the vessel have been transferred to the charterer turns on the facts of each case—a construction of the agreement between the parties, and the conduct of the parties under the arrangement. *United States* v. *Shea*, *supra*, pp. 189–191.

This agreement provides that the General Agent is appointed "to manage and conduct the business of vessels assigned to it by the United States from time to time." Art. 1. The General Agent promises "to manage and conduct the business for the United States" of such vessels as have been "assigned to and accepted by the General Agent." Art. 2. The United States has the power on specified notice to terminate the agreement and "to assume control forthwith" of the vessels. Art. 11. On

termination "all vessels and other property of whatsoever kind then in the custody of the General Agent" are to be "immediately turned over to the United States." Art. 12. The fair intendment of these provisions is that possession of the vessels passes to the General Agent under the agreement.

Management of the vessels also is granted the General Agent. It is to "maintain the vessels in such trade or service as the United States may direct." Art. 3. It is the one to "equip, victual, supply and maintain the vessels." *Id.* It shall "procure the Master of the vessels . . . subject to the approval of the United States." *Id.* It shall "procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel." *Id.* The officers and men are to be "procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time." *Id.* The General Agent shall "arrange for the repair of the vessels." Art. 14.

All of these things are done, to be sure, for the account of the United States. The agreement, moreover, specifically provides that the master is "an agent and employee of the United States." Art. 3. The officers and crew are subject "only to the orders of the Master." Art. 3. And the shipping articles which were entered into were between the master and the crew. From this it is argued that the members of the crew were employees of the United States, not of the General Agent or operator.

The shipping articles, however, are by statute required to be an engagement between the master and the crew. 38 Stat. 1168, 46 U. S. C. § 713. The responsibility of the master for the operation of the vessel is, moreover, traditional. See *United States* v. *Farnham,* 25 Fed. Cas.

No. 15,071, pp. 1042, 1045. So the case for respondent comes down essentially to the provision in the agreement that the master is the agent and employee of the United States.

If the parties to a contract could by the choice of a label determine these questions of responsibility to third persons the problem would be simple. But the conventions of the parties do not determine in the eyes of the law the rights of third persons. *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, 583. The Court dealt with one species of this problem in *Knights of Pythias* v. *Withers*, 177 U. S. 260, where an insurance policy designated the person to whom premiums were paid as the agent of the insured, not the agent of the insurer. The Court said, p. 268:

> "The reports are by no means barren of cases turning upon the proper construction of this so-called 'agency clause,' under which the defendant seeks to shift its responsibility upon the insured for the neglect of Chadwick to remit on the proper day. In some jurisdictions it is held to be practically void and of no effect; in others, it is looked upon as a species of wild animal, lying in wait and ready to spring upon the unwary policyholder, and in all, it is eyed with suspicion and construed with great strictness. We think it should not be given effect when manifestly contrary to the facts of the case, or opposed to the interests of justice."

This problem of liability to third persons is resolved by determining whose enterprise the particular venture was. The fact that the parties say it is the enterprise of one, not the other, is not decisive. Control in the operation and management of the business, as distinguished from general supervision, is the customary test. I look in vain to find in the present arrangement any evidence that the owner acted as the manager of this business. Respondent, the General Agent, had a most substantial measure of control over the operations of the

vessels. Its *de facto* control was no whit less or more whether the master were called the agent of the owner or its own agent. The case is not one where an agent attends only to the business of a vessel as distinguished from its manning or physical operation or control. Respondent maintains the vessels in the broadest sense and procures the master and crew. In the *Brady* case the operator was "to man, equip, victual, supply and operate the vessels." 317 U. S. p. 576. The same was true in *Quinn* v. *Southgate Nelson Corp.*, 121 F. 2d 190, 191. But the difference in words between the agreements in those cases and the present one does not, on a view of the entire situation, mark a difference in functions of the private operator. It is, indeed, difficult to see how the functions of the private operator were in any way changed under this agreement from what they were in those other two cases. Respondent, of course, accounts for its operations to the United States. The United States reimburses it for all of its expenditures, including the wages of the crew. But it is immaterial that the owner provides the entire crew and pays their wages. A charterer who has control of the operations is owner *pro hac vice*. *Hills* v. *Leeds*, 149 F. 878. So far as this record reveals, the operator performed all of the functions which it performed in the *Brady* and *Quinn* cases. There is here no taking over of additional functions by the owner. The arrangement is clothed in different garb. But it is the private operator who manages and controls the physical operation. The powers reserved to the owner were general supervisory powers adequate for the exigencies of the wartime conditions which prevailed. But they did not detract from the powers of physical operation granted respondent.

The fact that we have here no more than a change in form not in substance is borne out by collateral phases

of this undertaking. The compensation of respondent is not to be less than "the amount of earnings which the General Agent would have been permitted to earn under any applicable previously existing bareboat charters, preference agreements, commitments, rules or regulations of the United States Maritime Commission until the earliest termination date permissible thereunder as of March 22, 1942." Art. 5. The United States agrees to reimburse respondent for "damages or compensation for death or personal injury or illness" required to be paid. Art. 7. It also agrees to reimburse respondent for payments made by respondent to a pension fund for officers and members of the crew, as well as for "social security taxes which the General Agent is or may be required to pay on behalf of the officers and crew of said vessels as agent or otherwise." *Id.*

These provisions all suggest, as the relationship of the parties bears out, that the United States was the underwriter of the financial risks of the venture,[1] the operator continuing, as it always had, to perform the managerial functions. These managerial functions constitute control, decisive of liability in this case. There was no demise. But the form of the agreement is not important if the functions of the operator were those of an owner *pro hac vice.* I think that is the true condition which existed here.

At common law respondent would be the principal, for the business of managing and operating the vessel was its business. It was therefore the employer and responsible for this personal injury claim.

MR. JUSTICE REED, dissenting.

Petitioner, Hust, a fireman and watertender on the S. S. Mark Hanna, brought an action in an Oregon Circuit

[1] See S. Rep. No. 898, 74th Cong., 1st Sess., pp. 39–40.

Court[1] against the respondent, the Moore-McCormack Lines, Inc. The suit was under the Merchant Marine Act of 1920, the Jones Act, § 33.[2] It sought damages against the respondent as employer. As § 33 shows on its face, a seaman has the advantages of the Federal Employers' Liability Act only against his employer.[3] The judgment of the Supreme Court of Oregon denying petitioner the right to recover in this action would then be correct unless the respondent is petitioner's employer or unless congressional legislation since the Merchant Marine Act grants petitioner a right of recovery against respondent even though the employer-employee relationship does not exist.

The S. S. Mark Hanna, a Liberty ship, was owned by the United States. So far as appears from the record, it had never belonged to anyone else. Its operation was under the direction of the War Shipping Administration. In order to carry out its responsibilities, the Administration employed respondent as its General Agent to conduct the business of certain ships assigned to respondent for handling. From the excerpts from the contract, set out

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[1] See *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 245.

[2] 41 Stat. 1007, 46 U. S. C. § 688:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . ."

[3] *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 389; *Nolan* v. *General Seafoods Corp.*, 112 F. 2d 515, 517; *The Norland*, 101 F. 2d 967; *Baker* v. *Moore-McCormack Lines*, 57 F. Supp. 207, 208; Eggleston v. *Republic Steel Corp.*, 47 F. Supp. 658, 659; *Gardiner* v. *Agwilines, Inc.*, 29 F. Supp. 348.

Compare *Robinson* v. *Baltimore & Ohio R. Co.*, 237 U. S. 84, 94:

> "We are of the opinion that Congress used the words 'employé' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employé."

Hull v. *Philadelphia & Reading R. Co.*, 252 U. S. 475.

below, we think it clear that this was a conventional agency contract under which respondent managed certain matters connected with the ship for the United States. We think it clear, as did the Supreme Court of Oregon, that so far as the crew is concerned the respondent only procured the members, such as Hust, and made them available to the Master, a United States agent, for employment by said Master for the account of the United States.[4] Such a contract makes the United States the

[4] "Witnesseth: That in consideration of the reciprocal undertakings and promises of the parties herein expressed:

"Article 1. The United States appoints the General Agent as its agent and not as an independent contractor, to manage and conduct the business of vessels assigned to it by the United States from time to time.

"Article 2. The General Agent accepts the appointment and undertakes and promises so to manage and conduct the business for the United States, in accordance with such directions, orders, or regulations as the latter has prescribed, or from time to time may prescribe, and upon the terms and conditions herein provided, of such vessels as have been or may be by the United States assigned to and accepted by the General Agent for that purpose.

"Article 3A. To the best of its ability, the General Agent shall for the account of the United States:

. . . .

"(d) The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the

employer under the Merchant Marine Act, not the Master and not respondent, the General Agent. This is an action under the Merchant Marine Act and the question of liability of the respondent for any negligence under any other statute or rule of law, admiralty or otherwise, is not before us.

Since 1920, employees of the United States upon merchant vessels of the United States have had a right of action in admiralty against the vessels in all cases where the employees would have had a right if the vessel were privately owned or operated. This came from § 2 of the Suits in Admiralty Act.[5] This right of action was enforceable exclusively in admiralty.[6] There was no right to a trial and assessment of damages by a jury.

When the War Shipping Administration became the operator of practically the entire American merchant marine, doubts sometimes arose as to whether a particular vessel was a "merchant" vessel, operated by the United States or not. Therefore to clarify this situation and to assure all "employees of the United States through the War Shipping Administration" all "rights" for "injuries" applicable to seamen "employed on privately owned and operated American vessels," Congress enacted an act to clarify the law relating to functions of the Administra-

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Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder."

[5] 41 Stat. 525–26:

> "SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. . . ."

[6] *Fleet Corp.* v. *Rosenberg Bros.*, 276 U. S. 202; *Johnson* v. *Fleet Corp.*, 280 U. S. 320.

tion. Provisions from the first section which are important here are set out below.[7]

As will be seen by an examination of the reports of the House and Senate [8] in connection with the specific requirement of the first section, *supra,* for enforcement of these rights, Congress declared its purpose in no uncertain terms to grant the power to enforce these rights only through the Suits in Admiralty Act. That is, the seaman could not submit his claim to a jury.[9] It will be noted that the words "right" and "status" are used with care, so that

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[7] 57 Stat. 45–46:

"That (a) officers and members of crews (hereinafter referred to as 'seamen') employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to . . . (2) death, injuries, illness, . . . have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels. . . . Any claim referred to in clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act. Any claim, right, or cause of action of or in respect of any such seaman accruing on or after October 1, 1941, and prior to the date of enactment of this section may be enforced, and upon the election of the seaman or his surviving dependent or beneficiary, or his legal representative to do so shall be governed, as if this section had been in effect when such claim, right, or cause of action accrued, such election to be made in accordance with rules and regulations prescribed by the Administrator, War Shipping Administration. . . . "

[8] S. Rep. No. 62, 78th Cong., 1st Sess.; H. Rep. No. 107, 78th Cong., 1st Sess.

[9] This purpose is made plain by a few excerpts from the reports.

S. Rep. No. 62, 78th Cong., 1st Sess., pp. 5–6, 11, 14:

"Seamen employed as Government employees on vessels owned by, or bareboat-chartered to, the War Shipping Administration are sometimes precluded from enforcing against the United States the rights and benefits in case of death, injury, illness, detention, and so on that would be available to them if employed by private employers, except under the Suits in Admiralty Act. If they were private employees, rights to redress for death, injury, or illness could be prosecuted under the Jones Act and the general maritime law. These same rights may be asserted against the

it is plain Congress intended to give all Administration seamen rights under the Merchant Marine Act and remedies under the Suits in Admiralty Act.

United States as the employer under the Suits in Admiralty Act providing the vessel involved is a merchant vessel. In case of public vessels the seaman must rely for compensation upon the Administrator's policy recognizing contractual liability which this legislation recognizes. Present-day operating conditions often make uncertain in some cases whether the vessel is a merchant or a public vessel. As a consequence, even though the vessels are generally merchant vessels and not public vessels, there are some cases in which the aforementioned rights of such seamen are in doubt. In addition to these rights which, at times, are uncertain for the reasons mentioned, the seamen who are employees of the United States probably have rights under the United States Employees' Compensation Act in the event of injury or death. Such compensation benefits are not presently enjoyed by seamen under private employment. Thus vital differences in these rights are made to depend upon whether the seaman happens to be employed aboard a vessel time-chartered to the War Shipping Administration or owned by or bareboat-chartered to the War Shipping Administration. Since seamen constantly change from one vessel to another, their rights for death, injury, or illness also constantly change, depending upon the relationship of the War Shipping Administration to the vessel. This fluctuation and lack of uniformity of rights leads to dependency of vital rights upon chance with a result of confusion and inequities. The bill is designed to remove this confusion and these inequities. The bill does not affect seamen employed on vessels time-chartered to the War Shipping Administration where the vessels are supplied with crews employed by the company from which the vessel is chartered. As to them their status and the status of the Government employees mentioned will be made uniform.

. . . . . .

". . . They will continue to have the right to indemnity through court action for injury resulting from unseaworthiness of the vessel or defects in vessel appliances, and they (and their dependents) will have the right to action under the Jones Act (1920) for injury or death resulting from negligence of the employer. Such seamen will have the right to enforce claims for these benefits according to the procedure of the Suits in Admiralty Act, except that claims with respect to social-security benefits shall be prosecuted in accordance with the procedure provided in the social-security law. . . .

. . . . . .

"The provision of the Suits in Admiralty Act that suit lies thereunder only if the ship involved is employed as a merchant vessel or a tugboat is waived for the purposes of section 1 so

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As there might be instances where a seaman was an employee of the Administration but his boat was not a merchant vessel of the United States, the Clarification

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that the claim may be enforced regardless of the nature of the vessel on which the seaman is serving as an employee of the War Shipping Administration. To prevent unnecessary or premature litigation against the United States, it is required that before suit there shall be an administrative disallowance of the same in accord with rules or regulations to be prescribed by the Administrator, War Shipping Administration."

H. Rep. No. 107, 78th Cong., 1st Sess., pp. 3, 21:

"The basic scope and philosophy of the measure is to preserve private rights of seamen while utilizing the merchant marine to the utmost for public wartime benefit. Except in rare cases the ships themselves are being operated as merchant vessels, and are therefore subject to the Suits in Admiralty Act. Granting seamen rights to sue under that act is therefore entirely consistent with the underlying pattern of the measure. This should follow even in the extraordinary case where vessels might otherwise technically be classed as public vessels.

. . . . . .

"The various rights and remedies under statute and general maritime law with respect to death, injury, illness, and other casualty to seamen, have been rather fully set forth hereinabove. Under clause 2 of section 1 (a) these substantive rights would be governed by existing law relating to privately employed seamen. The only modification thereof arises from the remedial provision that they shall be enforced in accordance with the provisions of the Suits in Admiralty Act. This procedure is appropriate in view of the fact that the suits will be against the Government of the United States. In such a suit no provision is made for a jury trial as may otherwise be had in a proceeding such as one under the Jones Act for reasons set forth in the letter of the Attorney General (September 14, 1942). The provision of the Suits in Admiralty Act that suit lies thereunder only if the ship involved is employed as a merchant vessel or a tugboat is waived for the purposes of section 1 so that the claim may be enforced regardless of the nature of the vessel on which the seaman is serving as an employee of the War Shipping Administration. To prevent unnecessary or premature litigation against the United States, it is required that before suit there shall be an administrative disallowance of the same in accord with rules or regulations to be prescribed by the Administrator, War Shipping Administration."

The desirability of a jury trial was commented upon by a representative of the National Maritime Union and the Attorney General in reply. See Hearings on H. R. 7424, House Committee on Merchant Marine & Fisheries, 77th Cong., 2d Sess., pp. 30–33.

Act of March 24, 1943, was made retroactive to October 1, 1941.[10] Probably other compensation for injuries may have existed prior to the enactment of this Act.

It is said by the Court that if a seaman employed by the United States is limited to the remedies of the Suits in Admiralty Act for recovery in tort, the holding in *Emergency Fleet Corp.* v. *Lustgarten,* 280 U. S. 320, is restored as a rule of law. The *Lustgarten* case was overruled by *Brady* v. *Roosevelt S. S. Co.,* 317 U. S. 575, 578. We think that this misconceives the effect of the *Brady* case. We do not think the requirement that seamen, employees of the United States, must seek their remedy against their employer under the Suits in Admiralty Act has any relation to the *Lustgarten* or *Brady* cases.

Lustgarten, a seaman, sought recovery at law for a tort against the Navigation Company, an agent of the United States. It was held that he could only recover under

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[10] S. Rep. No. 62, 78th Cong., 1st Sess., p. 13:

"Inasmuch as certain vessel operations on account of the Government were undertaken prior to the establishment of the War Shipping Administration by or through the Maritime Commission, the provisions of section 1 and all amendments therein are made applicable to the United States Maritime Commission with respect to the period beginning October 1, 1941, to the time of taking office of the Administrator, War Shipping Administration (February 11, 1942). To avoid administrative confusion and uncertainty as to the exact status of employment of seamen employed on War Shipping Administration vessels, it is provided that seamen employed through that agency shall be included under the provisions of section 1 even though the seamen may be employed on a vessel chartered or made available to another department or agency of the United States for purposes of convenience in the war effort.

. . . . .

"With respect to seamen on foreign-flag vessels, the remedy provided by this legislation is, of course, in substitution for remedies that might exist under the laws of a country in which the vessel may be documented, and seamen proceeding under this section by such choice of remedies will have waived benefits under laws of any other country that might otherwise be available."

See also H. Report No. 107, *supra,* pp. 21 and 22.

the Suits in Admiralty Act. In the *Brady* case, under a petition of a visitor to the boat to recover against a similar agent, it was held a cause of action in tort at law would lie. The *Lustgarten* case was overruled. The only effect of the *Brady* decision was to hold that actions could be maintained against agents of the United States at common law for the agent's own torts. The case had nothing whatever to do with the right to recover against employers under the Jones Act. The opinion said, 317 U. S. at 577, "The sole question here is whether the Suits in Admiralty Act makes private operators such as respondent non-suable for their torts." "The liability of an agent for his own negligence has long been embedded in the law." *Id.*, at 580. "But it is a *non sequitur* to say that because the Act takes away the remedy of libel *in rem* in all cases involving government vessels and restricts the remedies against the United States and its wholly owned corporations, it must be presumed to have abolished all right to proceed against all other parties." *Id.*, at 582. "The question is not whether the Commission had authority to delegate to respondent responsibilities for managing and operating the vessel as its agent. It is whether respondent can escape liability for a negligent exercise of that delegated power if we assume that by contract it will be exonerated or indemnified for any damages it must pay." *Id.*, at 583–84. The case was then sent back to the Circuit Court of Appeals to determine whether a cause of action against the agent was established. All that was meant or said in *Brady* about *Lustgarten* was that the *Lustgarten* case was in error in saying that a seaman could not sue an agent for the agent's own tort. The *Brady* final statement on *Lustgarten* was, "Our conclusion, however, is that that position is untenable and that the *Lustgarten* case so far as it would prevent a private operator from being sued under the circumstances of this case

must be considered as no longer controlling." *Id.*, at 578. There is no reason here why the petitioner should not sue respondent for its alleged tort. What petitioner is attempting is to hold respondent liable as employer for negligence of petitioner's fellow servants, of petitioner's superiors or the Master under the Merchant Marine Act. This it cannot do under this record.[11]

It is suggested that the respondent may be in the position of an employer, as a charterer or owner *pro hac vice.* But a charterer or owner *pro hac vice,* who is also an employer, is one who takes over "the exclusive possession, command, and navigation of the vessel." *Reed* v. *United States,* 11 Wall. 591, 600. That is a bareboat charter. Under the contract in this case, the respondent had no

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[11] 176 Ore. 662, 665, 668–669, 680, 695, 158 P. 2d 275, 276, 277–78, 282, 287–88:

"On the trial the defendant moved for a directed verdict on the grounds that the evidence showed that the plaintiff was not employed by it and that his injury was not caused by its negligence. The court denied the motion, and in its charge left it to the jury to determine as a question of fact whether the relation of employer and employee existed between defendant and plaintiff."

"There is no evidence that the defendant did anything in connection with the business of the vessel not contemplated by the terms of the service agreement, or that it exercised or attempted to exercise any control over the master or crew. Indeed, the uncontradicted evidence is that when it was the duty of the defendant to assist in the loading of the vessel it acted under the instructions of the master as to the time, place and method of loading."

"As stated, the trial judge left to the jury the question of employer-employee relationship as one of fact. The propriety of that submission is not defended here, and it seems to be agreed by both parties that the question is one of law to be determined by the court. Of the correctness of this view we think there can be no doubt."

"We find no such basis of liability in this case. The defendant was not responsible for a negligent order of the boatswain which sent the plaintiff into a place of danger. There is no evidence that the vessel was not properly equipped when it started on its voyage."

such authority. As we have pointed out above, and as the contract shows, he acted for the United States under its command and then only in certain matters not connected with actual navigation.

The Court does not challenge the respondent's assertion that the Merchant Marine Act requires the employer-employee relationship. It is said, "But it does not follow from the fact that Hust was technically the Government's employee that he lost all remedies against the operating 'agent' for such injuries as he incurred." Certainly Hust did not lose his remedies against the agent for the agent's torts. He still has those remedies but petitioner wishes to hold the agent as an employer. There is here no "disruption" of the normal and past relationship between seaman and employer. This Court errs, we think, in suggesting any seaman has been deprived of any right by the Clarification Act of 1943 under the construction of the Oregon Supreme Court. No seaman ever had a right of recovery under the Merchant Marine Act except against his employer. That the seaman still has.

What the Clarification Act does and what it obviously was intended to do, see notes 7 and 9, *supra,* was to continue the policy of requiring seamen who were employees of the United States to continue to vindicate those rights through the Suits in Admiralty Act. Congress has been generous in permitting seamen to recover in court against the United States for torts. It felt that the traditional proceeding in admiralty offered the best opportunity for justice to all such injured seamen when they were employees of the United States.[12]

A convenient summary of the attitude of the administrative agencies toward this problem is found in a letter of the War Shipping Administration to the National Labor

[12] See Remedies of Merchant Seamen Injured on Government Owned Vessels, 55 Yale Law Journal 584, 591.

Relations Board of October 20, 1942.[13] Such administrative determination is entitled to weight.

We think that the judgment of the Oregon Supreme Court should be affirmed.

MR. JUSTICE FRANKFURTER and MR. JUSTICE BURTON join in this dissent.

[13] "The War Shipping Administrator has been advised that under the contractual arrangements mentioned above and for other reasons, the Master, officers and members of the crew of all vessels owned by or bareboat chartered to the War Shipping Administration are employees of the United States and particularly of the War Shipping Administration, and are so considered and treated at the present time by other governmental departments and agencies for the purposes of the Civil Service Retirement Act, the United States Employees' Compensation Act, the Federal Social Security Laws, and the Federal Employment Tax laws. Furthermore, the wages of such personnel are exempt from attachment as government employees."

KOTTEAKOS ET AL. *v.* UNITED STATES.

NO. 457. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.*

Argued February 28, 1946.—Decided June 10, 1946.

1. Petitioner and 31 others were indicted under § 37 of the Criminal Code for a single general conspiracy to violate the National Housing Act by inducing lending institutions to make loans which would be offered to the Federal Housing Administration for insurance on the basis of false and fraudulent information. Nineteen defendants were brought to trial and the cases of 13 were submitted to the jury. The evidence proved eight or more different conspiracies by separate groups of defendants which had no connection with each other except that all utilized one Brown as a broker to handle fraudulent applications. Evidence of dealings between Brown and defendants other than petitioner was admitted against petitioner; and the judge instructed the jury, *inter alia*, that only one conspiracy was charged and that the acts and declarations of one conspirator bound all. Petitioner and six other defendants were convicted. *Held:* The rights of petitioner were substantially prejudiced, within the meaning of § 269 of the Judicial Code, and the judgment is reversed. *Berger* v. *United States*, 295 U. S. 78, distinguished. Pp. 756, 777.
2. In applying the "harmless error" rule of § 269, it is not the appellate court's function to determine guilt or innocence nor to speculate upon probable reconviction and decide according to how the speculation comes out. P. 763.
3. The question is not whether the jury's verdict was right, regardless of the error, but what effect the error had or reasonably may have had upon the jury's decision. P. 764.
4. If one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. P. 765.
5. Where the jury could not possibly have found, upon the evidence, that there was only one conspiracy, it was erroneous to charge that, "It is one conspiracy, and the question is whether or not each

*Together with No. 458, *Regenbogen* v. *United States*, on certiorari to the same court, argued and decided on the same dates.

of the defendants, or which of the defendants, are members of that conspiracy." Pp. 767, 768.

6. Where the instructions obviously confused the common purpose of a single enterprise with the purposes of numerous separate adventures of like character, it could not be assumed that the jurors were so well informed upon the law that they disregarded the permission expressly given to ignore that vital difference. P. 769.
7. In view of a charge in this case that the statements and overt acts of *any* defendant found to be a conspirator could be considered in evidence against *all* defendants found to be members of *the* conspiracy, it could not be concluded that the jury considered and was influenced by nothing except the evidence showing that each defendant shared in the fraudulent phases of the particular conspiracy in which he participated. Pp. 770, 771.
8. Neither Congress, when it enacted § 269, nor this Court, when it decided the *Berger* case, intended to authorize the Government to string together for common trial eight or more separate and distinct conspiracies, related in kind though they may be, when the only nexus among them lies in the fact that one man participated in all. P. 773.
9. The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one can say prejudice to substantial right has not taken place. Section 269 was not intended to go so far. P. 774.
10. Each defendant in this case had a "substantial right" within the meaning of § 269 not to be tried *en masse* for a conglomeration of distinct and separate offenses committed by others. P. 775.

151 F. 2d 170, reversed.

Petitioners were convicted under § 37 of the Criminal Code of conspiracy to violate the National Housing Act. The Circuit Court of Appeals affirmed. 151 F. 2d 170. This Court granted certiorari. 326 U. S. 711. *Reversed,* p. 777.

Henry G. Singer argued the cause for petitioners. With him on the brief was *James I. Cuff.*

W. Marvin Smith argued the cause for the United States. With him on the brief was *Solicitor General McGrath, Robert S. Erdahl* and *Beatrice Rosenberg.*

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

The only question is whether petitioners have suffered substantial prejudice from being convicted of a single general conspiracy by evidence which the Government admits proved not one conspiracy but some eight or more different ones of the same sort executed through a common key figure, Simon Brown. Petitioners were convicted under the general conspiracy section of the Criminal Code, 18 U. S. C. § 88, of conspiring to violate the provisions of the National Housing Act, 12 U. S. C. §§ 1702, 1703, 1715, 1731. The judgments were affirmed by the Circuit Court of Appeals. 151 F. 2d 170. We granted certiorari because of the importance of the question for the administration of criminal justice in the federal courts. 326 U. S. 711.

The indictment named thirty-two defendants, including the petitioners.[1] The gist of the conspiracy, as alleged, was that the defendants had sought to induce various financial institutions to grant credit, with the intent that the loans or advances would then be offered to the Federal Housing Administration for insurance upon applications containing false and fraudulent information.[2]

[1] Four other persons were alleged to be conspirators but were not made defendants.

[2] It was also alleged that as part of the conspiracy the defendants would solicit persons desiring to make loans not in conformity with the rules and regulations prescribed by the National Housing Administrator, which limited the making of such loans for modernizing and altering existing structures, in amounts not to exceed $2500; and would represent to those persons that money obtained through false and fraudulent applications could be used for purposes not within the contemplation of Title 1 of the National Housing Act. The defendants would procure various documents, e. g., credit statements and certificates falsely stating that work contracted for had been completed and material delivered; and on the basis of these docu-

Of the thirty-two persons named in the indictment nineteen were brought to trial [3] and the names of thirteen were submitted to the jury.[4] Two were acquitted; the jury disagreed as to four; and the remaining seven, including petitioners, were found guilty.

The Government's evidence may be summarized briefly, for the petitioners have not contended that it was insufficient, if considered apart from the alleged errors relating to the proof and the instructions at the trial.

Simon Brown, who pleaded guilty, was the common and key figure in all of the transactions proven. He was president of the Brownie Lumber Company. Having had experience in obtaining loans under the National Housing Act, he undertook to act as broker in placing for others loans for modernization and renovation, charging a five per cent commission for his services. Brown knew, when he obtained the loans, that the proceeds were not to be used for the purposes stated in the applications.

In May, 1939, petitioner Lekacos told Brown that he wished to secure a loan in order to finance opening a law office, to say the least a hardly auspicious professional launching. Brown made out the application, as directed by Lekacos, to state that the purpose of the loan was to modernize a house belonging to the estate of Lekacos' father. Lekacos obtained the money. Later in the same year Lekacos secured another loan through Brown, the application being in the names of his brother and sister-

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ments, which were presented to the various financial institutions and to the Federal Housing Administration, would obtain loans, the proceeds of which would be used for purposes other than housing renovation and modernization.

[3] As to four a severance was granted. The indictment was nol-prossed as to one, and eight others pleaded guilty.

[4] One pleaded guilty during trial. The indictment was nol-prossed as to another, and a severance was ordered for a third. Verdicts of acquittal were directed as to three others.

in-law. Lekacos also received part of the proceeds of a loan for which one Gerakeris, a defendant who pleaded guilty, had applied.

In June, 1939, Lekacos sent Brown an application for a loan signed by petitioner Kotteakos. It contained false statements.[5] Brown placed the loan, and Kotteakos thereafter sent Brown applications on behalf of other persons. Two were made out in the names of fictitious persons. The proceeds were received by Kotteakos and petitioner Regenbogen, his partner in the cigarette and pinball machine business. Regenbogen, together with Kotteakos, had indorsed one of the applications. Kotteakos also sent to Brown an application for a loan in Regenbogen's name. This was for modernization of property not owned by Regenbogen. The latter, however, repaid the money in about three months after he received it.

The evidence against the other defendants whose cases were submitted to the jury was similar in character. They too had transacted business with Brown relating to National Housing Act loans. But no connection was shown between them and petitioners, other than that Brown had been the instrument in each instance for obtaining the loans. In many cases the other defendants did not have any relationship with one another, other than Brown's connection with each transaction. As the Circuit Court of Appeals said, there were "at least eight, and perhaps more, separate and independent groups, none of which had any connection with any other, though all

[5] The application stated that the house on which the loan was sought was bought in 1936 rather than in 1938, that the purchase price was $8500 rather than $7200, and that the assessed valuation was $9500 rather than $6500. The application further stated that among the repairs contemplated was a repainting of the house, whereas in fact only the basement hallway and garage were repainted.

dealt independently with Brown as their agent." 151 F. 2d at 172. As the Government puts it, the pattern was "that of separate spokes meeting in a common center," though, we may add, without the rim of the wheel to enclose the spokes.

The proof therefore admittedly made out a case, not of a single conspiracy, but of several, notwithstanding only one was charged in the indictment. Cf. *United States* v. *Falcone,* 311 U. S. 205; *United States* v. *Peoni,* 100 F. 2d 401; *Tinsley* v. *United States,* 43 F. 2d 890, 892–893. The Court of Appeals aptly drew analogy in the comment, "Thieves who dispose of their loot to a single receiver—a single 'fence'—do not by that fact alone become confederates: they may, but it takes more than knowledge that he is a 'fence' to make them such." 151 F. 2d at 173. It stated that the trial judge "was plainly wrong in supposing that upon the evidence there could be a single conspiracy; and in the view which he took of the law, he should have dismissed the indictment." 151 F. 2d at 172. Nevertheless the appellate court held the error not prejudicial, saying among other things that "especially since guilt was so manifest, it was 'proper' to join the conspiracies," and "to reverse the conviction would be a miscarriage of justice." [6] This is indeed the

[6] The court carefully examined the evidence relating to petitioners and considered that their guilt turned upon their intent in making the misrepresentations on their applications for loans. The jury, it thought, must have believed Brown, who testified that their misrepresentations had been deliberate. The opinion stated there was some possibility that, in so far as Brown's story as to his transactions with applicants not in conspiracy with petitioners had been confirmed, "the jury might have been disposed to find more credible the story of his dealings" with petitioners; but it was held that in the circumstances of this case the possibility did not warrant reversal, since whenever two crimes are tried together the possibility of confusion exists "because testimony relevant to one crime may gain credibility

Government's entire position. It does not now contend that there was no variance in proof from the single conspiracy charged in the indictment. Admitting that separate and distinct conspiracies were shown, it urges that the variance was not prejudicial to the petitioners.

In *Berger* v. *United States,* 295 U. S. 78, this Court held that in the circumstances presented the variance was not fatal where one conspiracy was charged and two were proved, relating to contemporaneous transactions involving counterfeit money. One of the conspiracies had two participants; the other had three; and one defendant, Katz, was common to each.[7] "The true inquiry," said

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from testimony relevant only to the other" and Congress has not insisted upon absolute separation.

Rev. Stat. § 1024, 18 U. S. C. § 557, provides: "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

The Court of Appeals in this case, as in *United States* v. *Liss,* 137 F. 2d 995; see also *United States* v. *Cohen,* 145 F. 2d 82, 89; *United States* v. *Rosenberg,* 150 F. 2d 788, 793, treated the problem of variance as "strictly speaking rather one of joinder" under § 557.

[7] The facts were succinctly stated. "It is not necessary now to refer to the evidence further than to say that it tended to establish not a single conspiracy as charged but two conspiracies—one between Rice and Katz and another between Berger, Jones and Katz. The only connecting link between the two was that Katz was in both conspiracies and the same counterfeit money had to do with both. There was no evidence that Berger was a party to the conspiracy between Rice and Katz." 295 U. S. at 80. For a more complete statement of the facts see the opinion of the Circuit Court of Appeals in the same case, 73 F. 2d 278. In that opinion the court said: "The materiality of a variance does not depend upon the degree of its logical perversity, but upon how far it throws confusion into the trial and makes it likely to miscarry." 73 F. 2d at 280.

the Court, "is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused." 295 U. S. at 82.

The Court held the variance not fatal,[8] resting its ruling on what has become known as "the harmless error statute," § 269 of the Judicial Code, as amended (28 U. S. C. § 391), which is controlling in this case and provides:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." [9]

Applying that section, the Court likened the situation to one where the four persons implicated in the two conspiracies had been charged as conspirators in separate

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[8] But the Court applied § 269 in another connection to reverse the conviction, namely, for misconduct of the prosecuting attorney in examination of witnesses and in addressing the jury.

This Court has explicitly considered or applied § 269 in connection with the following criminal cases: *Horning* v. *District of Columbia,* 254 U. S. 135; *Sinclair* v. *United States,* 279 U. S. 749 (contempt); *Aldridge* v. *United States,* 283 U. S. 308, dissenting opinion; *Berger* v. *United States,* 295 U. S. 78; *Bruno* v. *United States,* 308 U. S. 287; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150; *Weiler* v. *United States,* 323 U. S. 606; *Bollenbach* v. *United States,* 326 U. S. 607.

[9] Both the Federal Rules of Civil Procedure, 28 U. S. C. following § 723 (c), Rule 61, and the Federal Rules of Criminal Procedure, effective March 21, 1946, Rule 52 (a), contain "harmless error" sections. With respect to the latter it is said, "This rule is a restatement of existing law, . . ." with citation of 28 U. S. C. § 391 and 18 U. S. C. § 556. Notes to the Rules of Criminal Procedure for the District Courts of the United States, as prepared under the direction of the Advisory Committee on Rules of Criminal Procedure (1945) 43. See also Preliminary Draft of the Federal Rules of Criminal Procedure (1943) 197; Second Preliminary Draft of the Federal Rules of Criminal Procedure (1944) 185.

counts, but with a failure in the proof to connect one of them (Berger) with one of the conspiracies, and a resulting conviction under one count and acquittal under the other. In that event, the Court said, "Plainly enough, his substantial rights would not have been affected." The situation supposed and the one actually presented, the opinion stated, though differing greatly in form, were not different in substance. The proof relating to the conspiracy with which Berger had not been connected could be regarded as incompetent as to him. But nothing in the facts, it was concluded, could reasonably be said to show that prejudice or surprise resulted; and the Court went on to say, "Certainly the fact that the proof disclosed two conspiracies instead of one, each within the words of the indictment, cannot prejudice his defense of former acquittal of the one or former conviction of the other, if he should again be prosecuted." 295 U. S. at 83.

The question we have to determine is whether the same ruling may be extended to a situation in which one conspiracy only is charged and at least eight having separate, though similar objects, are made out by the evidence, if believed; and in which the more numerous participants in the different schemes were, on the whole, except for one, different persons who did not know or have anything to do with one another.

The salutary policy embodied in § 269 was adopted by the Congress in 1919 (Act of February 26, 1919, c. 48, 40 Stat. 1181) after long agitation under distinguished professional sponsorship,[10] and after thorough consideration of various proposals designed to enact the policy in

[10] See Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 29 A. B. A. Rep., Pt. 1, 395; *id.* 11, 55; 31 *id.* 505; 33 *id.* 27, 542; 34 *id.* 61, 578; 35 *id.* 56, 614; 36 *id.* 448; 37 *id.* 42, 557; 38 *id.* 44, 546; 39 *id.* 31, 575; 41 *id.* 36, 540; 2 A. B. A. J. 603; 42 A. B. A. Rep. 40, 334; 3 A. B. A. J. 507; 44 A. B. A. Rep. 62; 5 A. B. A. J. 455.

successive Congresses from the Sixtieth to the Sixty-fifth.[11] It is not necessary to review in detail the history of the abuses which led to the agitation or of the progress of the legislation through the various sessions to final enactment without debate. 56 Cong. Rec. 11586; 57 Cong. Rec. 3605. But anyone familiar with it knows that § 269 and similar state legislation [12] grew out of widespread and deep conviction over the general course of appellate review in American criminal causes. This was shortly, as one trial judge put it after § 269 had become law, that courts of review "tower above the trials of criminal cases as impregnable citadels of technicality." [13] So great was the threat of reversal, in many jurisdictions, that criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained.

In the broad attack on this system great legal names were mobilized, among them Taft, Wigmore, Pound and Hadley, to mention only four.[14] The general object was

[11] See, e. g., Hearings before the Committee on the Judiciary, H. R., on American Bar Association Bills, 62d Cong., 2d Sess.; H. R. Rep. No. 1949, 61st Cong., 3d Sess.; H. R. Rep. No. 611, 62d Cong., 2d Sess.; Sen. Rep. No. 1066, 62d Cong., 2d Sess.; 48 Cong. Rec. 11770–11777; H. R. Rep. No. 1218, 63d Cong., 3d Sess.; Sen. Rep. No. 853, 63d Cong., 3d Sess.; H. R. Rep. No. 264, 64th Cong., 1st Sess.; H. R. Rep. No. 913, 65th Cong., 3d Sess.; 56 Cong. Rec. 11586; 57 Cong. Rec. 3605.

[12] As of 1927 some eighteen states had adopted statutes similar to § 269. Sunderland, The Problem of Appellate Review (1927) 5 Tex. L. Rev. 126, 146. See also the list of statutes in the Official Draft of the American Law Institute Code of Criminal Procedure (1930) 1302–1304.

[13] Kavanagh, Improvement of Administration of Criminal Justice by Exercise of Judicial Power (1925) 11 A. B. A. J. 217, 222.

[14] See Hadley, Criminal Justice in America (1925) 11 A. B. A. J. 674; Hadley, Outline of Code of Criminal Procedure (1926) 12 A. B. A. J. 690; Taft, Administration of Criminal Law, in Present Day Problems, A Collection of Addresses (1908) 333; and cf. Hicks,

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simple: To substitute judgment for automatic application of rules; to preserve review as a check upon arbitrary action and essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect in a printed record.

The task was too big, too various in detail, for particularized treatment. Cf. *Bruno* v. *United States,* 308 U. S. 287, 293. The effort at revision therefore took the form of the essentially simple command of § 269. It comes down on its face to a very plain admonition: "Do not be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects." It is also important to note that the purpose of the bill in its final form was stated authoritatively to be "to cast upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have affected his substantial rights, otherwise they are to be disregarded." H. R. Rep. No. 913, 65th Cong., 3d Sess., 1. But that this burden does not extend to all errors appears from the statement which follows immediately. "The proposed legislation affects only technical errors. If the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will, notwithstanding this legislation rest upon the one who claims under it."

William Howard Taft (1945) 68–69; Wigmore, Criminal Procedure—"Good" Reversals and "Bad" Reversals (1909) 4 Ill. Rev. 352; Wigmore, Evidence (1904) § 21.

Perhaps the most notable instance of hypertechnicality in a court's assignment of a reason for its decision, arising in the early part of the period of agitation, is to be found in *State* v. *Campbell,* 210 Mo. 202, 109 S. W. 706. See also *State* v. *Warner,* 220 Mo. 23, 119 S. W. 399. The ruling was reversed in *State* v. *Adkins,* 284 Mo. 680, 695, 225 S. W. 981.

Ibid.; Bruno v. *United States, supra,* at 294; *Weiler* v. *United States,* 323 U. S. 606, 611.

Easier was the command to make than it has been always to observe. This, in part because it is general; but in part also because the discrimination it requires is one of judgment transcending confinement by formula or precise rule. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 240. That faculty cannot ever be wholly imprisoned in words, much less upon such a criterion as what are only technical, what substantial rights; and what really affects the latter hurtfully. Judgment, the play of impression and conviction along with intelligence, varies with judges and also with circumstance. What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another.

Moreover, lawyers know, if others do not, that what may seem technical may embody a great tradition of justice, *Weiler* v. *United States, supra,* or a necessity for drawing lines somewhere between great areas of law; that, in other words, one cannot always segregate the technique from the substance or the form from the reality. It is of course highly technical to confer full legal status upon one who has just attained his majority, but deny it to another a day, a week or a month younger. Yet that narrow line, and many others like it, must be drawn. The "hearsay" rule is often grossly artificial. Again in a different context it may be the very essence of justice, keeping out gossip, rumor, unfounded report, second, third, or further hand stories.

All this hardly needs to be said again. But it must be comprehended and administered every day. The task is not simple, although the admonition is. Neither is it impossible. By its very nature no standard of perfection can be attained. But one of fair approximation can be achieved. Essentially the matter is one for experience to work out. For, as with all lines which must be drawn

between positive and negative fields of law, the precise border may be indistinct, but case by case determination of particular points adds up in time to discernible direction.

In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations. Cf. *United States* v. *Socony-Vacuum Oil Co., supra,* at 240–242. Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors in judgment.

The statute in terms makes no distinction between civil and criminal causes. But this does not mean that the same criteria shall always be applied regardless of this difference. Indeed the legislative history shows that the proposed legislation went through many revisions, largely at the instance of the Senate,[15] because there was fear of too easy relaxation of historic securities thrown around the citizen charged with crime. Although the final form of the legislation was designed, and frequently has been effective,[16] to avoid some of the absurdities by which skilful

[15] See the materials cited in notes 10 and 11. At one time the Senate Judiciary Committee recommended that the "harmless error" bill be confined solely to civil cases. S. Rep. No. 1066, 62d Cong., 2d Sess. See 38 A. B. A. Rep. 546–548. At another time the same committee reported out a bill considerably weaker than that passed in the House of Representatives. See 53 Cong. Rec. 2493; 41 A. B. A. Rep. 540; 2 A. B. A. J. 603. See also 42 A. B. A. Rep. 334; 3 A. B. A. J. 507.

[16] Cf. *Horning* v. *District of Columbia,* 254 U. S. 135; *Sneierson* v. *United States,* 264 F. 268, 275–276, and see other authorities cited in *United States* v. *Antonelli Fireworks Co.,* 155 F. 2d 631, dissenting opinion, notes 12 and 12a. See also 18 U. S. C. § 556.

manipulation of procedural rules had enabled the guilty to escape just punishment, § 269 did not make irrelevant the fact that a person is on trial for his life or his liberty. It did not require the same judgment in such a case as in one involving only some question of civil liability. There was no purpose, for instance, to abolish the historic difference between civil and criminal causes relating to the burden of proof placed in the one upon the plaintiff and in the other on the prosecution. Nor does § 269 mean that an error in receiving or excluding evidence has identical effects, for purposes of applying its policy, regardless of whether the evidence in other respects is evenly balanced or one-sided. Errors of this sort in criminal causes conceivably may be altogether harmless in the face of other clear evidence, although the same error might turn scales otherwise level, as constantly appears in the application of the policy of § 269 to questions of the admission of cumulative evidence.[17] So it is with errors in instructions to the jury. Cf. *United States* v. *Socony-Vacuum Oil Co., supra,* at 239, 241.

Some aids to right judgment may be stated more safely in negative than in affirmative form. Thus, it is not the appellate court's function to determine guilt or innocence. *Weiler* v. *United States, supra,* at 611; *Bollenbach* v. *United States,* 326 U. S. 607, 613–614. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. Appellate judges cannot escape such impressions. But they may not make them sole criteria for reversal or affirmance. Those judgments are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the con-

[17] E. g., *Lucks* v. *United States,* 100 F. 2d 908; *United States* v. *Goldsmith,* 91 F. 2d 983, 986; *Beach* v. *United States,* 19 F. 2d 739, 743.

viction unaffected by the error.[18] *Weiler* v. *United States, supra; Bollenbach* v. *United States, supra.*

But this does not mean that the appellate court can escape altogether taking account of the outcome. To weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum. Cf. *United States* v. *Socony-Vacuum Oil Co., supra,* at 239, 242. In criminal causes that outcome is conviction. This is different, or may be, from guilt in fact. It is guilt in law, established by the judgment of laymen. And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting. Cf. *United States* v. *Socony-Vacuum Oil Co., supra,* at 239, 242; *Bollenbach* v. *United States, supra,* 614.

This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.

If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional

[18] This of course presents a question of law. And when the error relates to that minimum so that, if eliminated, the proof would not be sufficient, necessarily the prejudice is substantial. Cf. *Tot* v. *United States,* 319 U. S. 463.

norm [19] or a specific command of Congress. *Bruno* v. *United States, supra,* at 294. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Discussion, some of it recent,[20] has undertaken to formulate the problem in terms of presumptions. In view of the statement quoted above from the House Committee's report, it would seem that any attempt to create a generalized presumption to apply in all cases would be contrary not only to the spirit of § 269 but also to the expressed intent of its legislative sponsors. Indeed, according to their explicit statement, whether the burden of establishing that the error affected substantial rights or, conversely, the burden of sustaining the verdict shall be imposed, turns on whether the error is "technical" or is such that "its natural effect is to prejudice a litigant's substantial rights." Indeed the statement, in entire accord with the letter and spirit of § 269, is an injunction against attempting to generalize broadly, by presumption or otherwise. The only permissible presumption would seem to be particular, arising from the nature of the error

[19] Thus, when forced confessions have been received, reversals have followed although on other evidence guilt might be taken to be clear. See *Malinski* v. *New York,* 324 U. S. 401, 404; *Lyons* v. *Oklahoma,* 322 U. S. 596, 597, n. 1; *Bram* v. *United States,* 168 U. S. 532, 540–542; *United States* v. *Mitchell,* 137 F. 2d 1006, dissenting opinion at 1012.

[20] Cf. *United States* v. *Antonelli Fireworks Co.,* 155 F. 2d 631, majority and dissenting opinions.

and "its natural effect" for or against prejudice in the particular setting.

It follows that the *Berger* case is not controlling of this one, notwithstanding that, abstractly considered, the errors in variance and instructions [21] were identical in character. The *Berger* opinion indeed expressly declared: "We do not mean to say that a variance such as that here dealt with might not be material in a different case. We simply hold, following the view of the court below, that applying § 269 of the Judicial Code, as amended, to the circumstances of this case the variance was not prejudicial and hence not fatal." 295 U. S. at 83.

On the face of things it is one thing to hold harmless the admission of evidence which took place in the *Berger* case, where only two conspiracies involving four persons all told were proved, and an entirely different thing to apply the same rule where, as here, only one conspiracy was charged, but eight separate ones were proved, involving at the outset thirty-two defendants. The essential difference is not overcome by the fact that the thirty-two were reduced, by severance, dismissal or pleas of guilty, to nineteen when the trial began and to thirteen by the time the cases went to the jury. The sheer difference in numbers, both of defendants and of conspiracies proven, distinguishes the situation. Obviously the burden of

[21] Although not noted in the *Berger* opinion, the instructions in that case were substantially identical with the charge given here, quoted below, to the effect that only a single conspiracy had been charged and therefore more could not be proved. The court said: ". . . One may have control of a large amount of counterfeit money, and there may be an agreement that that money shall be distributed, and one may go forth and enlist the services of others in the furtherance of this common plan. *But it must be in the furtherance of the common plan; there can't be three or four different plans. There must be one plan, and all of them must bear their part.*" (Emphasis added.)

defense to a defendant, connected with one or a few of so many distinct transactions, is vastly different not only in preparation for trial, but also in looking out for and securing safeguard against evidence affecting other defendants, to prevent its transference as "harmless error" or by psychological effect, in spite of instructions for keeping separate transactions separate.

The Government's theory seems to be, in ultimate logical reach, that the error presented by the variance is insubstantial and harmless, if the evidence offered specifically and properly to convict each defendant would be sufficient to sustain his conviction, if submitted in a separate trial. For reasons we have stated and in view of the authorities cited, this is not and cannot be the test under § 269. But in apparent support of its view the Government argues that there was no prejudice here because the results show that the jury exercised discrimination as among the defendants whose cases were submitted to it. As it points out, the jury acquitted some, disagreed as to others, and found still others guilty. From this it concludes that the jury was not confused and, apparently, reached the same result as would have been reached or would be likely, if the convicted defendants had been or now should be tried separately.

One difficulty with this is that the trial court itself was confused in the charge which it gave to guide the jury in deliberation. The court instructed:

> "The indictment charges but one conspiracy, and to convict each of the defendants of a conspiracy the Government would have to prove, and you would have to find, that each of the defendants was a member of that conspiracy. You cannot divide it up. It is one conspiracy, and the question is whether or not each of the defendants, or which of the defendants, are members of that conspiracy."

On its face, as the Court of Appeals said, this portion of the charge was plainly wrong in application to the proof made; and the error pervaded the entire charge, not merely the portion quoted.[22] The jury could not possibly have found, upon the evidence, that there was only one conspiracy. The trial court was of the view that one conspiracy was made out by showing that each defendant was linked to Brown in one or more transactions, and that it was possible on the evidence for the jury to conclude that all were in a common adventure because

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[22] The charge further stated in part:

"The Government contends, *and they have offered evidence to show,* that Simon Brown was *the pivot* around which *this whole conspiracy* revolved. Have they shown that to your satisfaction? If they have, then we advance another step. *What was the relation between the several defendants? Did the defendants* Michael Lekacos, Louis Levine, Gus Kotteakos, Max J. Posner, James Secular, Nathan Regenbogen, *bring applicants or applications from any of these defendants to Brown?* Were any of these men acquainted with each other? Had they obtained loans for themselves, and after they had them, had they obtained loans for somebody else?

"That is the question. You have the evidence. It is certainly not all admitted. You have heard it explained to you.

"But if that be true, that these men were getting people to come in with Brown, *then it is for you to say whether you do not find streams running through each of them to Brown, and that all of those streams led in a common direction, and they are carrying craft destined for the same place.* That is the question.

"At least one of these applications was given to somebody. I think there was one given to Brown himself, but you can remember that. In reference to the others *did they come to Brown through* the agency, or through the introduction, or through the act of solicitation of those applications by *any* of the men that I have mentioned?

"That is important. *It is important because the allegation is a conspiracy, and there must be a common purpose shown. Was that a common purpose that was intended to be accomplished, and was the conspiracy* to do these things, to violate the law and to perpetrate a fraud against the Government, *participated in by any or all* of these defendants *and did they bring others, or any of the others, to Brown?* That is the question." (Emphasis added.)

of this fact and the similarity of purpose presented in the various applications for loans.[23]

This view, specifically embodied throughout the instructions, obviously confuses the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character. It may be that, notwithstanding the misdirection, the jury actually understood correctly the purport of the evidence, as the Government now concedes it to have been; and came to the conclusion that the petitioners were guilty only of the separate conspiracies in which the proof shows they respectively participated. But, in the face of the misdirection and in the circumstances of this case, we cannot assume that the lay triers of fact were so well informed upon the law or that they disregarded the permission expressly given to ignore that vital difference. *Bollenbach* v. *United States, supra,* 613.

As we have said, the error permeated the entire charge, indeed the entire trial. Not only did it permit the jury to find each defendant guilty of conspiring with thirty-five [24] other potential co-conspirators, or any less number as the proof might turn out for acquittal of some, when none of the evidence would support such a conviction, as the proof did turn out in fact. It had other effects. One was to prevent the court from giving a precautionary instruction such as would be appropriate, perhaps required, in cases where related but separate conspiracies are tried together under § 557 of the Code,[25] namely, that the jury should take care to consider the evidence relating to each conspiracy separately from that relating to each

[23] See note 22.

[24] In addition to the thirty-two persons who were indicted, four were named in the indictment as co-conspirators. See note 1.

[25] See note 6; also text at note 30.

other conspiracy charged.[26] The court here was careful to caution the jury to consider each defendant's case separately, in determining his participation in "the scheme" charged. But this obviously does not, and could not, go to keeping distinct conspiracies distinct, in view of the court's conception of the case.

Moreover, the effect of the court's misconception extended also to the proof of overt acts. Carrying forward his premise that the jury could find one conspiracy on the evidence, the trial judge further charged that, if the jury found a conspiracy, "then the acts or the statements of *any* of those whom you so find to be conspirators between the two dates that I have mentioned, may be considered by you in evidence as against *all* of the defendants whom you so find to be members of *the* conspiracy." (Emphasis added.) The instructions in this phase also declared:

> "It is not necessary, as a matter of law, that an overt act be charged against each defendant. It is sufficient if the conspiracy be established and the defendant be found to be a member of the conspiracy—it is sufficient to allege overt acts on the part of any others who may have been members of the conspiracy, if those acts were done in furtherance of, and for the purpose of accomplishing the conspiracy." [27]

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[26] See *United States* v. *Liss*, 137 F. 2d 995, dissenting opinion, at 1002–1003; cf. *Telman* v. *United States*, 67 F. 2d 716, 718.

[27] A similar instruction was given in the *Berger* case: "Let me say to you if a conspiracy existed then the actions or the statements or the declarations of any of the conspirators would bind all the others, if there was a conspiracy, up to the time of the arrest, and then the conspiracy ended. . . . the statements or acts of anyone who was a conspirator prior to the termination of the conspiracy by the arrest bound all the others. They are bound by that just as though they had done it and said it themselves." And further, "There were alleged here certain overt acts and the Government must prove at least one of them in order to vitalize the conspiracy."

On those instructions it was competent not only for the jury to find that all of the defendants were parties to a single common plan, design and scheme, where none was shown by the proof, but also for them to impute to each defendant the acts and statements of the others without reference to whether they related to one of the schemes proven or another, and to find an overt act affecting all in conduct which admittedly could only have affected some. True, the Court of Appeals painstakingly examined the evidence directly relating to each petitioner and concluded he had not been prejudiced in this manner.[28] That judgment was founded largely in the fact that each was clearly shown to have shared in the fraudulent phase of the conspiracy in which he participated. Even so, we do not understand how it can be concluded, in the face of the instruction, that the jury considered and was influenced by nothing else.

All this the Government seeks to justify as harmless error. Again the basis is that because the proof was sufficient to establish the participation of each petitioner in one or more of several smaller conspiracies, none of them could have been prejudiced because all were found guilty, upon such proof, of being members of a single larger conspiracy of the same general character. And the court's charge, in all the phases of its application to the facts, is regarded as "no more than a misnomer" which "cannot in itself be considered prejudicial." Stress is also placed upon the fact that, because the only kind of evidence to show petitioners' "membership in a conspiracy" was evidence that they themselves "had performed acts of direct participation in a conspiracy," in its finding that they had "joined a conspiracy, the jury at that point must have credited evidence which completely established guilt." All this, it is said also, the *Berger* case sustains.

[28] See note 6 *supra.*

We do not agree. It is true, as we have said, that taken in abstraction from the particular facts the cases are alike in these respects: The indictment charged a single conspiracy only; the proof showed more than one; the instructions told the jury erroneously that on the evidence they could find the defendants guilty of a single confederation; must find that each defendant joined it, in order to convict; must consider the evidence as to each separately on this phase; but, once satisfied concerning that, could attribute to each one found to be a member any act done by any other co-conspirator in furtherance of "the scheme" as an overt act, again in obvious error; and in neither case, of course, was there precaution to keep separate conspiracies separate. It is also true that, again abstractly taken, the indictment here might be considered, as was the one in *Berger, literally* to cover each of the conspiracies proved, if taken by itself. But obviously a much greater stretch of imagination is needed to regard an indictment charging thirty-six people with conspiring together as meaning that only three or four or even five did so, than was needed to say that one charging four as agreeing with each other in terms covered each of two agreements by three of the four, one conspirator being different in each proved offense. And even more would be needed to look upon the former as charging eight or more conspiracies than upon the latter as indicting for two.

These are the abstract similarities. They are only abstract. To strip them from the separate and distinct total contexts of the two cases, and disregard the vast difference in those contexts, is to violate the whole spirit, and we think the letter also, of § 269. Numbers are vitally important in trial, especially in criminal matters. Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application.

There are times when of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass. Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.

Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth.

Here toleration went too far. We do not think that either Congress, when it enacted § 269, or this Court, when deciding the *Berger* case, intended to authorize the Government to string together, for common trial, eight or more separate and distinct crimes, conspiracies related in kind though they might be, when the only nexus among them lies in the fact that one man participated in all. Leeway there must be for such cases as the *Berger* situation and for others where proof may not accord with exact specifications in indictments.[29] Otherwise criminal con-

[29] *Ibid.* It is common and approved practice, in charging a conspiracy, to name all who may be reached with process and whom it is anticipated the proof will connect with the scheme, although

spirators never could be brought to halt. But if the practice here followed were to stand, we see nothing to prevent its extension to a dozen, a score, or more conspiracies and at the same time to scores of men involved, if at all, only separately in them. The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place. Section 269 had no purpose to go so far. The line must be drawn somewhere. Whether or not *Berger* marks the limit, for this sort of error and case, we are clear that it must lie somewhere between that case and this one.

In so ruling we are not unmindful, as the Court of Appeals has held more than once,[30] that the problem is not merely one of variance between indictment and proof or of the right application of the policy of § 269 for freedom of judgment, but is also essentially one of proper joinder under § 557 of the Judicial Code. When we look at that section's requirement for separate statement in different counts of related but distinct "acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments," our conclusion is reinforced.

Section 557 too is a relaxation of rules of strict regularity. When to this is added the further relaxation of

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in most instances whether it will so turn out for each defendant can be only problematical. If failure to substantiate the charge as to one or more were to change the identity of the crime charged, so as to require reindictment and retrial for the others, the law of conspiracy would be a dead letter. But this accepted practice does not comprehend or justify that attempted here. If this comes down to a difference of degree, it is still one of vital importance as such differences always come to be when degrees spread farther and farther apart.

[30] See the authorities cited in note 6.

§ 269 for criminal causes, all technical advantage for the accused deriving not only from detailed specification of the offense in the indictment but also from separate statement of distinct offenses would seem to be lost. But this too may be carried too far. For, potentially at any rate, § 269 carries the threat of overriding the requirement of § 557 for substituting separate counts in the place of separate indictments, unless the application of § 269 is made with restraint. The two sections must be construed and applied so as to bring them into substantial harmony, not into square conflict.

We need not inquire whether the Sixth Amendment's requirement, that "in all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation," would be observed in a more generous application of § 269 to a situation governed also by § 557 than was made in the *Berger* ruling. Nor need we now express opinion whether reversal would be required in all cases where the indictment is so defective that it should be dismissed for such a fault, as the Court of Appeals said of the indictment in this case, taken in the trial court's conception.

We have had regard also for the fact that the Court of Appeals painstakingly examined the evidence relating directly to each of the petitioners; found it convincing to the point of making guilt manifest; could not find substantial harm or unfairness in the all-pervading error or in any particular phase of the trial; and concluded that reversal would be a miscarriage of justice.

With all deference we disagree with that conclusion and with the ruling that the permeating error did not affect "the substantial rights of the parties." That right, in each instance, was the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others as shown by this record.

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It may be, as the Court of Appeals found, that the evidence concerning each petitioner was so clear that conviction would have been dictated and reversal forbidden, if it had been presented in separate trials for each offense or in one or more substantially similar to the *Berger* trial in the number of conspiracies and conspirators involved. But whether so or not is neither our problem nor that of the Court of Appeals for this case. That conviction would, or might probably, have resulted in a properly conducted trial is not the criterion of § 269. We think it highly probable that the error had substantial and injurious effect or influence in determining the jury's verdict.

We have not rested our decision particularly on the fact that the offense charged, and those proved, were conspiracies. That offense is perhaps not greatly different from others when the scheme charged is tight and the number involved small. But as it is broadened to include more and more, in varying degrees of attachment to the confederation, the possibilities for miscarriage of justice to particular individuals become greater and greater. Cf. *Gebardi* v. *United States,* 287 U. S. 112, 122 n. 7, citing Report of the Attorney General (1925) 5–6, setting out the recommendations of the Conference of Senior Circuit Judges with respect to conspiracy prosecutions. At the outskirts they are perhaps higher than in any other form of criminal trial our system affords. The greater looseness generally allowed for specifying the offense and its details, for receiving proof, and generally in the conduct of the trial, becomes magnified as the numbers involved increase. Here, if anywhere, cf. *Bollenbach* v. *United States, supra,* extraordinary precaution is required, not only that instructions shall not mislead, but that they shall scrupulously safeguard each defendant individually, as far as possible, from loss of identity in the mass. Indeed, the instructions often become, in such

cases, his principal protection against unwarranted imputation of guilt from others' conduct. Here also it is of special importance that plain error be not too readily taken to be harmless.

Accordingly the judgments are reversed and the causes are remanded for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE BLACK concurs in the result.

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

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE REED agrees, dissenting.

It is clear that there was error in the charge. An examination of the record in *Berger* v. *United States,* 295 U. S. 78, shows that the same erroneous instructions were in fact given in that case. But I do not think the error "substantially injured" (*id.,* p. 81) the defendants in this case any more than it did in the *Berger* case.

Whether injury results from the joinder of several conspiracies depends on the special circumstances of each case. Situations can easily be imagined where confusion on the part of the jury is likely by reason of the sheer number of conspirators and the complexities of the facts which spell out the series of conspiracies. The evidence relating to one defendant may be used to convict another.

Those possibilities seem to be non-existent here. Nothing in the testimony of the other defendants even remotely implicated petitioners in the other frauds. Nothing in the evidence connected petitioners with the other defendants, except Brown, in the slightest way. On the record no implication of guilt by reason of a mass trial can be

found. The dangers which petitioners conjure up are abstract ones.

Moreover, the true picture of the case is not thirty-two defendants engaging in eight or more different conspiracies which were lumped together as one. The jury convicted only four persons in addition to petitioners.[1] The other defendants and the evidence concerning them were in effect eliminated from the case. We have then a case of two closely related conspiracies involving petitioners and two additional conspiracies in which petitioners played no part—but all of the same character and revolving around the same central figure, Brown. If, then, we look at what actually transpired before the jury rather than at what the indictment charged, we have a case approaching in its simplicity the *Berger* case. And the strong and irresistible inference that the jury was not confused is bolstered by their failure to convict six of the thirteen defendants on trial before them.

As I have said, it is plain that there was error in the charge as to the conspiracy. But I agree with Judge Learned Hand, speaking for the court below, when he said (151 F. 2d p. 174):

> "There remains only the question of the court's error in directing the jury that they must find that there was one conspiracy, or that they should acquit all. That was of course an error, as we have said, but it favored the accused. To suppose that these appellants suffered from it we should have to say

[1] Before trial a severance was granted on motion of the prosecutor as to four defendants. The indictment was nol-prossed as to one. Eight pleaded guilty before trial. Nineteen were brought to trial. One pleaded guilty during the trial and a nolle prosequi was entered as to another. The case was severed as to another who became ill during the trial. Verdicts of acquittal were directed as to three. Of the thirteen whose cases were submitted to the jury, two were acquitted. The jury disagreed as to four. The remaining seven, including petitioners, were convicted.

> that, if the judge had told the jury that they could convict any of the three for conspiring with Brown alone, they might have acquitted one or more of them, in spite of the fact that they convicted them all of a conspiracy with Brown and the other applicants. That is incredible; indeed, it is nonsense. Brown being the only liaison between the appellants and the other applicants, the jury could not rationally have drawn the appellants into the net with all the others, unless they had believed that the appellants and Brown had conspired together. The rest was surplusage, which may be disregarded."

The trial judge did improperly charge the jury not only that there was one conspiracy but also that the overt acts of any one conspirator were binding on all. But only if we consider the question in the abstract would we hold that was reversible error. For the charge made clear that before the jury could impute the acts of one conspirator to another, they were required to find that the particular defendant had first joined the conspiracy. The evidence shows that each of petitioners, acting through Brown, had made a fraudulent application for a loan. When the jury found that each of the petitioners had entered into a conspiracy with Brown, it made a complete determination of guilt as to that petitioner. The error in the other parts of the charge therefore did not reach the essential factors by which guilt or innocence must be determined. The situation would be different if membership in the conspiracy were shown by slight evidence of knowledge and association and the acts of others would need be imputed to a defendant in order to establish guilt beyond a reasonable doubt. And I would agree that reversible error would be established if the record left a lingering doubt on that score. But in view of the clear proof implicating petitioners, the simplicity of the transactions, and the fact that the jury must have credited evidence which completely established guilt in order to find that petitioners

joined the conspiracy, I cannot believe the erroneous charge was prejudicial.

There are, of course, further possibilities of prejudice. As stated in the *Berger* case, *supra*, p. 82, "The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense." But no surprise is shown. The overt acts charged in the indictment against petitioners were those implicating them in the conspiracy in which each participated. All of the overt acts charged were established by the evidence. And it would seem evident on the face of the indictment that petitioners would know that they must be prepared to defend against proof that they conspired with at least one of the other defendants. It is difficult to see how petitioners would be more misled here than if a single conspiracy had been charged but some of the defendants were not shown to be connected with it. And it is clear that petitioners were adequately protected against a second prosecution. The indictment and the evidence are available to disclose the proof on which the convictions rested. Parole evidence is likewise available to show the subject matter of the former conviction. *Bartell* v. *United States*, 227 U.S. 427, 433.

The several conspiracies could have been joined as separate counts in one indictment. For they were plainly "acts or transactions of the same class of crimes or offenses" within the meaning of 18 U. S. C. § 557. The objection that they were not so joined but were lumped together as one conspiracy is purely formal, as the Circuit Court of Appeals said, where, as here, it appears that there was no prejudice.

AMERICAN TOBACCO CO. ET AL. *v.* UNITED STATES.

NO. 18. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.*

Argued November 7, 8, 1945.—Decided June 10, 1946.

1. When there is a combination or conspiracy to control and dominate interstate trade and commerce in a commodity, coupled with the power and intent to exclude competitors to a substantial extent, the crime of monopolization under § 2 of the Sherman Anti-Trust Act is complete; and the actual exclusion of competitors is not necessary to the crime. Pp. 784–787, 798, 808–815.
2. To support a conviction for conspiring to monopolize certain trade in violation of the Sherman Act, it is not necessary to show power and intent to exclude *all* competitors, nor to show a conspiracy to exclude *all* competitors. P. 789.
3. Under § 2 of the Sherman Act, it is the crime of monopolizing for parties to combine or conspire to acquire or maintain the power to exclude competitors from any part of the trade or commerce among the several States or with foreign nations, provided (a) they also have such a power that they are able, as a group, to exclude actual or potential competition from the field and (b) they have the intent and purpose to exercise that power. P. 809.
4. It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. P. 809.
5. It is not important whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. P. 809.
6. No formal agreement is necessary to constitute an unlawful conspiracy. P. 809.
7. The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances as well as in an exchange of words. Pp. 809, 810.
8. Neither proof of exertion of the power to exclude nor proof of actual exclusion of existing or potential competitors is essential to sustain a charge of monopolization under the Sherman Act. P. 810.

*Together with No. 19, *Liggett & Myers Tobacco Co. et al.* v. *United States*, and No. 20, *R. J. Reynolds Tobacco Co. et al.* v. *United States*, on certiorari to the same court, argued and decided on the same dates.

9. A combination may be one in restraint of interstate trade or commerce or to monopolize a part of such trade or commerce in violation of the Sherman Act, although such restraint or monopoly may not have been actually attained to any harmful extent. P. 811.
10. The material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so. P. 811.
11. *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, approved. Pp. 811–814.
12. Separate convictions for a conspiracy to restrain trade and for a conspiracy to monopolize trade do not amount to double jeopardy or to a multiplicity of punishment in a single proceeding contrary to the Fifth Amendment, since they are separate statutory offenses, one being made criminal by § 1 and the other by § 2 of the Sherman Act. *Braverman* v. *United States,* 317 U. S. 49, distinguished. Pp. 787, 788.
13. Separate convictions for monopolization and for conspiring to monopolize in violation of the Sherman Act do not result in multiple punishment contrary to the Fifth Amendment, since they are separate offenses. *United States* v. *Rabinowich,* 238 U. S. 78; *Pinkerton* v. *United States,* 328 U. S. 640. Pp. 788, 789.

147 F. 2d 93, affirmed.

Petitioners were convicted of violating §§ 1 and 2 of the Sherman Anti-Trust Act. The Circuit Court of Appeals affirmed. 147 F. 2d 93. This Court granted certiorari "limited to the question whether actual exclusion of competitors is necessary to the crime of monopolization under § 2 of the Sherman Act." 324 U. S. 836. A petition for rehearing and enlargement of the scope of review in No. 20 was denied. 324 U. S. 891. *Affirmed,* p. 815.

George W. Whiteside and *Milton Handler* argued the cause for petitioners in No. 18. With them on the brief was *John A. V. Murphy.*

Bethuel M. Webster argued the cause for petitioners in No. 19. With him on the brief was *Francis H. Horan.*

Harold F. McGuire argued the cause for petitioners in No. 20. With him on the brief were *B. S. Womble, Thomas Turner Cooke* and *Richard C. Stoll.*

Assistant Attorney General Berge argued the cause for the United States. With him on the brief were *Solicitor General McGrath, Charles H. Weston* and *Robert L. Stern.*

MR. JUSTICE BURTON delivered the opinion of the Court.

The petitioners are The American Tobacco Company, Liggett & Myers Tobacco Company, R. J. Reynolds Tobacco Company,[1] American Suppliers, Inc., a subsidiary of American, and certain officials of the respective companies who were convicted by a jury, in the District Court of the United States for the Eastern District of Kentucky, of violating §§ 1 and 2 of the Sherman Anti-Trust Act, pursuant to an information filed July 24, 1940, and modified October 31, 1940.

Each petitioner was convicted on four counts: (1) conspiracy in restraint of trade, (2) monopolization, (3) attempt to monopolize, and (4) conspiracy to monopolize. Each count related to interstate and foreign trade and commerce in tobacco. No sentence was imposed under the third count as the Court held that that count was merged in the second. Each petitioner was fined $5,000 on each of the other counts, making $15,000 for each petitioner and a total of $255,000. Seven other defendants were found not guilty and a number of the original defendants were severed from the proceedings pursuant to stipulation.

The Circuit Court of Appeals for the Sixth Circuit, on December 8, 1944, affirmed each conviction. 147 F. 2d

[1] Here referred to as American, Liggett and Reynolds.

93. All the grounds urged for review of those judgments were considered here on petitions for certiorari. On March 26, 1945, this Court granted the petitions but each was "limited to the question whether actual exclusion of competitors is necessary to the crime of monopolization under § 2 of the Sherman Act." 324 U. S. 836. On April 19, 1945, Reynolds, et al., filed a petition for rehearing and enlargement of the scope of review in their case but it was denied. 324 U. S. 891. This opinion is limited to the convictions under § 2 of the Sherman Act[2] and deals especially with those for monopolization under the second count of the information.

The issue thus emphasized in the order allowing certiorari and primarily argued by the parties has not been previously decided by this Court. It is raised by the following instructions which were especially applicable to the second count[3] but were related also to the other counts under § 2 of the Sherman Act:

> "Now, the term '*monopolize*' as used in Section 2 of the Sherman Act, as well as in the last three counts

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[2] "SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 26 Stat. 209, 15 U. S. C. § 2.

[3] The second count included particularly the following:

> "Before and during the period of three years next preceding the filing of this information, . . . defendants, . . . well knowing the foregoing facts, have, . . . unlawfully monopolized the aforesaid interstate and foreign trade and commerce in tobacco, in violation of Section Two of the Act of Congress of July 2, 1890, . . .
>
> . . . . . .
>
> "In adopting and exercising such methods, means and practices, each defendant has acted with full knowledge that unanimity

of the Information, means the joint acquisition or maintenance by the members of a conspiracy formed for that purpose, of the *power to control and dominate interstate trade and commerce in a commodity to such an extent that they are able, as a group, to exclude actual or potential competitors from the field, accompanied with the intention and purpose to exercise such power.*

"The phrase 'attempt to monopolize' means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it, which methods, means and practices are so employed by the members of and pursuant to a combination or conspiracy formed for the purpose of such accomplishment.

"It is in no respect a violation of the law that a number of individuals or corporations, each acting for himself or itself, may own or control a large part, or even all of a particular commodity, or all the business in a particular commodity.

"*An essential element* of the illegal monopoly or monopolization charged *in this case is the existence*

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of action with reference thereto was and would be the policy, intent and practice of the others, that such unanimity of action would necessarily result in drawing to defendant major tobacco companies as a group the power to dominate, control, and exclude others from the aforesaid interstate and foreign trade and commerce, has intended such result, and such result has in fact been achieved.

"Said unlawful monopolization has had the effects, among others, of permitting a few companies to attain control of a bottleneck in a great industry, through which a major farm commodity, on which several million are dependent, must pass, on its way through the hands of jobbers and retailers, to the many millions of people who use tobacco products; of enabling these few companies to abuse their resulting strategic and dominant position, by making the income of growers of leaf tobacco lower than it otherwise would have been; by making the income of distributors and other manufacturers of tobacco products lower than it otherwise would have been; and by keeping from all other groups in the industry, and from consumers, the benefits which otherwise would flow from free, vigorous and normal competition."

of a combination or conspiracy to acquire and maintain the power to exclude competitors to a substantial extent.

"Thus you will see that *an indispensable ingredient of each of the offenses charged in the Information is a combination or conspiracy.*" (Italics supplied.)

While the question before us, as briefly stated in the Court's order, makes no express reference to the inclusion, in the crime of "monopolization," of the element of "a combination or conspiracy to acquire and maintain the power to exclude competitors to a substantial extent," yet the trial court, in its above quoted instructions to the jury, described such a combination or conspiracy as an "essential element" and an "indispensable ingredient" of that crime in the present cases. We therefore include that element in determining whether the foregoing instructions correctly stated the law as applied to these cases. In discussing the legal issue we shall assume that such a combination or conspiracy to monopolize has been established. Because of the presence of that element, we do not have here the hypothetical case of parties who themselves have not "achieved" monopoly but have had monopoly "thrust upon" them. See *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 429.

The present cases are not comparable to cases where the parties, for example, merely have made a new discovery or an original entry into a new field and unexpectedly or unavoidably have found themselves enjoying a monopoly coupled with power and intent to maintain it. In the *Aluminum Co.* case, discussed later, there was a use of various unlawful means to establish or maintain the monopoly. Here we have the additional element of a combination or conspiracy to acquire or maintain the power to exclude competitors that is charged in the fourth count.

The present opinion is not a finding by this Court one way or the other on the many closely contested issues of fact. The present opinion is an application of the law to the facts as they were found by the jury and which the Circuit Court of Appeals held should not be set aside.[4] The trial court's instruction did not call for proof of an "actual exclusion" of competitors on the part of the petitioners. For the purposes of this opinion, we shall assume, therefore, that an actual exclusion of competitors by the petitioners was not claimed or established by the prosecution. Simply stated the issue is: Do the facts called for by the trial court's definition of monopolization amount to a violation of § 2 of the Sherman Act?

Before reaching that issue we shall touch upon another contention which the petitioners have made and which the Government has undertaken to answer. This is the contention that the separate convictions returned under the conspiracy count in restraint of trade and under the conspiracy count to monopolize trade amount to double jeopardy, or to a multiplicity of punishment in a single proceeding, and therefore violate the Fifth Amendment to the Federal Constitution.[5] The petitioners argue that § 2 of the Sherman Act should be interpreted to require proof of actual exclusion of competitors in order to show "monopolization," and they claim that only thus can a "conspiracy to monopolize" trade be sufficiently differentiated from a "conspiracy in restraint of" trade as to avoid subjecting the parties accused under those counts to double jeopardy.

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[4] The verdict in a criminal case is sustained only when there is "relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt," that the accused is guilty. *Mortensen* v. *United States*, 322 U. S. 369, 374.

[5] ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . ."

Petitioners seek support for these contentions as to the two conspiracy counts from the principles stated in *Braverman* v. *United States,* 317 U. S. 49, and in *Blockburger* v. *United States,* 284 U. S. 299. On the authority of the *Braverman* case, petitioners claim that there is but one conspiracy, namely, a conspiracy to fix prices. In contrast to the single conspiracy described in that case in separate counts, all charged under the general conspiracy statute, § 37, Criminal Code, 35 Stat. 1096, 18 U. S. C. § 88, we have here separate statutory offenses, one a conspiracy in restraint of trade that may stop short of monopoly, and the other a conspiracy to monopolize that may not be content with restraint short of monopoly. One is made criminal by § 1 and the other by § 2 of the Sherman Act.

We believe also that in accordance with the *Blockburger* case, §§ 1 and 2 of the Sherman Act require proof of conspiracies which are reciprocally distinguishable from and independent of each other although the objects of the conspiracies may partially overlap. Cf. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 226. In the present cases, the court below has found that there was more than sufficient evidence to establish a conspiracy in restraint of trade by price fixing and other means, and also a conspiracy to monopolize trade with the power and intent to exclude actual and potential competitors from at least a part of the tobacco industry.

Petitioners further suggest that the second count (to monopolize), and the fourth count (to conspire to monopolize), may lead to multiple punishment, contrary to the principle of the *Blockburger* case. Petitioners argue that the Government's theory of monopolization calls for proof of a joint enterprise with power and intent to exclude competitors and, therefore, that the conspiracy to monop-

olize must be a part of that proof. It long has been settled, however, that a "conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy." *United States* v. *Rabinowich,* 238 U. S. 78, 85; *Pinkerton* v. *United States,* 328 U. S. 640, 643. Petitioners, for example, might have been convicted here of a conspiracy to monopolize without ever having acquired the power to carry out the object of the conspiracy, *i. e.,* to exclude actual and potential competitors from the cigarette field. Cf. *United States* v. *Shapiro,* 103 F. 2d 775, 776.

Although there is no issue of fact or question as to the sufficiency of the evidence to be discussed here, nevertheless, it is necessary to summarize the principal facts of that conspiracy to monopolize certain trade, which was charged in the fourth count. These facts demonstrate also the vigor and nature of the intent of the petitioners to exclude competitors in order to maintain that monopoly if need or occasion should offer itself to attempt such an exclusion. To support the verdicts it was not necessary to show power and intent to exclude *all* competitors, or to show a conspiracy to exclude *all* competitors. The requirement stated to the jury and contained in the statute was only that the offenders shall "monopolize any part of the trade or commerce among the several States, or with foreign nations." This particular conspiracy may well have derived special vitality, in the eyes of the jury, from the fact that its existence was established, not through the presentation of a formal written agreement, but through the evidence of widespread and effective conduct on the part of petitioners in relation to their existing or potential competitors.

The three years at issue in the charges made were those immediately preceding the filing of the informations on

July 24, 1940,[6] but for convenience the statistics relied upon generally have been those for the calendar years 1937, 1938 and 1939. Because of the circumstantial nature of most of the evidence and because of the essentiality of figures for comparative years in establishing any restraint of trade or monopoly, the record also contains much important material drawn from earlier years. Some appreciation of the history and development of the cigarette industry is essential to an understanding of the cases. However, in applying the law to the central issue in these cases, the variations among the several petitioners participating in each step are not material in reaching the conclusion on the legal question before us. There were many variations in the business activities of the several petitioners. It would be cumbersome and difficult to state exactly which petitioners and what combination of petitioners did each of the acts mentioned. It is, however, not fair to refer, without explanation, to all the acts simply as having been done by "the petitioners." In its usual sense, "the petitioners" would include all of them. Obviously, however, the corporate and individual petitioners did not and could not all act precisely alike. To refer only to "the corporate petitioners" would be unsatisfactory because, in addition to American, Liggett and Reynolds, there is the corporate petitioner, American Suppliers, Inc. It participated in only a limited number of activities and then only as a subsidiary of American. Furthermore, as pointed out by Reynolds in its petition for rehearing and for enlargement of scope of review in its

[6] "No person shall be prosecuted, tried, or punished for any offense, not capital, . . . unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed." Rev. Stat. § 1044, as amended by 45 Stat. 51, 18 U. S. C. § 582.

case, Reynolds' participation in some parts of the combination or conspiracy differs in many respects from that of American and Liggett.

The fact is that Reynolds, in 1913, actually broke into the cigarette field with its Camel cigarettes, and, as a vigorous competitor of American, Liggett and P. Lorillard Company, revolutionized the cigarette industry. Gradually Reynolds grew to be one of the "Big Three" with American and Liggett. The later evidence then tends to show that those three, in spite of the earlier competitive history of Reynolds, have operated together in recent years in violation of the Sherman Act. Similarly, much of the evidence relating to the purchase of tobacco at auction does not apply in precisely equal degree to each petitioner. However, taking the story as a whole, each petitioner now has been convicted of the same offense under like counts and the problem before us is only to state the rule of law to be applied in defining monopolization under the Sherman Act as applied to all of the petitioners alike. To distinguish among them at each stage would not change the legal conclusion on the one issue here presented but would confuse what should be a clear summary of the facts essential to an understanding of that legal issue. Accordingly, each reference to "petitioners" in this recital will mean "some or all of the petitioners as disclosed by the record."

First of all, the monopoly found by the jury to exist in the present cases appears to have been completely separable from the old American Tobacco Trust which was dissolved in 1911.[7] The conspiracy to monopolize and

[7] The history of the tobacco industry in America and of the litigation which resulted in the dissolution of the tobacco trust in 1911 is set forth in *United States* v. *American Tobacco Co.*, 221 U. S. 106–193. See also, *United States* v. *American Tobacco Co.*, 191 F. 371–431,

the monopolization charged here do not depend upon proof relating to the old tobacco trust but upon a dominance and control by petitioners in recent years over purchases

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containing the decree of dissolution and see 164 F. 700–728, 1024, for the report of the case in the Circuit Court. While the names of some of the parties in the earlier case are those of the present petitioners, the present proceedings do not reflect a failure on their part to observe the requirements of the 1911 decree. Although the decree of dissolution resulted in the separation of assets among the American, Liggett and Reynolds companies, as well as P. Lorillard Company and others, there is no contention here that common ownership of stock and the interlocking of officers and directors among those companies have continued to exist. The tobacco industry also has changed from one dealing primarily in the distribution of smoking tobacco, chewing tobacco, little cigars and cigarettes to one dealing primarily in cigarettes. The record shows that in 1910 the weight of the tobacco used in the domestic manufacture of cigarettes was about 31,000,000 pounds out of 522,000,000 pounds, or less than 6%, whereas in 1939, it was 509,000,000 pounds out of 885,000,000 pounds, or 57.5%.

By the 1911 decree, the cigarette brands of the trust were distributed as follows: To American: Sweet Caporal, Pall Mall, Hassan and Mecca. To Liggett: American Beauty, Fatima, Piedmont, Imperiales, Home Run and King Bee. To P. Lorillard Company: Helmar, Murad, Mogul, Turkish Trophies and Egyptian Deities. Neither the old trust nor the petitioners in the present cases have ever done much general cigar business. Reynolds in 1911 had no cigarette business and it received none by the decree. It then was small in comparison with the other companies named. In 1913, it put its Camel cigarettes on the market. These were neither Turkish, pseudo-Turkish, nor Virginia cigarettes. They were made largely of burley tobacco which had not been used in any successful cigarette up to that time. They were "cased" or flavored—an old process in preparing plug tobacco but an innovation in cigarettes. That competition was highly successful. Reynolds' sales rose to where, in 1919, it made about 40% of all domestic cigarette sales in the United States. By 1917 its total production exceeded by 50% the total national production of cigarettes in 1911. In 1916, American launched a new brand of burley cigarettes—Lucky Strikes. Liggett changed its Chesterfield

of the raw material and over the sale of the finished product in the form of cigarettes. The fact, however, that the purchases of leaf tobacco and the sales of so many products of the tobacco industry have remained largely within the same general group of business organizations for over a generation, inevitably has contributed to the ease with which control over competition within the industry and the mobilization of power to resist new competition can be exercised. A friendly relationship within such a long established industry is, in itself, not only natural but commendable and beneficial, as long as it does not breed illegal activities. Such a community of interest in any industry, however, provides a natural foundation for working policies and understandings favorable to the insiders and unfavorable to outsiders. The verdicts indicate that practices of an informal and flexible nature were adopted and that the results were so uniformly beneficial to the petitioners in protecting their common interests as against those of competitors that, entirely from circumstantial evidence, the jury found that a combination or conspiracy existed among the petitioners from 1937 to 1940, with power and intent to exclude competitors to such a substantial extent as to violate the Sherman Act as interpreted by the trial court.[8]

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brand from a Virginia type cigarette to a burley blend. Lorillard, in 1926, launched a new brand of Old Gold cigarettes. By that time the "Big Three" were American, Liggett and Reynolds and those companies are the three cigarette-producing companies that are parties to the present proceedings.

[8] The identity of the parties referred to in the present cases is more readily recognizable when they are identified with their products as follows:

American—Lucky Strike, Pall Mall (by a subsidiary), Herbert Tareyton cigarettes, Bull Durham tobacco, about 50 brands of chewing tobacco and hundreds of brands of smoking tobacco.

Liggett—Chesterfield and about 15 other brands of cigarettes, 45

The position of the petitioners in the cigarette industry from 1931 to 1939 is clear from the following tables:

PERCENTAGE OF TOTAL U. S. PRODUCTION OF SMALL CIGARETTES—1931–1939.

	1931	1932	1933	1934	1935	1936	1937	1938	1939
American	39.5	36.6	33.0	26.1	24.0	22.5	21.5	22.7	22.9
Liggett	22.7	23.0	28.1	27.4	26.0	24.6	23.6	22.9	21.6
Reynolds	28.4	21.8	22.8	26.0	28.1	29.5	28.1	25.3	23.6
Lorillard	6.5	5.2	4.7	4.1	3.8	4.3	4.7	5.1	5.8
Brown & Williamson	0 2	6.9	5.5	8.3	9.6	9.6	9.9	9.9	10.6
Philip Morris	0.9	1.4	0.8	2.0	3.1	4.1	5.4	5.7	7.1
Stephano	0.1	0.1	0.2	0.5	1.4	1.9	2.5	3.1	3.3
Axton-Fisher	0.7	3.1	4.4	4.4	3.0	2.2	2.4	2.7	2.4
Larus	0.2	1.0	0.2	0.6	0.7	0.8	1.0	1.3	1.3
Combined Percentages of American, Liggett and Reynolds	90.7	81.4	83.9	79.5	78.0	76.7	73.3	71.0	68.0

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brands of smoking tobacco, including Velvet and Duke's Mixture and over 25 brands of chewing tobacco.

Reynolds—Camel cigarettes, 12 brands of smoking tobacco, including Prince Albert, and 88 brands of chewing tobacco.

P. Lorillard Company—Old Gold, and Sensation cigarettes, as well as other tobacco products.

Philip Morris & Co., Ltd., Incorporated—Philip Morris, and Paul Jones cigarettes.

British-American Tobacco Company, Limited—Many tobacco products, including those of its subsidiary, Brown & Williamson Tobacco Corporation.

Brown & Williamson Tobacco Corporation—Raleigh cigarettes.

The Imperial Tobacco Company, Ltd.—Tobacco products sold in Great Britain and Ireland.

Universal Leaf Tobacco Company, Inc.—Dealers in leaf tobacco.

Stephano Brothers, Axton-Fisher Tobacco Company and Larus Bro. Co., Inc., are all producers of the so-called "10 cent cigarettes." Their cigarettes, like certain comparable cigarettes produced by P. Lorillard Company and by Philip Morris & Co., Ltd., Incorporated, generally sell for 10 cents a package in contrast to 13 or 15 cents or more for the leading brands of burley blend cigarettes.

VOLUME OF CIGARETTE PRODUCTION—1931–1939.

(Billions of cigarettes.)

	1931	1932	1933	1934	1935	1936	1937	1938	1939
Total U. S. Production	117.1	106.6	114.9	130.0	140.0	158.9	170.0	171.7	180.7
American	46.2	39.0	37.9	33.9	33.5	35.8	36.6	39.0	41.4
Liggett	26.6	24.6	32.2	35.6	36.3	39.1	40.2	39.3	39.0
Reynolds	33.3	23.2	26.2	33.8	39.4	46.9	47.8	43.5	42.6
Lorillard	7.6	5.5	5.4	5.3	5.3	6.8	8.1	8.8	10.5
Brown & Williamson	0.3	7.3	6.3	10.8	13.4	15.2	16.8	17.1	19.1
Philip Morris	1.0	1.5	0.9	2.6	4.4	6.4	9.2	9.7	12.8
Stephano	0.1	0.1	0.2	0.7	2.0	3.0	4.2	5.4	6.0
Axton-Fisher	0.8	3.3	5.0	5.7	4.2	3.5	4.1	4.5	4.3
Larus	0.3	1.0	0.3	0.7	1.0	1.2	1.7	2.2	2.3
Combined volume of American, Liggett and Reynolds	106.1	86.8	96.3	103.3	109.2	121.8	124.6	121.8	123.0

The first table shows that, although American, Liggett and Reynolds gradually dropped in their percentage of the national domestic cigarette production from 90.7% in 1931 to 73.3%, 71% and 68%, respectively, in 1937, 1938 and 1939, they have accounted at all times for more than 68%, and usually for more than 75%, of the national production. The balance of the cigarette production has come from six other companies. No one of those six ever has produced more than the 10.6% once reached by Brown & Williamson in 1939. The second table shows that, while the percentage of cigarettes produced by American, Liggett and Reynolds in the United States dropped gradually from 90.7% to 68%, their combined volume of production actually increased from 106 billion in 1931 to about 125 billion, 122 billion and 123 billion, respectively, in 1937, 1938 and 1939. The remainder of the production was divided among the other six companies. No one of those six ever has produced more than about 19 billion cigarettes a year, which was the high point reached by Brown & Williamson in 1939.

The further dominance of American, Liggett and Reynolds within their special field of burley blend cigarettes, as

compared with the so-called "10 cent cigarettes," is also apparent. In 1939, the 10 cent cigarettes constituted about 14½% of the total domestic cigarette production. Accordingly, the 68% of the total cigarette production enjoyed by American, Liggett and Reynolds amounted to 80% of that production within their special field of cigarettes. The second table shows a like situation. In 1939, the 10 cent cigarettes accounted for 25.6 billion of the cigarettes produced. Deducting this from the 57.7 billion cigarettes produced by others than American, Liggett and Reynolds left only about 32 billion cigarettes of a comparable grade produced in that year by competitors of the "Big Three" as against the 123 billion produced by them. In addition to the combined production by American, Liggett and Reynolds in 1939 of over 68% of all domestic cigarettes, they also produced over 63% of the smoking tobacco and over 44% of the chewing tobacco. They never were important factors in the cigar or snuff fields of the tobacco industry.

The foregoing demonstrates the basis of the claim of American, Liggett and Reynolds to the title of the "Big Three." The marked dominance enjoyed by each of these three, in roughly equal proportions, is emphasized by the fact that the smallest of them at all times showed over twice the production of the largest outsider. Without adverse criticism of it, comparative size on this great scale inevitably increased the power of these three to dominate all phases of their industry. "Size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past." *United States* v. *Swift & Co.*, 286 U. S. 106, 116. An intent to use this power to maintain a monopoly was found by the jury in these cases.

The record further shows that the net worth of American, Liggett and Reynolds in terms of their total assets,

less current liabilities, rose from $277,000,000 in 1912 to over $551,000,000 in 1939. Their net annual earnings, before payment of interest and dividends, rose from about $28,000,000 in 1912 to over $75,000,000 in 1939. The record is full of evidence of the close relationship between their large expenditures for national advertising of cigarettes and resulting volumes of sales. In each of the years 1937, 1938 and 1939, American, Liggett and Reynolds expended a total of over $40,000,000 a year for advertising. Such advertising is not here criticized as a business expense. Such advertising may benefit indirectly the entire industry, including the competitors of the advertisers. Such tremendous advertising, however, is also a widely published warning that these companies possess and know how to use a powerful offensive and defensive weapon against new competition. New competition dare not enter such a field, unless it be well supported by comparable national advertising. Large inventories of leaf tobacco, and large sums required for payment of federal taxes in advance of actual sales, further emphasize the effectiveness of a well financed monopoly in this field against potential competitors if there merely exists an intent to exclude such competitors. Prevention of all potential competition is the natural program for maintaining a monopoly here, rather than any program of actual exclusion. "Prevention" is cheaper and more effective than any amount of "cure."

With this background of a substantial monopoly, amounting to over two-thirds of the entire domestic field of cigarettes, and to over 80% of the field of comparable cigarettes, and with the opposition confined to several small competitors, the jury could have found from the actual operation of the petitioners that there existed a combination or conspiracy among them not only in restraint of trade, but to monopolize a part of the tobacco

industry. The trial court described this combination or conspiracy as an "essential element" and "indispensable ingredient" of the offenses charged. It is therefore only in conjunction with such a combination or conspiracy that these cases will constitute a precedent. The conspiracy so established by the verdicts under the second count appears to have been one to fix and control prices and other material conditions relating to the purchase of raw material in the form of leaf tobacco for use in the manufacture of cigarettes. It also appears to have been one to fix and control prices and other material conditions relating to the distribution and sale of the product of such tobacco in the form of cigarettes. The jury found a conspiracy to monopolize to a substantial degree the leaf market and the cigarette market. The jury's verdicts also found a power and intent on the part of the petitioners to exclude competition to a substantial extent in the tobacco industry.

I.

The verdicts show that the jury found that the petitioners conspired to fix prices and to exclude undesired competition against them in the purchase of the domestic type of flue-cured tobacco and of burley tobacco. These are raw materials essential to the production of cigarettes of the grade sold by the petitioners and also, to some extent, of the 10 cent grade of cigarettes which constitutes the only substantial competition to American, Liggett and Reynolds in the cigarette field of the domestic tobacco industry. The tobaccos involved in these cases are the flue-cured, burley and Maryland tobaccos. The flue-cured or bright tobacco is grown in a number of areas called "belts." These are in Virginia, North Carolina, South Carolina, Georgia and Florida. The tobacco takes its name of flue-cured from the "curing" process to which

it is subjected and which consists of hanging the tobacco leaves in barns heated by a system of flues. Between 50% and 60% of the total flue-cured product is for export to England. The petitioners purchased a combined total of between 50% and 80% of the domestic flue-cured tobacco. The burley tobacco is produced largely in the burley belt in Kentucky and Tennessee. It is cured without heating, by exposing the leaves to the air in barns in which they are hung. The petitioners purchased from 60% to 80% of the annual crop of burley. The Maryland tobacco is grown in the southern part of that State. Some of it is sold in auction markets, the rest is packed in hogsheads and sold in two Baltimore warehouses by the Maryland Tobacco Growers' Association and by commercial merchants. The greater part of the Maryland tobacco was purchased by petitioners. The crops in the more southerly belts mature first and the burley crops are not ready for market until late fall. When the tobacco is ready for market the farmers strip, sort and grade the leaves according to their judgment as to quality, tie them into bundles called "hands" (except in Georgia where the tobacco remains loose), and truck them to tobacco auction markets. In the possession of the farmers the crops are perishable as they require a redrying process. Under the modern system of marketing, the tobacco cannot be stored to await another season. The farmers have no facilities for redrying the tobacco and therefore must sell their crops in the season in which those crops are raised or they will lose them. The petitioners kept large enough tobacco stocks on hand to last about three years. The value of these stocks was over $100,000,000 for each company and these stocks assured their independence of the market in any one year. Auction markets for the sale of leaf tobacco have been in operation for many years and were well established long before the dissolution of

the tobacco trust in 1911.[9] Such markets are located in 75 towns in the flue-cured region and 42 towns in the burley area. There are four Maryland markets. Since the crop in the Georgia Belt matures first, the markets in that belt open first, usually about August 1. The auctioneers then follow the marketing seasons to the North, reaching the "Old Belt" in North Carolina and Virginia in the latter part of September. The dates for opening the markets in the flue-cured belts are set by the Tobacco Association of the United States of which buyers, including petitioners, warehousemen and others connected with the industry, but not including farmers, are members. Burley sales begin in Lexington, Kentucky, which is the principal market, on the first Monday in December. The other burley markets open the next day. Sales continue, excepting at Christmas time, for the next few months.

The Government introduced evidence showing that, although there was no written or express agreement discovered among American, Liggett and Reynolds, their practices included a clear course of dealing. This evidently convinced the jury of the existence of a combination or conspiracy to fix and control prices and practices as to domestic leaf tobacco, both in restraint of trade as such, and to establish a substantially impregnable defense against any attempted intrusion by potential competitors into these markets.

It appeared that petitioners refused to purchase tobacco on these markets unless the other petitioners were also represented thereon. There were attempts made by

[9] For a description of the auction methods of selling in Georgia, see *Townsend* v. *Yeomans*, 301 U. S. 441, 445, and in North Carolina, see *Currin* v. *Wallace*, 306 U. S. 1, 7–8. See also, market practices described in the report of the Committee on Agriculture of the House of Representatives, June 5, 1935, to accompany H. R. 8026. H. Rep. No. 1102, 74th Cong., 1st Sess.

others to open new tobacco markets but none of the petitioners would participate in them unless the other petitioners were present. Consequently, such markets were failures due to the absence of buyers. It appeared that the tobacco farmers did not want to sell their tobacco on a market in which the only purchasers were speculators or dealers. The prices paid under such circumstances were likely to be low in order that the purchasers eventually might resell the tobacco to the manufacturing companies. The foreign purchasers likewise would not participate without the presence of the petitioners. In this way the new tobacco markets and their locations were determined by the unanimous consent of the petitioners and, in arriving at their determination, the petitioners consulted with each other as to whether or not a community deserved a market.

The Government presented evidence to support its claim that, before the markets opened, the petitioners placed limitations and restrictions on the prices which their buyers were permitted to pay for tobacco. None of the buyers exceeded these price ceilings. Grades of tobacco were formulated in such a way as to result in the absence of competition between the petitioners. There was manipulation of the price of lower grade tobaccos in order to restrict competition from manufacturers of the lower priced cigarettes. Methods used included the practice of the petitioners of calling their respective buyers in, prior to the opening of the annual markets, and giving them instructions as to the prices to be paid for leaf tobacco in each of the markets. These instructions were in terms of top prices or price ranges. The price ceilings thus established for the buyers were the same for each of them. In case of tie bids the auctioneer awarded the sale customarily to the buyer who bid first. Under this custom the buyers representing the petitioners often made bids on various baskets of tobacco

before an opening price could be announced so that they might have their claim to the tobacco recognized at the understood ceiling price in the case of tie bids. Often a buyer would bid ahead by indicating that he wanted a certain basket further along in the line of baskets and, in such cases, the tobacco in question was awarded to such buyer without the mention of any price, it being understood that it was sold at the top price theretofore previously determined upon.

Where one or two of the petitioners secured their percentage of the crop on a certain market or were not interested in the purchase of certain offerings of tobacco, their buyers, nevertheless, would enter the bidding in order to force the other petitioners to bid up to the maximum price. The petitioners were not so much concerned with the prices they paid for the leaf tobacco as that each should pay the same price for the same grade and that none would secure any advantage in purchasing tobacco. They were all to be on the same basis as far as the expenses of their purchases went. The prices which were set as top prices by petitioners, or by the first of them to purchase on the market, became, with few exceptions, the top prices prevailing on those markets. Competition also was eliminated between petitioners by the purchase of grades of tobacco in which but one of them was interested. To accomplish this, each company formulated the grades which it alone wished to purchase. The other companies recognized the grades so formulated as distinctive grades and did not compete for them. While the differences between the grades so formulated were distinguishable by the highly trained special buyers, they were in reality so minute as to be inconsequential. This element, however, did not mean that a company could bid any price it wished for its especially formulated grades of tobacco. The other companies prevented that by bidding up the tobacco, at least to a point where they did not risk being

awarded the sale to themselves. Each company determined in advance what portion of the entire crop it would purchase before the market for that season opened. The petitioners then separately informed their buyers of the percentage of the crop which they wished to purchase and gave instructions that only such a percentage should be purchased on each market. The purchases were spread evenly over the different markets throughout the season. No matter what the size of the crop might be, the petitioners were able to purchase their predetermined percentages thereof within the price limits determined upon by them, thus indicating a stabilized market. The respective petitioners employed supervisors whose functions were to see that the prices were the same on one market as on another. Where, because of difference in appraisals of grades or other similar factors, the bidding was out of line with the predetermined price limits or there was a tendency for prices to vary from those on other markets, the supervisors sought to maintain the same prices and grades on different markets. This was sought to be achieved by instructions to buyers to change the prices bid or the percentages purchased, and such actions proved to be successful in maintaining and equalizing the prices on the different markets.

At a time when the manufacturers of lower priced cigarettes were beginning to manufacture them in quantity, the petitioners commenced to make large purchases of the cheaper tobacco leaves used for the manufacture of such lower priced cigarettes. No explanation was offered as to how or where this tobacco was used by petitioners. The compositions of their respective brands of cigarettes calling for the use of more expensive tobaccos remained unchanged during this period of controversy and up to the end of the trial. The Government claimed that such purchases of cheaper tobacco evidenced a combination and a purpose among the petitioners to deprive the man-

ufacturers of cheaper cigarettes of the tobacco necessary for their manufacture, as well as to raise the price of such tobacco to such a point that cigarettes made therefrom could not be sold at a sufficiently low price to compete with the petitioners' more highly advertised brands.

II.

The verdicts show also that the jury found that the petitioners conspired to fix prices and to exclude undesired competition in the distribution and sale of their principal products. The petitioners sold and distributed their products to jobbers and to selected dealers who bought at list prices, less discounts. Almost all of the million or more dealers who handled the respective petitioners' products throughout the country consisted of such establishments as small storekeepers, gasoline station operators and lunch room proprietors who purchased the cigarettes from jobbers. The jobbers in turn derived their profits from the difference between the wholesale price paid by them and the price charged by them to local dealers. A great advantage therefore accrued to any dealer buying at the discounted or wholesale list prices. Selling to dealers at jobbers' prices was called "direct selling" and the dealers as well as the jobbers getting those prices were referred to as being on the "direct list." The list prices charged and the discounts allowed by petitioners have been practically identical since 1923 and absolutely identical since 1928. Since the latter date, only seven changes have been made by the three companies and those have been identical in amount. The increases were first announced by Reynolds. American and Liggett thereupon increased their list prices in identical amounts.

The following record of price changes is circumstantial evidence of the existence of a conspiracy and of a power and intent to exclude competition coming from cheaper

grade cigarettes. During the two years preceding June, 1931, the petitioners produced 90% of the total cigarette production in the United States. In that month tobacco farmers were receiving the lowest prices for their crops since 1905. The costs to the petitioners for tobacco leaf, therefore, were lower than usual during the past 25 years, and their manufacturing costs had been declining. It was one of the worst years of financial and economic depression in the history of the country. On June 23, 1931, Reynolds, without previous notification or warning to the trade or public, raised the list price of Camel cigarettes, constituting its leading cigarette brand, from $6.40 to $6.85 a thousand. The same day, American increased the list price for Lucky Strike cigarettes, its leading brand, and Liggett the price for Chesterfield cigarettes, its leading brand, to the identical price of $6.85 a thousand. No economic justification for this raise was demonstrated. The president of Reynolds stated that it was "to express our own courage for the future and our own confidence in our industry." The president of American gave as his reason for the increase, "the opportunity of making some money." See 147 F. 2d 93, 103. He further claimed that because Reynolds had raised its list price, Reynolds would therefore have additional funds for advertising and American had raised its price in order to have a similar amount for advertising. The officials of Liggett claimed that they thought the increase was a mistake as there did not seem to be any reason for making a price advance but they contended that unless they also raised their list price for Chesterfields, the other companies would have greater resources to spend in advertising and thus would put Chesterfield cigarettes at a competitive disadvantage. This general price increase soon resulted in higher retail prices and in a loss in volume of sales. Yet in 1932, in the midst of the national depression with the sales of the petitioners' cigarettes falling off greatly in number, the

petitioners still were making tremendous profits as a result of the price increase. Their net profits in that year amounted to more than $100,000,000. This was one of the three biggest years in their history.

Before 1931, certain smaller companies had manufactured cigarettes retailing at 10 cents a package, which was several cents lower than the retail price for the leading brands of the petitioners. Up to that time, the sales of the 10 cent cigarettes were negligible. However, after the above described increase in list prices of the petitioners in 1931, the 10 cent brands made serious inroads upon the sales of the petitioners. These cheaper brands of cigarettes were sold at a list price of $4.75 a thousand and from 1931 to 1932 the sales of these cigarettes multiplied 30 times, rising from 0.28% of the total cigarette sales of the country in June, 1931, to 22.78% in November, 1932. In response to this threat of competition from the manufacturers of the 10 cent brands, the petitioners, in January, 1933, cut the list price of their three leading brands from $6.85 to $6 a thousand. In February, they cut again to $5.50 a thousand. The evidence tends to show that this cut was directed at the competition of the 10 cent cigarettes. Reports that previously had been sent in by various officials and representatives to their companies told of the petitioners' brands losing in competition with the 10 cent brands. The petitioners were interested in a sufficiently low retail price for their products so that they would defeat the threat from the lower priced cigarettes and found that, in order to succeed in their objective, it was necessary that there be not more than a 3 cent differential on each package at retail between the cheaper cigarettes and their own brands. The petitioners' cuts in their list prices and the subsequent reductions in the retail prices of their products resulted in a victory over the 10 cent brands. The letters of petitioners' representatives to their companies reported upon the progress of

this battle, giving an account of the decline in sales of the 10 cent brands because of the price reductions in the "15-cent brands," and prophesying that certain of the 10 cent brands would "pass out of the picture." Following the first price cut by petitioners, the sales of the 10 cent brands fell off considerably. After the second cut they fell off to a much greater extent. When the sale of the 10 cent brands had dropped from 22.78% of the total cigarette sales in November, 1932, to 6.43% in May, 1933, the petitioners, in January, 1934, raised the list price of their leading brands from $5.50 back up to $6.10 a thousand. During the period that the list price of $5.50 a thousand was in effect, Camels and Lucky Strikes were being sold at a loss by Reynolds and American. Liggett at the same time was forced to curtail all of its normal business activities and cut its advertising to the bone in order to sell at this price. The petitioners, in 1937, again increased the list prices of their above named brands to $6.25 a thousand and in July, 1940, to $6.53 a thousand.

Certain methods used by the petitioners to secure a reduction in the retail prices of their cigarettes were in evidence. Reynolds and Liggett required their retailers to price the 10 cent brands at a differential of not more than 3 cents below Camel and Chesterfield cigarettes. They insisted upon their dealers correcting a greater differential by increasing the retail price of the 10 cent brands to 11 cents with petitioners' brands at 14 cents a package, or by requiring that petitioners' brands be priced at 13 cents with the lower priced cigarettes at 10 cents a package. Salesmen for Liggett were instructed to narrow the differential to 3 cents, it being deemed of no consequence whether the dealer raised the price of the 10 cent brands or reduced the price of Chesterfields. Reynolds referred to a differential of more than 3 cents as "discriminatory" on the ground that the dealer then

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would make a higher gross profit on the higher priced cigarettes than on the 10 cent brands. After the list price reductions were made and at the height of the price war, the petitioners commenced the distribution of posters advertising their brands at 10 cents a package and made attempts to have dealers meet these prices. Among the efforts used to achieve their objectives, petitioners gave dealers direct list privileges of purchase, together with discounts, poster advertising displays, cash subsidies and free goods. In addition to the use of these inducements, petitioners also used threats and penalties to enforce compliance with their retail price program, removed dealers from the direct lists, cancelled arrangements for window advertising, changed credit terms with a resulting handicap to recalcitrant dealers, discontinued cash allowances for advertising, refused to make deals giving free goods, and made use of price cutters to whom they granted advantageous privileges to drive down retail prices where a parity, or price equalization, was not maintained by dealers between brands of petitioners or where the dealers refused to maintain the 3 cent differential between the 10 cent brands and the leading brands of petitioners' cigarettes. There was evidence that when dealers received an announcement of the price increase from one of the petitioners and attempted to purchase some of the leading brands of cigarettes from the other petitioners at their unchanged prices before announcement of a similar change, the latter refused to fill such orders until their prices were also raised, thus bringing about the same result as if the changes had been precisely simultaneous.

III.

It was on the basis of such evidence that the Circuit Court of Appeals found that the verdicts of the jury were sustained by sufficient evidence on each count. The question squarely presented here by the order of this

Court in allowing the writs of certiorari is whether actual exclusion of competitors is necessary to the crime of monopolization in these cases under § 2 of the Sherman Act. We agree with the lower courts that such actual exclusion of competitors is not necessary to that crime in these cases and that the instructions given to the jury, and hereinbefore quoted, correctly defined the crime. A correct interpretation of the statute and of the authorities makes it the crime of monopolizing, under § 2 of the Sherman Act, for parties, as in these cases, to combine or conspire to acquire or maintain the power to exclude competitors from any part of the trade or commerce among the several states or with foreign nations, provided they also have such a power that they are able, as a group, to exclude actual or potential competition from the field and provided that they have the intent and purpose to exercise that power. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 226, n. 59 and authorities cited.

It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition. No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose. Where the conspiracy is proved, as here, from the evidence of the action taken in concert by the parties to it, it is all the more convincing proof of an intent to exercise the power of exclusion acquired through that conspiracy. The essential combination or conspiracy in violation of the Sherman Act may be found in a course

of dealing or other circumstances as well as in an exchange of words. *United States* v. *Schrader's Son,* 252 U. S. 85. Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified. Neither proof of exertion of the power to exclude nor proof of actual exclusion of existing or potential competitors is essential to sustain a charge of monopolization under the Sherman Act.

In *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 496, this Court said in a footnote, "On finding . . . a power to control the output, supply of the market and the transportation facilities of potential competitors, in the anthracite coal market, the arrangement was held void in *United States* v. *Reading Co.*, 253 U. S. 26, 47–48." It has been held that regardless of the use made of it, a power resulting from the deliberately calculated purchase of a control, which enables a holding company to dominate two great competing interstate railroad carriers and two great competing coal companies engaged extensively in mining and selling anthracite coal which must be distributed over these railroads, is a menace and an undue restraint upon interstate commerce within the meaning of the Anti-Trust Act and is in flagrant violation of the prohibition against monopoly in the Second Section of that Act. *United States* v. *Reading Co.*, 253 U. S. 26. In *Northern Securities Co.* v. *United States,* 193 U. S. 197, in referring to the holding company device there in issue, this Court said that the mere existence of such a combination and the power acquired by the holding company as its trustee constituted a menace to and a direct restraint upon that freedom of commerce which Congress intended to recognize and protect and which the public is entitled to have

protected. A combination may be one in restraint of interstate trade or commerce or to monopolize a part of such trade or commerce in violation of the Sherman Act, although such restraint or monopoly may not have been actually attempted to any harmful extent. See *United States* v. *International Harvester Co.,* 214 F. 987, *id.,* 274 U. S. 693. The authorities support the view that the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so. *United States* v. *American Tobacco Co.,* 164 F. 700, 721, remanded for further proceedings, 221 U. S. 106, 188. "It is undoubtedly true . . . that trade and commerce are 'monopolized' within the meaning of the federal statute, when, as a result of efforts to that end, such power is obtained that a few persons acting together can control the prices of a commodity moving in interstate commerce. It is not necessary that the power thus obtained should be exercised. Its existence is sufficient." *United States* v. *Patten,* 187 F. 664, 672, reversed on other grounds, 226 U. S. 525. Cf. *North American Co.* v. *S. E. C.,* 327 U. S. 686.

The precise question before us has not been decided previously by this Court. However, on March 12, 1945, two weeks before the grant of the writs of certiorari in the present cases, a decision rendered in a suit in equity brought under §§ 1 and 2 of the Sherman Anti-Trust Act against the Aluminum Company of America closely approached the issue we have here. That case was decided by the Circuit Court of Appeals for the Second Circuit under unique circumstances which add to its weight as a precedent. *United States* v. *Aluminum Co. of America,* 148 F. 2d 416. That court sat in that case under a new statute authorizing it to render a decision "in lieu of a

decision by the Supreme Court" and providing that such decision "shall be final and there shall be no review of such decision by appeal or certiorari or otherwise." [10]

[10] "In every suit in equity brought in any district court of the United States under any of said Acts [including the Sherman Anti-Trust Act], wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: *Provided, however,* That if, upon any such appeal, it shall be found that, by reason of disqualification, there shall not be a quorum of Justices of the Supreme Court qualified to participate in the consideration of the case on the merits, then, in lieu of a decision by the Supreme Court, the case shall be immediately certified by the Supreme Court to the circuit court of appeals of the circuit in which is located the district in which the suit was brought which court shall thereupon have jurisdiction to hear and determine the appeal in such case, and it shall be the duty of the senior circuit judge of said circuit court of appeals, qualified to participate in the consideration of the case on the merits, to designate immediately three circuit judges of said court, one of whom shall be himself and the other two of whom shall be the two circuit judges next in order of seniority to himself, to hear and determine the appeal in such case and it shall be the duty of the court, so comprised, to assign the case for argument at the earliest practicable date and to hear and determine the same, and the decision of the three circuit judges so designated, or of a majority in number thereof, shall be final and there shall be no review of such decision by appeal or certiorari or otherwise. . . ." 32 Stat. 823, as amended by 58 Stat. 272, 15 U. S. C. Supp. IV, § 29.

The proviso in the above section was added by Public Law 332, 78th Cong., 2d Sess., approved June 9, 1944, which also made the Act applicable "to every case pending before the Supreme Court of the United States on the date of its enactment." 58 Stat. 272. The case against the Aluminum Company of America was then pending in this Court and, on June 12, 1944, this Court certified it to the Circuit Court of Appeals for the Second Circuit because of the lack of a quorum of Justices of the Supreme Court qualified to participate in the consideration of it on its merits. It was tried before the three senior judges of the Circuit Court of Appeals (Judges Learned Hand, Swan and Augustus N. Hand) and is the only case that has been tried under that proviso.

We find the following statements from the opinion of the court in that case to be especially appropriate here and we welcome this opportunity to endorse them:

> "Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. . . . These considerations, which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes. [148 F. 2d at 427.]
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> "Starting, however, with the authoritative premise that all contracts fixing prices are unconditionally prohibited, the only possible difference between them and a monopoly is that while a monopoly necessarily involves an equal, or even greater, power to fix prices, its mere existence might be thought not to constitute an exercise of that power. That distinction is nevertheless purely formal; it would be valid only so long as the monopoly remained wholly inert; it would disappear as soon as the monopoly began to operate; for, when it did—that is, as soon as it began to sell at all—it must sell at some price and the only price at which it could sell is a price which it itself fixed. Thereafter the power and its exercise must needs coalesce. Indeed it would be absurd to condemn such contracts unconditionally, and not to extend the condemnation to monopolies; for the contracts are only steps toward that entire control which monopoly confers: they are really partial monopolies. [*Id.* 427–428.]
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> "It does not follow because 'Alcoa' had such a monopoly, that it 'monopolized' the ingot market: it may not have achieved monopoly; monopoly may have been thrust upon it. If it had been a combination of existing smelters which united the whole indus-

try and controlled the production of all aluminum ingot, it would certainly have 'monopolized' the market. In several decisions the Supreme Court has decreed the dissolution of such combinations, although they had engaged in no unlawful trade practices. . . . We may start therefore with the premise that to have combined ninety per cent of the producers of ingot would have been to 'monopolize' the ingot market; and, so far as concerns the public interest, it can make no difference whether an existing competition is put an end to, or whether prospective competition is prevented. The Clayton Act itself speaks in that alternative: 'to injure, destroy, or prevent competition.' § 13 (a), 15 U. S. C. A. [*Id.* 429.]

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"It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret 'exclusion' as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exclusionary.' So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent. [*Id.* 431.]

. . . . . .

"In order to fall within § 2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read the passage as demanding any 'specific' intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing." [*Id.* 432.]

In the present cases, the petitioners have been found to have conspired to establish a monopoly and also to have the power and intent to establish and maintain the mo-

nopoly. To hold that they do not come within the prohibition of the Sherman Act would destroy the force of that Act. Accordingly, the instructions of the trial court under § 2 of the Act are approved and the judgment of the Circuit Court of Appeals is

Affirmed.[11]

MR. JUSTICE FRANKFURTER entirely agrees with the judgment and the opinion in these cases. He, however, would have enlarged the scope of the orders allowing the petitions for certiorari so as to permit consideration of the alleged errors in regard to the selection of the jury.

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

MR. JUSTICE RUTLEDGE, concurring.

I concur in the Court's opinion and judgment. In doing so, however, I express no judgment concerning other questions determined on the appeal to the Circuit Court of Appeals, 147 F. 2d 93, and presented in the application for certiorari or the later petition for rehearing and enlargement of the scope of review here, including the question whether upon the particular facts the law has been applied in such a manner as to bring about, in substantial effect, multiple punishment for the same offense. Cf. *Pinkerton* v. *United States, ante,* pp. 640, 648, dissenting opinion.

[11] Upon suggestion of the death of Edward H. Thurston, a petitioner in case No. 19, a motion to dismiss the writ of certiorari as to him was granted by the Court on February 11, 1946, 327 U. S. 764. It remains for the Circuit Court of Appeals and the District Court of the United States for the Eastern District of Kentucky to take such further action as law and justice may require. See *Singer* v. *United States,* 323 U. S. 338, 346; *United States* v. *Johnson,* 319 U. S. 503, 520.

That question has been discussed in the briefs and the argument, for its bearing upon the disposition of the single question which certiorari was granted to review, namely, "whether actual exclusion of competitors is necessary to the crime of monopolization under § 2 of the Sherman Act." 324 U. S. 836. On this issue I have no doubt of the correctness of the Court's conclusion that the offense of monopolization is complete when power is acquired to exclude competitors and therefore that actual exclusion need not be shown, for the reasons set forth in the opinion. Whether, in this view, multiple punishment may arise upon application of the law to particular facts under counts charging conspiracy in restraint of trade, monopolization, and conspiracy to monopolize presents a different question which can be determined only by examination of the manner in which the particular application has been made. Since, in view of the limited character of our action in granting certiorari, neither the issue of multiple punishment nor the facts of record upon which it arises are before us for review, it would be inappropriate to express opinion on that question.

DECISIONS PER CURIAM, ETC., FROM APRIL 23, 1946, THROUGH JUNE 10, 1946.*

No. 1009. GOSSELIN *v.* KELLEY, SUPERINTENDENT. Appeal from the Supreme Judicial Court of Maine. April 29, 1946. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE dissent. *F. Harold Dubord* for appellant. Reported below: 141 Me. 412, 44 A. 2d 882.

No. 115, Misc. UNITED STATES EX REL. FOXALL *v.* RAGEN, WARDEN; and

No. 116, Misc. DOBRY *v.* OLSON, WARDEN. April 29, 1946. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 946. BADT, CAPTAIN, U. S. NAVY, *v.* UNITED STATES EX REL. REEL. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. April 29, 1946. Petition for certiorari dismissed on motion of *Solicitor General McGrath.* Reported below: 152 F. 2d 627.

No. 40. DEFENSE PLANT CORPORATION *v.* BEAVER COUNTY. April 30, 1946. Reconstruction Finance Corporation substituted for Defense Plant Corporation, which has been ordered dissolved by Act of June 30, 1945, c. 215, 59 Stat. 310.

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*MR. JUSTICE JACKSON took no part in the consideration or decisions of the cases in which judgments or orders were announced during this period.

For orders on applications for certiorari, see *post,* pp. 825, 833; rehearing, *post,* p. 876.

No. 627. HOWARD HALL CO., INC. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Northern District of Alabama. Argued April 30 and May 1, 1946. Decided May 6, 1946. *Per Curiam:* The judgment is affirmed. *Alton R. Co.* v. *United States,* 315 U. S. 15; *United States* v. *Carolina Freight Carriers Corp.,* 315 U. S. 475; *Howard Hall Co.* v. *United States,* 315 U. S. 495. *Harold G. Hernly* argued the cause for appellant. With him on the brief was *James W. Wrape. Daniel W. Knowlton* argued the cause for the United States and Interstate Commerce Commission, appellees. With him on the brief were *Solicitor General McGrath, Assistant Attorney General Berge, Edward Dumbauld, David O. Mathews, Nelson Thomas* and *Allen Crenshaw.* Reported below: 65 F. Supp. 166.

No. 1087. FEDERAL TRADE COMMISSION *v.* S. BUCHSBAUM & Co. On petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. May 6, 1946. *Per Curiam:* The petition for a writ of certiorari is granted. A trial examiner of the Federal Trade Commission died after having heard some of the witnesses in these proceedings. Respondent moved that the new trial examiner start the proceedings anew and hear all the evidence *de novo.* The Commission denied this motion. In the enforcement proceeding before the Circuit Court of Appeals respondent assigned this denial as one of a number of alleged errors. On that ground alone, and without passing on others urged by petitioner, the Circuit Court of Appeals refused to enforce the Commission's order. Respondent here moves for leave to file a written waiver of the assigned error relied on by the court below and also moves that the Circuit Court of Appeals judgment be reversed and that the case be remanded for consideration of the other errors assigned below. Motion for leave to file

written waiver is granted. The judgment of the Circuit Court of Appeals is vacated and the case is remanded for consideration of the other errors assigned below. *Solicitor General McGrath* for petitioner. *Walter H. Moses* for respondent. Reported below: 153 F. 2d 85.

No. 609. COMET CARRIERS, INC. *v.* WALLING, WAGE & HOUR ADMINISTRATOR. Certiorari, 326 U. S. 716, to the Circuit Court of Appeals for the Second Circuit. May 6, 1946. Writ of certiorari dismissed on motion of counsel for petitioner. *Ralph D. Elmer* for petitioner. *Solicitor General McGrath* and *Bessie Margolin* for respondent. Reported below: 151 F. 2d 107.

No. 118, Misc. SANTA FE PACIFIC RAILROAD CO. *v.* LING, U. S. DISTRICT JUDGE. May 13, 1946. The motion for leave to file a petition for a writ of mandamus is denied. *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21. *J. C. Gibson, Lawrence Cake* and *Richard Fennemore* for petitioner. *Solicitor General McGrath, J. Edward Williams* and *Roger P. Marquis* for respondent.

No. 117, Misc. NOWAK *v.* NIERSTHEIMER, WARDEN;
No. 119, Misc. IN RE BROWN; and
No. 120, Misc. POVICH *v.* NICHOLSEN, WARDEN. May 13, 1946. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 104, Misc. DALE *v.* HEINZE, WARDEN. May 13, 1946. Dismissed. The matters were presented and disposed of by denial of petition for certiorari in No. 949, *Dale* v. *California*, 327 U. S. 809.

No. 918. LYNCH ET AL. *v.* NEW JERSEY ET AL. On petition for writ of certiorari to the Court of Errors and Appeals of New Jersey. May 13, 1946. Petition for certiorari dismissed on motion of counsel for petitioners. *Samuel L. Rothbard* for petitioners.

No. 1140. COGSWELL *v.* CHICAGO & EASTERN ILLINOIS RAILROAD CO. On petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. May 20, 1946. *Per Curiam:* The petition is granted, except as to the question whether the jury could have found respondent guilty of a violation of Rule 152 of the Interstate Commerce Commission. The judgment is reversed. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 67–8; *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 353–4; *Lavender* v. *Kurn*, 327 U. S. 645. *Royal W. Irwin* for petitioner. *Edward W. Rawlins* for respondent. Reported below: 153 F. 2d 94.

No. 121, Misc. JONES *v.* WELCH, SUPERINTENDENT; and

No. 122, Misc. DUGGAN *v.* OLSON, WARDEN. May 20, 1946. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 732. HELWIG *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit. May 27, 1946. *Per Curiam:* The petition for writ of certiorari is granted. 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, Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 151 F. 2d 535.

No. 1008. JORDAN *v.* FEDERAL FARM MORTGAGE CORPORATION ET AL. May 27, 1946. The petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit is dismissed for failure to comply with the Rules. *G. P. North* for petitioner. Reported below: 152 F. 2d 642.

No. 124, Misc. BUTZ *v.* UNITED STATES POSTMASTER GENERAL. May 27, 1946. Application denied.

No. 947. PEARSON, POST COMMANDING OFFICER, *v.* UNITED STATES EX REL. HOROWITZ; and

No. 948. PEARSON, POST COMMANDING OFFICER, *v.* UNITED STATES EX REL. SAMUELS. See *post,* p. 830.

No. 1240. MARLEY *v.* CALIFORNIA. Appeal from the Superior Court in and for the County of Los Angeles, Appellate Department, California. June 3, 1946. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. MR. JUSTICE RUTLEDGE dissents. *Hiram T. Kellogg* and *Ralph C. Curren* for appellant. *Ray L. Chesebro* and *John L. Bland* for appellee.

No. 123, Misc. IN RE DOMINION OF CANADA. June 3, 1946. The motion for leave to file a petition for writ of mandamus or prohibition is denied. MR. JUSTICE DOUGLAS dissents. *Lane Summers, F. T. Merritt* and *G. H. Bucey* for petitioner.

No. 125, Misc. IN RE REFRIGERATION PATENTS CORPORATION. June 3, 1946. The motion for leave to file a petition for writ of prohibition or mandamus is denied. *Tracy R. V. Fike* for petitioner.

No. 126, Misc. SHERIDAN *v.* BENSON, WARDEN. June 3, 1946. The motion for leave to file a petition for writ of habeas corpus is denied.

No. 1090. CAROTHERS, DOING BUSINESS AS ALLRIGHT AUTO PARK, ET AL. *v.* BOWLES. See *post*, p. 859.

No. 629. PERLSTEIN *v.* HIATT, WARDEN. Certiorari, 327 U. S. 777, to the Circuit Court of Appeals for the Third Circuit. June 10, 1946. *Per Curiam:* It appearing that the case is moot, the writ of certiorari is dismissed. Petitioner *pro se*. *Solicitor General McGrath* and *Robert S. Erdahl* for respondent. Reported below: 151 F. 2d 167.

No. 789. PRUDENTIAL INSURANCE CO. *v.* HOBBS, INSURANCE COMMISSIONER;

No. 790. AETNA INSURANCE CO. *v.* HOBBS, COMMISSIONER OF INSURANCE;

No. 791. AMERICAN INDEMNITY CO. *v.* HOBBS, COMMISSIONER OF INSURANCE; and

No. 792. PACIFIC MUTUAL LIFE INSURANCE CO. *v.* HOBBS, COMMISSIONER OF INSURANCE. Appeals from the Supreme Court of Kansas. June 10, 1946. *Per Curiam:* The judgments are affirmed. *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408; *Robertson* v. *California*, 328 U. S. 440. *Joseph W. Henderson* and *W. E. Stanley* for appellant in No. 789. *John L. Hunt* for appellant in No. 790. *John L. Hunt* and *Neth L. Leachman* for appellant

in No. 791. *Robert Stone* for appellant in No. 792. Reported below: 160 Kan. 300, 161 P. 2d 726.

No. 987. WILSON *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. June 10, 1946. *Per Curiam:* The petition for writ of certiorari is granted limited to Question I in the Government's brief. The judgment of the Circuit Court of Appeals is vacated and the cause is remanded to the District Court for resentence. *J. Bertram Wegman, William G. Fullen* and *Emanuel H. Reichart* for petitioner. *Solicitor General McGrath* and *Robert S. Erdahl* for the United States. Reported below: 154 F. 2d 802.

No. 1085. PRUDENTIAL INSURANCE CO. *v.* INDIANA. Appeal from the Supreme Court of Indiana. June 10, 1946. *Per Curiam:* The judgment is affirmed. *Prudential Insurance Co.* v. *Benjamin,* 328 U. S. 408. *Joseph J. Daniels* and *William G. Davis* for appellant. Reported below: 223 Ind. 198, 64 N. E. 2d 150.

No. 1255. WEST PUBLISHING CO. *v.* MCCOLGAN, FRANCHISE TAX COMMISSIONER. Appeal from the Supreme Court of California. June 10, 1946. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *United States Glue Co.* v. *Town of Oak Creek,* 247 U. S. 321; *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245; *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 656; *International Shoe Co.* v. *Washington,* 326 U. S. 310. *John W. Preston* for appellant. *Robert W. Kenny,* Attorney General of California, and *John L. Nourse,* Deputy Attorney General, for appellee. Reported below: 27 Cal. 2d 705, 166 P. 2d 861.

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No. —, original. WATSON, ATTORNEY GENERAL, *v.* BOWLES, ECONOMIC STABILIZATION DIRECTOR, ET AL. June 10, 1946. The motion for leave to file bill of complaint is denied. *J. Tom Watson,* Attorney General of Florida, and *Lamar Warren,* Assistant Attorney General, for complainant.

No. —. UNITED STATES ET AL. *v.* NEW YORK ET AL. June 10, 1946. The motion to vacate injunction pending appeal is denied.

No. 19. LIGGETT & MYERS TOBACCO CO. ET AL. *v.* UNITED STATES; and

No. 20. R. J. REYNOLDS TOBACCO CO. ET AL. *v.* UNITED STATES. Certiorari, 324 U. S. 836, to the Circuit Court of Appeals for the Sixth Circuit. June 10, 1946. The motion for leave to file petition for enlargement of the scope of review is denied. MR. JUSTICE REED took no part in the consideration or decision of this application. Reported below: 147 F. 2d 93.

No. 517. D. A. SCHULTE, INC. *v.* GANGI ET AL. June 10, 1946. Order entered amending the dissenting opinion of MR. JUSTICE FRANKFURTER.

Opinion reported as amended, 328 U. S. 108, 121.

No. 127, Misc. RESCO *v.* RAGEN, WARDEN; and

No. 130, Misc. BAILEY *v.* STOUTAMIRE, SHERIFF. June 10, 1946. The motions for leave to file petitions for writs of certiorari are denied.

No. 128, Misc. UNITED STATES EX REL. JAMES *v.* RAGEN, WARDEN; and

No. 129, Misc. UNITED STATES EX REL. MANCIONE *v.* RAGEN, WARDEN. June 10, 1946. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 131, Misc. POPE *v.* CHIEF JUSTICE AND ASSOCIATE JUDGES OF THE COURT OF CLAIMS. June 10, 1946. The motion for leave to file a petition for writ of mandamus is denied.

No. 1306. UYEKI *v.* STYER, COMMANDING GENERAL. June 10, 1946. A petition for writ of certiorari having been granted in this case, *post*, p. 832, it is ordered that all further proceedings in this matter be stayed pending the final disposition of this case by this Court.

No. 1124. SCHREFFLER, DOING BUSINESS AS SCHREFFLER STEEL & SUPPLY CO., ET AL. *v.* BOWLES, PRICE ADMINISTRATOR. See *post*, p. 870.

ORDERS GRANTING CERTIORARI, FROM APRIL 23, 1946, THROUGH JUNE 10, 1946.

No. 973. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. *v.* AGNEW ET AL. April 29, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Solicitor General McGrath* and *George B. Vest* for petitioners. *Hugh H. Obear* for respondents. Reported below: 153 F. 2d 785.

No. 942. UNITED STATES *v.* POWELL ET AL., RECEIVERS. April 29, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Solicitor General McGrath* for the United States. Reported below: 152 F. 2d 228.

No. 943. UNITED STATES *v.* ATLANTIC COAST LINE RAILROAD CO. April 29, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Solicitor General McGrath* for the United States. *Thos. W. Davis* for respondent. Reported below: 152 F. 2d 230.

No. 994. CRANE *v.* COMMISSIONER OF INTERNAL REVENUE. April 29, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Edward S. Bentley* for petitioner. *Solicitor General McGrath, Sewall Key, J. Louis Monarch* and *Morton K. Rothschild* for respondent. Reported below: 153 F. 2d 504.

Nos. 997 and 998. EDWARD KATZINGER CO. *v.* CHICAGO METALLIC MFG. CO. April 29, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Charles J. Merriam* for petitioner. *Max W. Zabel* and *Ephraim Banning* for respondent. Reported below: 153 F. 2d 149.

No. 1116. PORTER, PRICE ADMINISTRATOR, *v.* LEE ET AL.; and

No. 1117. PORTER, PRICE ADMINISTRATOR, *v.* LEE ET AL. April 29, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted.

Solicitor General McGrath for petitioner. *Howell W. Vincent* for respondents.

No. 1118. PORTER, PRICE ADMINISTRATOR, *v.* DICKEN ET AL. April 29, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Solicitor General McGrath* for petitioner. Respondents *pro se.*

No. 1087. FEDERAL TRADE COMMISSION *v.* S. BUCHSBAUM & Co. See *ante,* p. 818.

No. 950. NATIONAL LABOR RELATIONS BOARD *v.* A. J. TOWER Co. May 6, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Solicitor General McGrath* for petitioner. *Malcolm Donald* for respondent. Reported below: 152 F. 2d 275.

No. 996. AMERICAN STEVEDORES, INC. *v.* PORELLO ET AL. May 6, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Edward Ash* for petitioner. *Solicitor General McGrath* for the United States, and *George J. Engelman* for Porello, respondents. Reported below: 153 F. 2d 605.

No. 764. CARTER *v.* ILLINOIS. May 6, 1946. Petition for writ of certiorari to the Supreme Court of Illinois granted. Petitioner *pro se. George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent. Reported below: 391 Ill. 594, 63 N. E. 2d 763.

No. 1103. DODEZ *v.* UNITED STATES. May 6, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Victor F. Schmidt* and *Hayden C. Covington* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 154 F. 2d 637.

No. 1018. WALLING, WAGE & HOUR ADMINISTRATOR, *v.* HALLIBURTON OIL WELL CEMENTING CO. May 13, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General McGrath* for petitioner. *Ben F. Saye* and *Gurney E. Newlin* for respondent. Reported below: 152 F. 2d 622.

No. 1052. UNITED STATES *v.* DICKINSON; and

No. 1053. UNITED STATES *v.* WITHROW. May 13, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Solicitor General McGrath* for the United States. *J. H. McClintic* and *Ernest K. James* for respondents. Reported below: 152 F. 2d 865.

No. 988. UNITED STATES *v.* BRUNO. May 13, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General McGrath* for the United States. *George R. Sommer* for respondent. Reported below: 153 F. 2d 843.

No. 1075. PARKER ET AL. *v.* PORTER, PRICE ADMINISTRATOR. May 13, 1946. Petition for writ of certiorari to the United States Emergency Court of Appeals granted. *Alexander Pfeiffer* for petitioners. *Solicitor General Mc-*

Grath and *Richard H. Field* for respondent. *Louis L. Tetelman* filed a brief for certain landlords, as *amici curiae*, opposing the petition. Reported below: 154 F. 2d 830.

No. 1104. ANDERSON, RECEIVER, *v.* YUNGKAU, EXECUTOR, ET AL. May 13, 1946. Petition for writ 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 this application. *Robert S. Marx, Frank E. Wood* and *Harry Kasfir* for petitioner. *George W. Luedeke* for Sandifer, and *LeWright Browning* for Geiger et al., respondents. Reported below: 153 F. 2d 685.

No. 1088. SECURITIES & EXCHANGE COMMISSION *v.* CHENERY CORPORATION ET AL.; and

No. 1089. SECURITIES & EXCHANGE COMMISSION *v.* FEDERAL WATER & GAS CORP. May 13, 1946. Petition for writs of certiorari to the United States Court of Appeals for the District of Columbia granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Solicitor General McGrath* and *Roger S. Foster* for petitioner. *Spencer Gordon* and *Charles A. Horsky* for the Chenery Corporation et al., and *Allen S. Hubbard* for the Federal Water & Gas Corp., respondents. Reported below: 154 F. 2d 6.

No. 914. UNITED STATES *v.* SHERIDAN. May 13, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Solicitor General McGrath* for the United States. Respondent *pro se*. Reported below: 152 F. 2d 57.

No. 1140. COGSWELL *v.* CHICAGO & EASTERN ILLINOIS RAILROAD CO. See *ante*, p. 820.

No. 1148. GULF OIL CORP. *v.* GILBERT, DOING BUSINESS AS GILBERT STORAGE & TRANSFER CO. May 20, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Matthew S. Gibson* and *Archie D. Gray* for petitioner. *Solomon Dimond* for respondent. Reported below: 153 F. 2d 883.

No. 1129. JESIONOWSKI, ADMINISTRATRIX, *v.* BOSTON & MAINE RAILROAD. May 20, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Thomas C. O'Brien* and *John Edward Keefe, Jr.* for petitioner. *Francis P. Garland* for respondent. Reported below: 154 F. 2d 703.

No. 732. HELWIG *v.* UNITED STATES. See *ante*, p. 820.

No. 1056. STEELE *v.* GENERAL MILLS, INC. May 27, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Cecil A. Morgan* and *T. S. Christopher* for petitioner. *Charles E. France* and *Alfred McKnight* for respondent. *Grover Sellers*, Attorney General, filed a brief for the State of Texas, as *amicus curiae*, in support of the petition. Reported below: 154 F. 2d 367.

No. 947. PEARSON, POST COMMANDING OFFICER, *v.* UNITED STATES EX REL. HOROWITZ; and

No. 948. PEARSON, POST COMMANDING OFFICER, *v.* UNITED STATES EX REL. SAMUELS. May 27, 1946. Hobbs

substituted for Pearson. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General McGrath* for petitioner. *Harry Mesard* for respondents. Reported below: 151 F. 2d 801.

No. 1098. OKLAHOMA *v.* UNITED STATES CIVIL SERVICE COMMISSION. May 27, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Mac Q. Williamson,* Attorney General of Oklahoma, and *Randell S. Cobb,* First Assistant Attorney General, for petitioner. *Solicitor General McGrath* for respondent. Reported below: 153 F. 2d 280.

No. 900. HAUPT *v.* UNITED STATES. May 27, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. Petitioner *pro se. Solicitor General McGrath, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 152 F. 2d 771.

No. 885. HICKMAN, ADMINISTRATOR, *v.* TAYLOR ET AL., TRADING AS TAYLOR & ANDERSON TOWING & LIGHTERAGE CO., ET AL. See *post,* p. 876.

No. 987. WILSON *v.* UNITED STATES. See *ante,* p. 823.

No. 1143. GARDNER, TRUSTEE, *v.* NEW JERSEY. See *post,* p. 876.

No. 1099. TRAILMOBILE COMPANY ET AL. *v.* WHIRLS. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted.

Morison R. Waite and *Sol Goodman* for petitioners. *Solicitor General McGrath* for respondent. Reported below: 154 F. 2d 866.

No. 700. HARRIS *v.* UNITED STATES. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Herbert K. Hyde* for petitioner. *Solicitor General McGrath* and *Robert S. Erdahl* for the United States. Reported below: 151 F. 2d 837.

No. 1251. PAN AMERICAN AIRWAYS CORP. ET AL. *v.* W. R. GRACE & CO. ET AL.; and

No. 1258. EASTERN AIR LINES, INC. *v.* W. R. GRACE & CO. ET AL. June 10, 1946. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Henry J. Friendly* for petitioners in No. 1251. *E. Smythe Gambrell* for petitioners in No. 1258. *John T. Cahill* and *Fred J. Knauer* for respondents.

No. 1306. UYEKI *v.* STYER, COMMANDING GENERAL. June 10, 1946. Petition for writ of certiorari to the Supreme Court of the Philippines granted. *John E. McCullough* for petitioner. *Solicitor General McGrath* and *Frederick Bernays Wiener* for respondent.

Nos. 1192 and 1193. KRUG, SECRETARY OF THE INTERIOR, ET AL. *v.* SANTA FE PACIFIC RAILROAD CO. June 10, 1946. Petition for writs of certiorari to the United States Court of Appeals for the District of Columbia granted. *Solicitor General McGrath* for petitioners. *Lawrence Cake* for respondent. Reported below: 153 F. 2d 305.

No. 1227. UNITED STATES EX REL. GOODMAN *v.* HEARN, COMMANDING GENERAL. June 10, 1946. The petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit is granted, limited to the third and fourth questions in the petition for writ of certiorari. *Harry Mesard* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Irving S. Shapiro* for respondent. Reported below: 153 F. 2d 186.

No. 1302. LOUISIANA EX REL. FRANCIS *v.* RESWEBER, SHERIFF, ET AL. June 10, 1946. Petition for writ of certiorari to the Supreme Court of Louisiana granted. *Robert E. Kline, Jr.* for petitioner.

ORDERS DENYING CERTIORARI, FROM APRIL 23, 1946, THROUGH JUNE 10, 1946.

No. 714. UNITED STATES *v.* HEINE. April 29, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General McGrath* for the United States. *George Gordon Battle* for respondent. Reported below: 151 F. 2d 813.

No. 891. MCKOWN *v.* FLORIDA. April 29, 1946. Petition for writ of certiorari to the Supreme Court of Florida denied. *B. K. Roberts* and *W. J. Oven, Jr.* for petitioner.

No. 925. GERMAN-AMERICAN VOCATIONAL LEAGUE, INC. *v.* UNITED STATES;

No. 926. D. A. B. RECREATIONAL RESORT, INC. *v.* UNITED STATES;

No. 927. SCHROEDER *v.* UNITED STATES;

No. 928. BERTRAM *v.* UNITED STATES;
No. 929. GIBBE *v.* UNITED STATES;
No. 930. BREMER *v.* UNITED STATES;
No. 931. KOEHN *v.* UNITED STATES;
No. 932. LIEBLEIN *v.* UNITED STATES; and
No. 933. SCHMIDT *v.* UNITED STATES. April 29, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Frederic M. P. Pearse* for petitioners. *Solicitor General McGrath, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 153 F. 2d 860.

No. 934. GREENE COUNTY NATIONAL FARM LOAN ASSOCIATION ET AL. *v.* FEDERAL LAND BANK OF LOUISVILLE ET AL. April 29, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *F. H. Parvin* for petitioners. *Solicitor General McGrath, Paul A. Sweeney, W. Carroll Hunter* and *William C. Goodwyn* for respondents. Reported below: 152 F. 2d 215.

No. 974. HAYS *v.* BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; and
No. 975. PORTEOUS *v.* BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION. April 29, 1946. Petition for writs of certiorari to the District Court of Appeal, Third Appellate District, of California, denied. *Charles Lederer* for petitioners. *G. D. Schilling* for respondent. Reported below: 71 Cal. App. 2d 301, 162 P. 2d 679.

No. 976. STEIN *v.* UNITED STATES. April 29, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Isaac Pacht, Clore Warne* and *Louis M. Brown* for petitioner. *Solicitor Gen-*

eral McGrath, Robert S. Erdahl and *Andrew F. Oehmann* for the United States. Reported below: 153 F. 2d 737.

No. 978. BOWEN *v.* UNITED STATES. April 29, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Dupuy G. Warrick* for petitioner. *Solicitor General McGrath* and *Robert S. Erdahl* for the United States. Reported below: 153 F. 2d 747.

No. 979. 11,000 ACRES OF LAND ET AL. *v.* UNITED STATES. April 29, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *C. G. Calhoun* and *W. M. Streetman* for petitioners. *Solicitor General McGrath, J. Edward Williams* and *Roger P. Marquis* for the United States. Reported below: 152 F. 2d 566.

No. 983. AGWILINES, INC. *v.* THE SAN VERONICO ET AL. April 29, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Chauncey I. Clark* for petitioner. *Edwin S. Murphy* for respondents. Reported below: 153 F. 2d 869.

No. 990. H. REEVE ANGEL & CO., INC. *v.* UNITED STATES. April 29, 1946. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Frederick W. Brooks* for petitioner. *Solicitor General McGrath, Assistant Attorney General Rao* and *John R. Benney* for the United States. Reported below: 33 C. C. P. A. (Customs) 114.

No. 1000. INDEMNITY INSURANCE COMPANY OF NORTH AMERICA *v.* SMOOT. April 29, 1946. Petition for writ of

certiorari to the United States Court of Appeals for the District of Columbia denied. *Louis M. Denit* for petitioner. *Stanley H. Kamerow* for respondent. Reported below: 152 F. 2d 667.

Nos. 1004 and 1005. EASTERN TRANSPORTATION CO. *v.* WALLING ET AL. April 29, 1946. Petitions for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Christopher E. Heckman* for petitioner. *Joseph W. Henderson* for respondents. Reported below: 152 F. 2d 924.

No. 1011. HUDOCK, EXECUTOR, *v.* FREEMAN, SECRETARY OF BANKING. April 29, 1946. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Robert T. McCracken, George G. Chandler* and *Frank L. Pinola* for petitioner. *Leo W. White* for respondent. Reported below: 353 Pa. 345, 45 A. 2d 1.

No. 1013. HARE *v.* UNITED STATES;

No. 1014. HARE *v.* UNITED STATES; and

No. 1015. HARE *v.* UNITED STATES. April 29, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Daniel S. Ring* and *C. Leo DeOrsey* for petitioners. *Solicitor General McGrath, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 153 F. 2d 816.

No. 644. WILLIAMS-BAUER CORPORATION ET AL. *v.* DE PASQUALE ET AL. May 6, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Emanuel Tacker* for petitioners. *George M. Aronwald* for respondents. Reported below: 151 F. 2d 578.

No. 908. MARIO MERCADO RIERA, EXECUTOR, ET AL. *v.* MARIA LUISA MERCADO RIERA DE BELAVAL ET AL. May 6, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Fred W. Llewellyn* and *Pedro M. Porrata* for petitioners. *José A. Poventud* and *F. Fernández Cuyar* for respondents. Reported below: 152 F. 2d 86.

No. 982. WHEAT *v.* TEXAS LAND & MORTGAGE CO., LTD. ET AL. May 6, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *John T. Barker* and *Frank P. Barker* for petitioner. Reported below: 153 F. 2d 926.

No. 986. HARBOR MARINE CONTRACTING CO. ET AL. *v.* LOWE, DEPUTY COMMISSIONER, ET AL. May 6, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Nelson T. Hartson, Howard Boyd* and *George E. Monk* for petitioners. *Solicitor General McGrath, Assistant Attorney General Sonnett, Paul A. Sweeney* and *Leon Frechtel* for Lowe, respondent. Reported below: 152 F. 2d 845.

No. 989. WILLIAM SPENCER & SON CORP. *v.* LOWE, DEPUTY COMMISSIONER, ET AL. May 6, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Charles Landesman, John J. Hickey* and *Walter W. Ahrens* for petitioner. *Solicitor General McGrath, Assistant Attorney General Sonnett, Paul A. Sweeney* and *Leon Frechtel* for Lowe, and *Isidor Enselman* for Lindenberg, respondents. Reported below: 152 F. 2d 847.

No. 995. SMALL *v.* UNITED STATES. May 6, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Max H. Margolis* for petitioner. *Solicitor General McGrath* and *Robert S. Erdahl* for the United States. Reported below: 153 F. 2d 144.

No. 999. PRESSED STEEL CAR CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. May 6, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Earl F. Reed* for petitioner. *Solicitor General McGrath, Sewall Key, Helen R. Carloss* and *William Robert Koerner* for respondent. Reported below: 152 F. 2d 280.

No. 1001. ESTATE OF DUVAL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. May 6, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Charles A. Beardsley* for petitioners. *Solicitor General McGrath, Sewall Key* and *J. Louis Monarch* for respondent. Reported below: 152 F. 2d 103.

No. 1016. HASH *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 1017. HASH *v.* COMMISSIONER OF INTERNAL REVENUE. May 6, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Oppie L. Hedrick* for petitioners. *Solicitor General McGrath, Sewall Key* and *J. Louis Monarch* for respondent. Reported below: 152 F. 2d 722.

No. 1021. 415 FIFTH AVENUE CO., INC. *v.* FINN, TRUSTEE. May 6, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied.

Lowell M. Birrell and *Theodore E. Larson* for petitioner. *Joseph Lorenz* for respondent. Reported below: 153 F. 2d 501.

No. 1043. MEIGHAN, SUBSTITUTED TRUSTEE, *v.* FINN, TRUSTEE. May 6, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Burton C. Meighan, Jr.* for petitioner. *Joseph Lorenz* for respondent. Reported below: 153 F. 2d 501.

No. 1033. GILLESPIE *v.* COMMISSIONER OF INTERNAL REVENUE. May 6, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Harold E. Rorschach* and *Jack L. Rorschach* for petitioner. *Solicitor General McGrath, Sewall Key, J. Louis Monarch* and *Hilbert P. Zarky* for respondent. Reported below: 151 F. 2d 903.

No. 1047. MCINTOSH *v.* WIGGINS ET AL., EXECUTORS, ET AL. May 6, 1946. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Paul Bakewell, Jr.* for petitioner. *Harry W. Kroeger* and *Chas. Claflin Allen* for respondents. Reported below: 354 Mo. 747, 191 S. W. 2d 637.

No. 1078. JESKOWITZ *v.* CARTER, TRUSTEE IN BANKRUPTCY. May 6, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Archibald Palmer* for petitioner. *Joseph Glass* for respondent. Reported below: 153 F. 2d 303.

No. 1081. GLASSER, TRUSTEE IN BANKRUPTCY, *v.* ROGERS ET AL. May 6, 1946. Petition for writ of cer-

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tiorari to the Circuit Court of Appeals for the Second Circuit denied. *Sidney S. Bobbé* for petitioner. *Aaron E. Koota* for respondent. Reported below: 152 F. 2d 428.

No. 1092. METALLIZING ENGINEERING CO., INC. *v.* KENYON BEARING & AUTO PARTS CO., INC. ET AL. May 6, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Wm. H. Davis* and *Louis Burgess* for petitioner. *Morris Kirschstein* for respondents. Reported below: 153 F. 2d 516.

No. 1154. CRAMPTON *v.* CRAMPTON MANUFACTURING CO. May 6, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Frank E. Liverance, Jr.* for petitioner. *Frank Parker Davis* and *Wm. Cyrus Rice* for respondent. Reported below: 153 F. 2d 543.

No. 952. SABIN ET AL. *v.* HOME OWNERS' LOAN CORPORATION ET AL. May 6, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Herbert K. Hyde* and *Roy St. Lewis* for petitioners. *Solicitor General McGrath, Kenneth G. Heisler* and *Ray E. Dougherty* for the Home Owners' Loan Corporation, respondent. Reported below: 151 F. 2d 541.

No. 797. GARRISON *v.* JOHNSTON, WARDEN. May 6, 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 *Beatrice Rosenberg* for respondent. Reported below: 151 F. 2d 1011.

No. 857. COY *v.* UNITED STATES. May 6, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *James E. Fahey* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 156 F. 2d 293.

No. 887. COPELAND *v.* UNITED STATES. May 6, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *James J. Laughlin* for petitioner. *Solicitor General McGrath* and *Robert S. Erdahl* for the United States. Reported below: 80 U. S. App. D. C. 308, 152 F. 2d 769.

No. 939. MAXWELL *v.* HUDSPETH, WARDEN. May 6, 1946. Petition for writ of certiorari to the Supreme Court of Kansas denied. Reported below: 160 Kan. 553, 164 P. 2d 134.

No. 955. SKAUG *v.* NEVADA; and

No. 956. SKAUG *v.* SHEEHY, WARDEN. May 6, 1946. Petition for writs of certiorari to the Supreme Court of Nevada denied. *Gregory Hankin* for petitioner. *Alan Bible,* Attorney General of Nevada, and *Gray Mashburn* for respondents. Reported below: 164 P. 2d 743.

No. 1041. MARVICH *v.* CALIFORNIA ET AL. May 6, 1946. Petition for writ of certiorari to the Supreme Court of California denied. Reported below: 27 Cal. 2d 503, 165 P. 2d 241.

No. 1079. RECK *v.* ILLINOIS. May 6, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Wm. Scott Stewart* for petitioner. Reported below: 392 Ill. 311, 64 N. E. 2d 526.

No. 1095. BARNES *v.* HOWARD, WARDEN. May 6, 1946. Petition for writ of certiorari to the Supreme Court of Indiana denied. Reported below: 65 N. E. 2d 55.

No. 1101. MAXWELL *v.* NEIBARGER, CLERK OF COURT. May 6, 1946. Petition for writ of certiorari to the Supreme Court of Kansas denied.

No. 1106. MOORE *v.* ILLINOIS. May 6, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 894. MORGAN *v.* PARKER, WARDEN. May 6, 1946. Petition for writ of certiorari to the Supreme Court of Missouri denied. MR. JUSTICE MURPHY is of the opinion that the petition for certiorari should be granted.

No. 971. STASSI *v.* UNITED STATES. May 13, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Edward R. Schowalter* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 152 F. 2d 581.

Nos. 1022 and 1023. WOODVILLE ET AL. *v.* UNITED STATES. May 13, 1946. Petition for writs 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* and *George S. Swarth* for the United States. Reported below: 152 F. 2d 735.

No. 1024. RULE *v.* SEARS ET AL. May 13, 1946. Petition for writ of certiorari to the Supreme Court of California denied. *Kenneth E. Grant* for petitioner. *Pierce Works* for respondents. Reported below: 27 Cal. 2d 131, 163 P. 2d 443.

No. 1035. PITTMAN ET AL. *v.* UNITED STATES. May 13, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Jesse Kilgore Brockman* for petitioners. *Solicitor General McGrath, Assistant Attorney General Sonnett* and *Paul A. Sweeney* for the United States. Reported below: 151 F. 2d 851.

No. 1037. CHAHOON *v.* HICKEY, COLLECTOR OF INTERNAL REVENUE. May 13, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Laurence Graves* for petitioner. *Solicitor General McGrath, Sewall Key* and *J. Louis Monarch* for respondent. Reported below: 153 F. 2d 107.

No. 1042. LINE MATERIAL CO. ET AL. *v.* OOMS, COMMISSIONER OF PATENTS. May 13, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Charles F. Meroni, Carlton Hill* and *William A. Smith, Jr.* for petitioners. *Solicitor General McGrath, Assistant Attorney General Sonnett* and *Paul A. Sweeney* for respondent. Reported below: 80 U. S. App. D. C. 285, 152 F. 2d 665.

No. 1070. TRUCCO *v.* ERIE RAILROAD CO. May 13, 1946. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Edward E. Petrillo* for peti-

tioner. *E. Lowry Humes* for respondent. Reported below: 353 Pa. 320, 45 A. 2d 20.

No. 1074. WINDING GULF COLLIERIES *v.* BOARD OF EDUCATION ET AL. May 13, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *James William Maxwell* and *Floyd McKinley Sayre* for petitioner. *Clay S. Crouse* and *Grover C. Trail* for respondents. Reported below: 152 F. 2d 382.

No. 1080. MCRAE *v.* BOYKIN. May 13, 1946. Petition for writ of certiorari to the Court of Appeals of Georgia denied. *William G. McRae, pro se.* Reported below: 73 Ga. App. 67, 35 S. E. 2d 548.

No. 1105. HEATH *v.* FRANKEL ET AL. May 13, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Collins Mason* for petitioner. *Frederick S. Lyon* and *Lewis E. Lyon* for respondents. Reported below: 153 F. 2d 369.

No. 1119. CITY OF FRANKLIN *v.* COLEMAN BROS. CORPORATION. May 13, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Lawrence J. Bernard* and *John E. Shea* for petitioner. *Robert W. Upton* for respondent. Reported below: 152 F. 2d 527.

No. 1076. PHOENIX FINANCE CORP. *v.* IOWA-WISCONSIN BRIDGE CO.; and

No. 1077. IOWA-WISCONSIN BRIDGE CO. *v.* PHOENIX FINANCE CORP. May 13, 1946. Petitions for writs of

certiorari to the Supreme Court of Iowa denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications. *James R. Morford* for Phoenix Finance Corp. *Fred J. Ontjes* and *Wm. C. Green* for Iowa-Wisconsin Bridge Co. Reported below: 237 Iowa 165, 20 N. W. 2d 457.

No. 1086. PICCARD *v.* SPERRY CORPORATION ET AL. May 13, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE REED took no part in the consideration or decision of this application. *A. Joseph Geist* for petitioner. *Frank J. Berberich, Henry A. Mulcahy, Isidor Wasservogel* and *E. W. Debevoise* for respondents. Reported below: 152 F. 2d 462.

No. 1032. LESSER *v.* NEW YORK. May 13, 1946. Petition for writ of certiorari to the Court of General Sessions of the County of New York, New York, denied.

No. 1067. COOPER *v.* JACKSON, WARDEN. May 13, 1946. Petition for writ of certiorari to the Supreme Court, Appellate Division, 3d Judicial Department, New York, denied.

No. 1115. BORRELLI *v.* ILLINOIS. May 13, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Wm. Scott Stewart* for petitioner. Reported below: 392 Ill. 481, 64 N. E. 2d 719.

No. 1120. NOWAK *v.* NIERSTHEIMER, WARDEN. May 13, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied.

No. 1122. HANCOCK *v.* NIERSTHEIMER, WARDEN. May 13, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1133. TOMANEK *v.* ILLINOIS. May 13, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1134. MINOR *v.* RAGEN, WARDEN. May 13, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1150. PAYNES *v.* ILLINOIS. May 13, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1152. LOFTUS *v.* RAGEN, WARDEN. May 13, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1157. STAFFORD *v.* RAGEN, WARDEN. May 13, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 1164. SCOTT *v.* RAGEN, WARDEN. May 13, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 1165. MILLS *v.* RAGEN, WARDEN. May 13, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1166. GAUSE *v.* RAGEN, WARDEN. May 13, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 1167. LEBEDIS *v.* RAGEN, WARDEN, ET AL. May 13, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 1020. SYKES *v.* PENNSYLVANIA. May 13, 1946. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. MR. JUSTICE MURPHY is of the opinion that the petition for certiorari should be granted. *Charles H. Houston* for petitioner. *John H. Maurer* for respondent. Reported below: 353 Pa. 392, 45 A. 2d 43.

No. 1006. CONTINENTAL OIL CO. *v.* UNITED STATES. May 20, 1946. Petition for writ of certiorari to the Court of Claims denied. *Arthur B. Hyman* for petitioner. *Solicitor General McGrath, Sewall Key, J. Louis Monarch* and *Elizabeth B. Davis* for the United States. Reported below: 104 Ct. Cls. 795, 62 F. Supp. 876.

No. 1065. FIRST NATIONAL BENEFIT SOCIETY *v.* STUART, COLLECTOR OF INTERNAL REVENUE. May 20, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Robert R. Weaver* for petitioner. *Solicitor General McGrath, Sewall Key, Robert N. Anderson* and *Irving I. Axelrad* for respondent. Reported below: 152 F. 2d 298.

No. 1071. CARPENTER ET AL. *v.* TITLE INSURANCE & TRUST CO. May 20, 1946. Petition for writ of certiorari

to the District Court of Appeal, 2d Appellate District, of California, denied. *A. L. Wirin* for petitioners. *Archibald H. Vernon* and *Gilbert E. Harris* for respondent. Reported below: 163 P. 2d 73.

No. 1084. GATEWOOD *v.* SANDERS ET AL. May 20, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Leon T. Seawell* for petitioner. *George M. Lanning* for respondents. Reported below: 71 Cal. App. 2d 593, 152 F. 2d 379.

No. 1091. LOS ANGELES SOAP CO. *v.* UNITED STATES. May 20, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Isidore B. Dockweiler* and *Thomas A. J. Dockweiler* for petitioner. *Solicitor General McGrath, Sewall Key, Helen R. Carloss* and *Norman S. Altman* for the United States. Reported below: 153 F. 2d 320.

No. 1094. BARNES *v.* PHILADELPHIA. May 20, 1946. Petition for writ of certiorari to the Superior Court of Pennsylvania denied. *Thomas D. McBride* for petitioner. *Abraham Wernick* for respondent. Reported below: 158 Pa. Super. 179, 44 A. 2d 610.

No. 1097. KNUDSEN *v.* STEGMAN. May 20, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Walter H. Maloney* for petitioner. Reported below: 152 F. 2d 871.

No. 1102. GOULD ET AL. *v.* UNITED STATES. May 20, 1946. Petition for writ of certiorari to the Circuit Court

of Appeals for the Sixth Circuit denied. *Edward F. Prichard, Jr., Colvin P. Rouse* and *Frank E. Wood* for petitioners. *Solicitor General McGrath, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 153 F. 2d 353.

No. 1114. CUDAHY PACKING CO. *v.* UNITED STATES. May 20, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Vincent O'Brien* for petitioner. *Solicitor General McGrath, Sewall Key* and *Robert N. Anderson* for the United States. Reported below: 152 F. 2d 831.

No. 1123. HARTZBERG ET AL., DOING BUSINESS AS J. & L. HARTZBERG, *v.* NEW YORK CENTRAL RAILROAD CO. May 20, 1946. Petition for writ of certiorari to the Supreme Court of New York, County of New York, denied. *Henry H. Shepard* and *Joseph M. Proskauer* for petitioners. *Frederick L. Wheeler* and *C. Austin White* for respondent. Reported below: 295 N. Y. 703, 65 N. E. 2d 337.

No. 1136. SWIFT & CO. *v.* HERZIG, ADMINISTRATRIX. May 20, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Harold R. Medina* for petitioner. *Maurice Edelbaum* for respondent. Reported below: 154 F. 2d 64.

No. 1141. HILL *v.* BALTIMORE & OHIO RAILROAD CO. May 20, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Royal W. Irwin* for petitioner. *Edward W. Rawlins* for respondent. Reported below: 153 F. 2d 91.

No. 1143. GARDNER, TRUSTEE, *v.* NEW JERSEY. May 20, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *James D. Carpenter, Jr., Howard L. Kern* and *Alexander H. Elder* for petitioner. *Walter D. Van Riper,* Attorney General of New Jersey, and *Benjamin C. Van Tine* for respondent. Reported below: 152 F. 2d 408.

No. 634. CRUM *v.* HUNTER, WARDEN. May 20, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. Reported below: 151 F. 2d 359.

No. 907. HAMPSON *v.* SMITH, SUPERINTENDENT. May 20, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. Reported below: 153 F. 2d 417.

No. 957. NORRIS ET AL. *v.* UNITED STATES. May 20, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Bernard A. Golding* for petitioners. *Solicitor General McGrath, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 152 F. 2d 808.

No. 1073. DOTSON *v.* TEXAS. May 20, 1946. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied. *Preston P. Reynolds* for petitioner. Reported below: 191 S. W. 2d 38.

No. 1121. SPENCER *v.* NEW YORK. May 20, 1946. Petition for writ of certiorari to the Court of General Sessions of the County of New York, New York, denied.

No. 1135. RUBIN *v.* NEW YORK. May 20, 1946. Petition for writ of certiorari to the Court of Appeals of New York denied. Reported below: 294 N. Y. 701, 60 N. E. 2d 849.

No. 1159. LEWIS *v.* PARKER ET UX. May 20, 1946. Petition for writ of certiorari to the Supreme Court of Louisiana denied.

No. 1163. VLAHOS *v.* ILLINOIS. May 20, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 1168. KRUSHINSKI *v.* ILLINOIS. May 20, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1184. PRICE *v.* RAGEN, WARDEN. May 20, 1946. Petition for writ of certiorari to the Circuit Court of Winnebago County, Illinois, denied.

No. 1197. BAILEY *v.* RAGEN, WARDEN. May 20, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1207. BEAGLE *v.* RAGEN, WARDEN. May 20, 1946. Petition for writ of certiorari to the Circuit Court of Madison County, Illinois, denied.

No. 981. A. B. FRANK CO. *v.* UNITED STATES. May 27, 1946. Petition for writ of certiorari to the Court of Claims denied. *Theodore B. Benson* for petitioner. *Solicitor*

General McGrath, Sewall Key, Helen R. Carloss and *Elizabeth B. Davis* for the United States. Reported below: 105 Ct. Cls. 55, 62 F. Supp. 860.

No. 1007. JORDAN *v.* FEDERAL FARM MORTGAGE CORPORATION ET AL. May 27, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *G. P. North* for petitioner. *Edgar M. Morsman, Jr.* for respondents. Reported below: 152 F. 2d 642.

No. 1049. TEXAS *v.* BALLI ET AL.;

No. 1050. CRANDALL *v.* BALLI ET AL.; and

No. 1051. HUGHES ET AL. *v.* BALLI ET AL. May 27, 1946. Petitions for writs of certiorari to the Supreme Court of Texas denied. *Grover Sellers,* Attorney General of Texas, *Wm. J. Fanning,* Assistant Attorney General, and *Fagan Dickson* for petitioner in No. 1049. *W. C. Franklin* for petitioner in No. 1050. *Ben D. Clower* for petitioners in No. 1051. *Gilbert Kerlin* for respondents. Reported below: 144 Tex. 195, 190 S. W. 2d 71.

No. 1068. EASTMAN *v.* UNITED STATES. May 27, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Louis B. Sher* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 153 F. 2d 80.

No. 1069. GREAT LAKES DREDGE & DOCK CO. *v.* UNITED STATES. May 27, 1946. Petition for writ of certiorari to the Court of Claims denied. *William S. Hammers* for petitioner. *Solicitor General McGrath, Assistant Attor-*

ney General Sonnett, Paul A. Sweeney and *Joseph B. Goldman* for the United States. Reported below: 104 Ct. Cls. 818, 62 F. Supp. 675.

No. 1112. MOFFITT *v.* UNITED STATES. May 27, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *John B. Dudley* and *Robert K. Everest* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 154 F. 2d 402.

No. 1113. COUNTY OF MARIN *v.* PEDROTTI ET AL. May 27, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Carlos R. Freitas* for petitioner. *Harold C. Faulkner* and *A. J. Zirpoli* for respondents. Reported below: 152 F. 2d 829.

No. 1127. HASTINGS MANUFACTURING CO. *v.* FEDERAL TRADE COMMISSION. May 27, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Laurence A. Masselink* for petitioner. *Solicitor General McGrath, Assistant Attorney General Berge, Charles H. Weston, W. T. Kelley* and *Walter B. Wooden* for respondent. Reported below: 153 F. 2d 253.

No. 1137. STONE, TRADING AS STONE TOWING LINE, *v.* DIAMOND STEAMSHIP TRANSPORTATION CORP. ET AL. May 27, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *John W. Oast, Jr.* for petitioner. *Paul Speer* for the Diamond Steamship Transportation Corp., and *Thomas H. Middleton* for the Texas Gulf Sulphur Co., respondents. Reported below: 152 F. 2d 916.

No. 1146. IVUSICH *v.* CUNARD WHITE STAR, LTD. May 27, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Jacob Rassner* and *George J. Engelman* for petitioner. Reported below: 155 F. 2d 104.

No. 1186. DURE, TRUSTEE, ET AL. *v.* GLAZEBROOK ET AL. May 27, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *James H. Price* for petitioners. *Leonard D. Adkins, W. R. C. Cocke* and *Harold J. Gallagher* for respondents. Reported below: 152 F. 2d 756.

No. 1199. CENTURY INDEMNITY CO. *v.* ARNOLD ET AL. May 27, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *John Wilson Hood* for petitioner. *Bertrand L. Pettigrew* for respondents. Reported below: 153 F. 2d 531.

No. 1034. GEORGE F. DRISCOLL CO. *v.* UNITED STATES. May 27, 1946. Petition for writ of certiorari to the Court of Claims denied. *Joseph J. Cotter, James C. Rogers* and *Arthur J. Phelan* for petitioner. *Solicitor General McGrath, Assistant Attorney General Sonnett* and *Paul A. Sweeney* for the United States. By special leave of Court, a brief was filed by *Allen Pope* (a layman), as *amicus curiae,* in support of the petition. Reported below: 104 Ct. Cls. 762, 63 F. Supp. 657.

No. 1126. GOLDBLATT BROS., INC. *v.* WALLING, WAGE & HOUR ADMINISTRATOR. May 27, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the

Seventh Circuit denied. *Abram N. Pritzker* and *Stanford Clinton* for petitioner. *Solicitor General McGrath, William S. Tyson, Bessie Margolin, Morton Liftin* and *Joseph M. Stone* for respondent. Reported below: 152 F. 2d 475.

No. 1139. LANDRETH *v.* WABASH RAILROAD CO. May 27, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Royal W. Irwin* for petitioner. *Elmer W. Freytag* for respondent. *Lee Pressman* and *Frank Donner* filed a brief for the United Railroad Workers, as *amicus curiae,* in support of the petition. Reported below: 153 F. 2d 98.

No. 765. VAN HORN *v.* RAGEN, WARDEN. May 27, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied. Petitioner *pro se. George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent.

No. 744. EVANS *v.* UNITED STATES. May 27, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Petitioner *pro se. Solicitor General McGrath, Robert S. Erdahl* and *Andrew F. Oehmann* for the United States. Reported below: 152 F. 2d 105.

No. 808. BOUST *v.* UNITED STATES. May 27, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. Petitioner *pro se. Solicitor General McGrath, Robert S. Erdahl* and *Irving S. Shapiro* for the United States.

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No. 910. VAN HORN *v.* RAGEN, WARDEN. May 27, 1946. Petition for writ of certiorari to the Circuit Court of Clay County, Illinois, denied.

No. 958. SPAULDING *v.* UNITED STATES. May 27, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. Petitioner *pro se*. *Solicitor General McGrath* for the United States.

No. 1100. NOLAN *v.* UNITED STATES. May 27, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. Petitioner *pro se*. *Solicitor General McGrath, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 154 F. 2d 502.

No. 1125. FRIER *v.* FEDERAL CROP INSURANCE CORP. May 27, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Eugene DeBogory* for petitioner. *Solicitor General McGrath, Assistant Attorney General Sonnett, Paul A. Sweeney* and *M. M. Heuser* for respondent. Reported below: 152 F. 2d 149.

No. 1138. COREY *v.* NEW YORK. May 27, 1946. Petition for writ of certiorari to the County Court of Chemung County, New York, denied.

No. 1156. BESHEARS *v.* NIERSTHEIMER, WARDEN. May 27, 1946. Petition for writ of certiorari to the Circuit Court of Randolph County, Illinois, denied.

No. 1169. DAVIS *v.* INDIANA. May 27, 1946. Petition for writ of certiorari to the Supreme Court of Indiana denied. Reported below: 65 N. E. 2d 488.

No. 1188. CREBS *v.* HUDSPETH, WARDEN. May 27, 1946. Petition for writ of certiorari to the Supreme Court of Kansas denied. Reported below: 160 Kan. 650, 164 P. 2d 338.

No. 1189. TOUCEY *v.* NEW YORK LIFE INSURANCE CO. May 27, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. Reported below: 151 F. 2d 696.

No. 1205. KAJATEK *v.* NEW YORK. May 27, 1946. Petition for writ of certiorari to the County Court, Onondaga County, New York, denied.

No. 1217. PHILLIPS *v.* ILLINOIS. May 27, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. Reported below: 392 Ill. 561, 65 N. E. 2d 382.

No. 1225. PHILLIPS *v.* RAGEN, WARDEN. May 27, 1946. Petition for writ of certiorari to the Circuit Court of Edgar County, Illinois, denied.

No. 1145. INDEMNITY INSURANCE COMPANY OF NORTH AMERICA *v.* REISLEY, TRUSTEE IN BANKRUPTCY. June 3, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Henry K. Chapman* for petitioner. *Edgar E. Harrison* for respondent. Reported below: 153 F. 2d 296.

No. 1147. GORDON *v.* PORTER, PRICE ADMINISTRATOR. June 3, 1946. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Louis H. Burke* for petitioner. *Solicitor General McGrath* and *Richard H. Field* for respondent. Reported below: 153 F. 2d 614.

No. 1149. EPSTEIN *v.* UNITED STATES. June 3, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *David M. Palley* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 154 F. 2d 806.

No. 1158. EARNHARDT *v.* UNITED STATES. June 3, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Walter E. Wiles* for petitioner. *Solicitor General McGrath* for the United States. Reported below: 153 F. 2d 472.

No. 1180. E. C. SCHROEDER CO., INC. *v.* CLIFTON ET AL.; and

No. 1237. CLIFTON ET AL. *v.* E. C. SCHROEDER CO., INC. June 3, 1946. Petitions for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Charles A. Horsky* and *W. E. Utterback* for E. C. Schroeder Co. *Thos. W. Champion* and *Louis A. Fischl* for Clifton et al. Reported below: 153 F. 2d 385.

No. 1203. RYMARKIEWICZ *v.* PITTSBURGH STEAMSHIP CO. June 3, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied.

William L. Standard for petitioner. *Walker H. Nye* and *Arnold F. Bunge* for respondent. Reported below: 153 F. 2d 597.

No. 1210. GINSBURG *v.* SACHS ET AL. June 3, 1946. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Paul Ginsburg, pro se. Louis Caplan* for respondents.

No. 1228. BISHOP *v.* BANKERS BUILDING, INC. June 3, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Howard F. Bishop, pro se.* Reported below: 326 Ill. App. 256, 61 N. E. 2d 276.

No. 1239. SYLVANIA INDUSTRIAL CORP. ET AL. *v.* LIBBEY-OWENS-FORD GLASS CO. June 3, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Charles H. Howson, Dexter N. Shaw* and *William A. Smith, Jr.* for petitioners. *Alan N. Mann, William D. Burrows* and *Stuart S. Wall* for respondent. Reported below: 154 F. 2d 814.

No. 1090. CAROTHERS, DOING BUSINESS AS ALLRIGHT AUTO PARK, ET AL. *v.* BOWLES, PRICE ADMINISTRATOR. June 3, 1946. Porter substituted as the party respondent. The petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit is denied. *Walter F. Brown* for petitioners. *Solicitor General McGrath, John R. Benney* and *Milton Klein* for respondent. Reported below: 152 F. 2d 603.

No. 1160. PHILLIPS *v.* SECURITIES & EXCHANGE COMMISSION ET AL. June 3, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Julien Cornell* for petitioner. *Solicitor General McGrath, Roger S. Foster* and *Arnold R. Ginsburg* for the Securities & Exchange Commission, and *William L. Ransom* for the United Corporation, respondents. Reported below: 153 F. 2d 27.

No. 828. MITCHELL *v.* HUNTER, WARDEN. June 3, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. Petitioner *pro se*. *Solicitor General McGrath, Robert S. Erdahl* and *Andrew F. Oehmann* for respondent. Reported below: 152 F. 2d 959.

No. 1093. CABLE ET AL. *v.* WALKER, POSTMASTER GENERAL. June 3, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Jacob W. Friedman* for petitioners. *Solicitor General McGrath, Assistant Attorney General Sonnett, Paul A. Sweeney* and *Abraham J. Harris* for respondent. Reported below: 80 U. S. App. D. C. 283, 152 F. 2d 23.

No. 1128. JOYCE *v.* UNITED STATES. June 3, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Harold W. Bangert* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 153 F. 2d 364.

No. 1208. HIGLEY *v.* NEW YORK. June 3, 1946. Petition for writ of certiorari to the County Court, Onondaga County, New York, denied.

No. 1214. JULIAN *v.* NEW YORK. June 3, 1946. Petition for writ of certiorari to the County Court, Chemung County, New York, denied.

No. 1222. WHITEHEAD *v.* JACKSON, WARDEN. June 3, 1946. Petition for writ of certiorari to the Court of Appeals of New York denied.

No. 1226. MARR *v.* RAGEN, WARDEN. June 3, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 1234. RENNINGER *v.* NEW YORK. June 3, 1946. Petition for writ of certiorari to the County Court of Delaware County, New York, denied.

No. 1249. LESLIE *v.* NEW YORK. June 3, 1946. Petition for writ of certiorari to the County Court of Erie County, New York, denied.

No. 1257. BUCKLEY *v.* NEW YORK. June 3, 1946. Petition for writ of certiorari to the Appellate Division, 4th Department, of New York, denied. Reported below: 178 Misc. 545, 35 N. Y. S. 2d 96.

No. 1261. HOLDERFIELD *v.* ILLINOIS. June 3, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. Reported below: 393 Ill. 138, 65 N. E. 2d 443.

No. 1262. FEELEY *v.* RAGEN, WARDEN. June 3, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 951. GORA *v.* HAWAII. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Fred Patterson* for petitioner. *C. Nils Tavares,* Attorney General of Hawaii, for respondent. Reported below: 152 F. 2d 933.

No. 1142. MEJIA ET AL. *v.* UNITED STATES. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *M. A. Grace* and *Edwin H. Grace* for petitioners. *Solicitor General McGrath, Assistant Attorney General Sonnett* and *Abraham J. Harris* for the United States. Reported below: 152 F. 2d 686.

No. 1151. ROHMER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Watson Washburn* for petitioners. *Solicitor General McGrath, Sewall Key, Helen R. Carloss* and *Melva M. Graney* for respondent. Briefs were filed as *amici curiae* by *J. Robert Rubin* and *Samuel D. Cohen* for Loew's Incorporated et al., and by *Roswell Magill* and *George G. Tyler,* in support of the petition. Reported below: 153 F. 2d 61.

No. 1153. PORTLAND TUG & BARGE CO. *v.* UPPER COLUMBIA RIVER TOWING CO. ET AL. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Donald A. Schafer* for petitioner. *Carl E. Davidson* for respondents. Reported below: 153 F. 2d 237.

No. 1161. SAFEWAY STORES, INC. *v.* PORTER, PRICE ADMINISTRATOR. June 10, 1946. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Elisha Hanson* and *Eliot C. Lovett* for petitioner. *Solicitor General McGrath, John R. Benney* and *Richard H. Field* for respondent. Reported below: 154 F. 2d 656.

No. 1170. MCLEOD *v.* CITY OF JACKSON. June 10, 1946. Petition for writ of certiorari to the Supreme Court of Mississippi denied. *Joseph A. Padway* and *Herbert S. Thatcher* for petitioner. *Marcellus Green, W. E. Morse* and *Garner W. Green* for respondent. Reported below: 199 Miss. 676, 24 So. 2d 319.

No. 1171. BIRCH RANCH & OIL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Walter H. Maloney* for petitioner. *Solicitor General McGrath, Sewall Key, Helen R. Carloss* and *Louise Foster* for respondent. Reported below: 152 F. 2d 874.

No. 1172. GUISEPPE BOZZO FU LORENZO *v.* UNITED STATES ET AL.;

No. 1173. ROSASCO *v.* UNITED STATES ET AL.;

No. 1174. MARIANO MARESCA & CO. *v.* UNITED STATES ET AL.; and

No. 1175. "ITALIA"-SOCIETA ANONIMA DI NAVIGAZIONE *v.* UNITED STATES ET AL. June 10, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Homer L. Loomis* for petitioners. *Solicitor General McGrath, Assistant Attorney General Sonnett, Joseph B. Goldman, David Schwartz* and *Raoul Berger* for the United States and the Alien Property Custodian. Reported below: 153 F. 2d 138.

No. 1176. SOCIETA ANONIMA COOPERATIVA DI NAVIGAZIONE GARIBALDI *v.* UNITED STATES ET AL.;

No. 1177. "ITALIA"-SOCIETA ANONIMA DI NAVIGAZIONE *v.* UNITED STATES ET AL.;

No. 1178. "ITALIA"-SOCIETA ANONIMA DI NAVIGAZIONE *v.* UNITED STATES ET AL.; and

No. 1179. "ITALIA"-SOCIETA ANONIMA DI NAVIGAZIONE *v.* UNITED STATES ET AL. June 10, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Homer L. Loomis* for petitioners. *Solicitor General McGrath* and *Raoul Berger* filed a memorandum for the United States and the Alien Property Custodian. Reported below: 153 F. 2d 138.

No. 1223. LOOMIS *v.* UNITED STATES ET AL. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Homer L. Loomis, pro se. Solicitor General McGrath, Assistant Attorney General Sonnett, Paul A. Sweeney, David Schwartz* and *Raoul Berger* for respondents. Reported below: 153 F. 2d 138.

No. 1182. DINEEN, SUPERINTENDENT OF INSURANCE, *v.* UNITED STATES. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Samuel Markowitz* and *Alfred C. Bennett* for petitioner. *Solicitor General McGrath, Sewall Key, J. Louis Monarch* and *Fred E. Youngman* for the United States. Reported below: 153 F. 2d 425.

No. 1187. FRIEND ET AL. *v.* FRIEND. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Philip R. Shiff* for petitioners. *George H. Cohen* for respondent. Reported below: 153 F. 2d 778.

No. 1190. GOLSON *v.* ILLINOIS. June 10, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Robert E. Bryant* for petitioner. Reported below: 392 Ill. 252, 64 N. E. 2d 462.

No. 1191. ILLINOIS EX REL. PUSCH *v.* MULCAHY, SHERIFF, ET AL. June 10, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Robert E. Bryant* for petitioner. Reported below: 392 Ill. 209, 64 N. E. 2d 458.

No. 1195. JOHN A. JOHNSON & SONS, INC. ET AL. *v.* UNITED STATES TO THE USE OF THE BALTIMORE BRICK CO.; and

No. 1196. JOHN A. JOHNSON & SONS, INC. ET AL. *v.* FRIEDMAN, TRADING AS J. FRIEDMAN CO. June 10, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Emanuel Harris* for petitioners. *Jesse Slingluff, Jr.* for respondent in No. 1195. Reported below: 153 F. 2d 534.

No. 1198. WEST KENTUCKY COAL CO. *v.* NATIONAL LABOR RELATIONS BOARD. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *James G. Wheeler* and *M. K. Gordon* for petitioner. *Solicitor General McGrath, Ruth Weyand* and *Owsley Vose* for respondent. Reported below: 152 F. 2d 198.

No. 1202. W. D. HADEN CO. *v.* WALLING, WAGE & HOUR ADMINISTRATOR. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *W. P. Hamblen* for petitioner. *Solicitor General McGrath, William S. Tyson, Morton Liftin* and *Joseph M. Stone* for respondent. Reported below: 153 F. 2d 196.

No. 1213. MOORE, ADMINISTRATRIX, *v.* ATLANTIC COAST LINE RAILROAD CO. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *William F. Stanton* for petitioner. *Thomas W. Davis* and *M'Cready Sykes* for respondent. Reported below: 153 F. 2d 782.

No. 1215. GUSTIN, ADMINISTRATOR, *v.* SUN LIFE ASSURANCE CO. OF CANADA. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *M. C. Harrison* for petitioner. *Amos Burt Thompson* for respondent. Reported below: 154 F. 2d 961.

No. 1231. LEVERS, ADMINISTRATOR, *v.* ANDERSON, DISTRICT SUPERVISOR. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Huston Thompson* and *Hugh H. Obear*

for petitioner. *Solicitor General McGrath* and *Assistant Attorney General Berge* for respondent. Reported below: 153 F. 2d 1008.

No. 1233. E. L. Essley Machinery Co. *v.* Delta Manufacturing Co. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *John W. Michael* for petitioner. *William A. Strauch* and *J. Matthews Neale* for respondent. Reported below: 153 F. 2d 905.

No. 1247. Baltimore & Ohio Chicago Terminal Railroad Co. *v.* Howard. June 10, 1946. Petition for writ of certiorari to the Appellate Court of Illinois, First District, denied. *Edward W. Rawlins* for petitioner. *Joseph D. Ryan* for respondent.

No. 286. Denver & Rio Grande Western Railroad Co. *v.* Reconstruction Finance Corporation et al.; and

No. 291. Thompson, Trustee, *v.* Reconstruction Finance Corporation et al. June 10, 1946. Petitions for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *William V. Hodges* and *Frank C. Nicodemus, Jr.* for petitioner in No. 286. *H. H. Larimore* for petitioner in No. 291. *Acting Solicitor General Judson, John W. Davis, Edwin S. S. Sunderland, James L. Homire, Thomas O'G. FitzGibbon, Judson C. McLester, Jr., Henry W. Anderson, George D. Gibson, W. A. W. Stewart* and *Arthur A. Gammell* for respondents. Reported below: 150 F. 2d 28.

No. 1108. Brooks, Administratrix, *v.* St. Louis-San Francisco Railway Co. et al.;

No. 1109. DIKIS, ADMINISTRATOR, ET AL. *v.* ST. LOUIS-SAN FRANCISCO RAILWAY CO. ET AL.; and

No. 1110. ST. LOUIS-SAN FRANCISCO RAILWAY CO. *v.* CHASE NATIONAL BANK ET AL., TRUSTEES, ET AL. June 10, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *William V. Hodges, C. O. Inman* and *Phil W. Davis, Jr.*, for Lola Brooks et al., petitioners. *Edwin S. S. Sunderland, Thomas O'G. FitzGibbon, James L. Homire, Henry W. Anderson, George D. Gibson, Robert T. Swaine, Leonard D. Adkins, Fitzhugh McGrew, Jesse E. Waid, Alexander M. Lewis* and *Orville W. Wood* for Chase National Bank et al., respondents. Reported below: 153 F. 2d 312.

No. 1111. ST. LOUIS-SAN FRANCISCO RAILWAY CO. *v.* CHASE NATIONAL BANK ET AL. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *William V. Hodges* for petitioner. *Arthur A. Gammell* for the Chase National Bank, respondent. Reported below: 153 F. 2d 319.

No. 873. SIEGEL *v.* UNITED STATES. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Cyril Coleman* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 152 F. 2d 614.

No. 1201. UNITED STATES EX REL. KARPATHIOU *v.* JORDAN, DISTRICT DIRECTOR OF IMMIGRATION & NATURALIZATION. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Harry G. Johnson* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Leon Ulman* for respondent. Reported below: 153 F. 2d 810.

No. 1218. LIEBERMAN *v.* UNITED STATES; and

No. 1219. MALBIN *v.* UNITED STATES. June 10, 1946. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *A. Harry Weissman* for petitioners. *Solicitor General McGrath, Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 155 F. 2d 27.

No. 1229. FEDERAL LAND BANK OF SPOKANE ET AL. *v.* BEECHER. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *C. D. Randall* and *Josef Diamond* for petitioners. Respondent *pro se*. Reported below: 153 F. 2d 982.

No. 1238. GEORGE F. FISH, INC. ET AL. *v.* UNITED STATES. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Lewis F. Glaser* for petitioners. *Solicitor General McGrath, Robert S. Erdahl, Beatrice Rosenberg, Milton Klein* and *Irving M. Gruber* for the United States. Reported below: 154 F. 2d 798.

No. 1241. KAR ENGINEERING CO., INC. *v.* BROWN & SHARPE MANUFACTURING CO. ET AL. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Thomas J. Byrne* and *Clifford H. Byrnes* for petitioner. *Hector M. Holmes* for respondents. Reported below: 154 F. 2d 48.

No. 1284. KLEIN *v.* COMMISSIONER OF INTERNAL REVENUE. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Leonard M. Rieser* for petitioner. Reported below: 154 F. 2d 58.

No. 1285. SHEW *v.* UNITED STATES. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Raymond Kyle Hayes* and *J. Allie Hayes* for petitioner.

No. 1304. RICHMOND SCREW ANCHOR CO., INC. *v.* WALLING, WAGE & HOUR ADMINISTRATOR. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *E. John Ernst, Jr.* and *Julius L. Goldstein* for petitioner. Reported below: 154 F. 2d 780.

No. 1040. GREEN *v.* OKLAHOMA. June 10, 1946. Petition for writ of certiorari to the Criminal Court of Appeals of Oklahoma denied. *F. E. Riddle* for petitioner. Reported below: 163 P. 2d 554.

No. 1124. SCHREFFLER, DOING BUSINESS AS SCHREFFLER STEEL & SUPPLY CO., ET AL. *v.* BOWLES, PRICE ADMINISTRATOR. June 10, 1946. Porter substituted for Bowles. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Byron G. Rogers* for petitioners. *Solicitor General McGrath* and *Milton Klein* for respondent. Reported below: 153 F. 2d 1.

No. 916. SAUNDERS *v.* WILKINS. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. MR. JUSTICE DOUGLAS is of the opinion that the petition should be granted. *Moss A. Plunkett* and *Arthur Dunn* for petitioner. *Osmond K. Fraenkel* and *John F. Finerty* filed a brief for the American Civil Liberties Union, as *amicus curiae*, in support of the petition. Reported below: 152 F. 2d 235.

No. 1220. PHILLIPS ET AL. *v.* BALTIMORE & OHIO RAILROAD CO.; and

No. 1221. CROZIER ET AL. *v.* BALTIMORE & OHIO RAILROAD CO. June 10, 1946. Petitions for writs of certiorari to the District Court of the United States for the District of Maryland denied. *Abe Fortas* and *Milton V. Freeman* for petitioners in No. 1220. *Harold C. Ackert* and *John W. Giesecke* for petitioners in No. 1221. *Arthur H. Dean, DeLano Andrews, Harry N. Baetjer* and *Edwin H. Burgess* for respondents. *John D. Goodloe* and *W. Meade Fletcher* filed a memorandum on behalf of the Reconstruction Finance Corporation. Reported below: 63 F. Supp. 542.

No. 756. STREWL *v.* SANFORD, WARDEN. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Petitioner *pro se. Solicitor General McGrath, W. Marvin Smith, Robert S. Erdahl* and *Andrew F. Oehmann* for respondent. Reported below: 151 F. 2d 648.

No. 886. SNYDER *v.* UNITED STATES. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. Petitioner *pro se. Solicitor General McGrath, W. Marvin Smith, Robert S. Erdahl* and *Leon Ulman* for the United States.

Nos. 1055 and 1230. BEECHER *v.* FEDERAL LAND BANK OF SPOKANE ET AL. June 10, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. Petitioner *pro se. C. D. Randall* for respondents in No. 1055. Reported below: No. 1055, 153 F. 2d 987; No. 1230, 153 F. 2d 982.

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No. 1107. UNITED STATES EX REL. DURKIN *v.* MCDONNELL, U. S. MARSHAL. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Henry L. Balaban* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Andrew F. Oehmann* for respondent. Reported below: 153 F. 2d 919.

No. 1144. WILSON *v.* JOHNSTON, WARDEN. June 10, 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 *Beatrice Rosenberg* for respondent. Reported below: 154 F. 2d 111.

No. 1155. BLEDSOE *v.* JOHNSTON, WARDEN. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. Petitioner *pro se*. *Solicitor General McGrath* and *Robert S. Erdahl* for respondent. Reported below: 154 F. 2d 458.

No. 1162. MURPHY *v.* MURPHY. June 10, 1946. Petition for writ of certiorari to the Supreme Court of Florida denied. Petitioner *pro se*. *Thomas H. Anderson* for respondent. Reported below: 155 Fla. 905, 23 So. 2d 161.

No. 1206. AUDETT *v.* UNITED STATES. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. Petitioner *pro se*. *Solicitor General McGrath, Robert S. Erdahl* and *Leon Ulman* for the United States.

No. 1211. SANFORD *v.* MISSOURI; and

No. 1212. ELLIS *v.* MISSOURI. June 10, 1946. Petition for writs of certiorari to the Supreme Court of Missouri denied. *Scovel Richardson* for petitioners. *J. E. Taylor,* Attorney General of Missouri, and *Frank W. Hayes,* Assistant Attorney General, for respondent. Reported below: No. 1211, 354 Mo. 1012, 193 S. W. 2d 35; No. 1212, 354 Mo. 998, 193 S. W. 2d 31.

No. 1235. UNITED STATES EX REL. GOODMAN *v.* ROBERTS, COMMANDING OFFICER. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Harry Mesard* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Beatrice Rosenberg* for respondent. Reported below: 152 F. 2d 841.

No. 1242. MEDLEY *v.* UNITED STATES. June 10, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *John H. Burnett* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 155 F. 2d 857.

No. 1265. ROBERTS *v.* BOWMAN, SUPERINTENDENT. June 10, 1946. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. Reported below: 184 Va. LXV.

No. 1266. SMALL *v.* WEBSTER, SUPERINTENDENT. June 10, 1946. Petition for writ of certiorari to the Court of Appeals of New York denied. Petitioner *pro se.*

Nathaniel L. Goldstein, Attorney General of New York, and *Wendell P. Brown,* Solicitor General, for respondent. Reported below: 295 N. Y. 992, 65 N. E. 2d 105.

No. 1267. LA PLACA *v.* NEW YORK. June 10, 1946. Petition for writ of certiorari to the Court of Appeals of New York denied. Reported below: 295 N. Y. 731, 65 N. E. 2d 563.

No. 1273. LA RAVEARL *v.* RAGEN, WARDEN. June 10, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 1274. RAY *v.* RAGEN, WARDEN. June 10, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 1275. ROBINSON *v.* ILLINOIS. June 10, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1276. JAMES *v.* RAGEN, WARDEN. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 1277. JAMES *v.* RAGEN, WARDEN. June 10, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 1278. KRUSE *v.* RAGEN, WARDEN. June 10, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. Reported below: 385 Ill. 42, 52 N. E. 2d 200.

No. 1279. RUSK *v.* UNITED STATES. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Reported below: 154 F. 2d 763.

No. 1280. MCCANN *v.* MULCAHY, U. S. MARSHAL, ET AL. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. Reported below: 153 F. 2d 109.

No. 1288. MICHALOWSKI *v.* RAGEN, WARDEN. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 1289. MICHALOWSKI *v.* RAGEN, WARDEN. June 10, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1290. MANCIONE *v.* RAGEN, WARDEN. June 10, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 1296. DUNCAN *v.* RAGEN, WARDEN. June 10, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1297. CLOUSE *v.* RAGEN, WARDEN. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Clark County, Illinois, denied.

No. 1299. LONGTIN *v.* NIERSTHEIMER, WARDEN. June 10, 1946. Petition for writ of certiorari to the Circuit Court of Kankakee County, Illinois, denied.

ORDERS GRANTING REHEARING, FROM APRIL 23, 1946, THROUGH JUNE 10, 1946.

No. 885. HICKMAN, ADMINISTRATOR, *v.* TAYLOR ET AL., TRADING AS TAYLOR & ANDERSON TOWING & LIGHTERAGE CO., ET AL. On petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit. May 27, 1946. The petition for rehearing is granted. The order of April 22 denying the petition for writ of certiorari, 327 U. S. 808, is vacated and the petition for writ of certiorari is granted. *Abraham E. Freedman* and *Charles Lakatos* for petitioner. *Lee Pressman* and *Frank Donner* filed a brief for the United Railroad Workers, as *amicus curiae,* in support of the petition. Reported below: 153 F. 2d 212.

No. 1143. GARDNER, TRUSTEE, *v.* NEW JERSEY. June 10, 1946. The petition for rehearing is granted. The order of May 20 denying certiorari, 328 U. S. 850, is vacated and the petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit is granted. *James D. Carpenter, Jr., Howard L. Kern* and *Alexander H. Elder* for petitioner. *Walter D. Van Riper,* Attorney General of New Jersey, and *Benjamin C. Van Tine* for respondent. Reported below: 152 F. 2d 408.

ORDERS DENYING REHEARING, FROM APRIL 23, 1946, THROUGH JUNE 10, 1946.*

No. 86. GRIFFIN *v.* GRIFFIN. April 29, 1946. 327 U. S. 220.

No. 693. GASKILL ET AL. *v.* ROTH, TRUSTEE, ET AL. April 29, 1946. 327 U. S. 798.

*See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

No. 805. LENTIN, DOING BUSINESS AS J. LENTIN LUMBER CO., *v.* PORTER, PRICE ADMINISTRATOR. April 29, 1946. 327 U. S. 805.

No. 862. WELLS *v.* ILLINOIS. April 29, 1946. 327 U. S. 803.

No. 880. ALKER ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORP. April 29, 1946. 327 U. S. 799.

No. 275. NYCUM *v.* CITY OF ALTOONA. April 29, 1946. Second petition for rehearing denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application. 326 U. S. 808.

No. 755. GRECO *v.* PARKER, WARDEN. May 6, 1946. 327 U. S. 808.

No. 874. ANDREWS *v.* OHIO. May 6, 1946. 327 U. S. 799.

No. 1072. BARNARD *v.* RAGEN, WARDEN. May 6, 1946. 327 U. S. 811.

No. 667. WEST *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 668. WEST *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 669. ESTATE OF WEST ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 670. WEST *v.* COMMISSIONER OF INTERNAL REVENUE. May 6, 1946. Second petition for rehearing denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. 327 U. S. 815.

Nos. 654 and 655. DELLAR *v.* SAMUEL GOLDWYN, INC. ET AL. May 13, 1946. 327 U. S. 790.

No. 514, October Term, 1944. ROBINSON *v.* UNITED STATES. May 13, 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. 325 U. S. 895.

No. 340. GRASSO *v.* LORENTZEN, DIRECTOR. May 13, 1946. The motion for leave to file a petition for rehearing out of time is granted, and the petition is denied. MR. JUSTICE BURTON took no part in the consideration or decision of these applications. 326 U. S. 743.

No. 114, Misc. MCMAHAN *v.* BENNETT, DIRECTOR, BUREAU OF PRISONS. May 20, 1946. 327 U. S. 770.

No. 365. SEAS SHIPPING CO., INC. *v.* SIERACKI. May 20, 1946. 328 U. S. 101.

No. 883. KNIGHT *v.* OHIO. May 20, 1946. 327 U. S. 808.

No. 893. SHAVER *v.* FIDELITY BANKERS TRUST CO., TRUSTEE. May 20, 1946. 327 U. S. 809.

No. 967. AUTOCAR SALES & SERVICE CO. *v.* LEONARD ET AL., TRUSTEES. May 20, 1946. 327 U. S. 804.

No. 985. O'NEIL *v.* BURKE, WARDEN, ET AL. May 20, 1946. 327 U. S. 811.

No. 880. ALKER ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORP. May 20, 1946. Second petition for rehearing denied.

No. 496. HEISER *v.* WOODRUFF ET AL. May 27, 1946. 327 U. S. 726.

No. 603. FIRST IOWA HYDRO-ELECTRIC COOPERATIVE *v.* FEDERAL POWER COMMISSION ET AL. May 27, 1946. 328 U. S. 152.

No. 1016. HASH *v.* COMMISSIONER OF INTERNAL REVENUE; and

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No. 1041. MARVICH *v.* CALIFORNIA ET AL. May 27, 1946.

No. 68. THOMPSON *v.* UNITED STATES. May 27, 1946. Second petition for rehearing denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application. 326 U. S. 809.

No. 520. POPE *v.* UNITED STATES (327 U. S. 813);

No. 796. FARRELL *v.* MASSACHUSETTS (327 U. S. 819); and

No. 967. AUTOCAR SALES & SERVICE CO. *v.* LEONARD ET AL., TRUSTEES (*ante*, p. 878). May 27, 1946. Second petitions for rehearing denied.

No. 819. CANADIAN RIVER GAS CO. *v.* HIGGINS, FORMERLY COLLECTOR OF INTERNAL REVENUE. May 27, 1946. The motion for leave to file petition for rehearing out of time is granted, and the petition for rehearing is denied. 327 U. S. 793.

No. 894. MORGAN *v.* PARKER, WARDEN. June 3, 1946.

No. 622. BRADEY, ADMINISTRATRIX, *v.* UNITED STATES, AS REPRESENTED BY WAR SHIPPING ADMINISTRATION. June 3, 1946. The motion for leave to file a petition for rehearing out of time is granted, and the petition for rehearing is denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these applications. 326 U. S. 795.

No. 985. O'NEIL *v.* BURKE, WARDEN, ET AL. June 3, 1946. Second petition for rehearing denied.

No. 952. SABIN ET AL. *v.* HOME OWNERS' LOAN CORPORATION ET AL. June 10, 1946.

No. 971. STASSI *v.* UNITED STATES. June 10, 1946.

No. 1020. SYKES *v.* PENNSYLVANIA. June 10, 1946.

No. 1033. GILLESPIE *v.* COMMISSIONER OF INTERNAL REVENUE. June 10, 1946.

No. 1049. TEXAS *v.* BALLI ET AL. June 10, 1946.

No. 1092. METALLIZING ENGINEERING CO., INC. *v.* KENYON BEARING & AUTO PARTS CO., INC. ET AL. June 10, 1946.

No. 1097. KNUDSEN *v.* STEGMAN. June 10, 1946.

No. 1115. BORRELLI *v.* ILLINOIS. June 10, 1946.

No. 1189. TOUCEY *v.* NEW YORK LIFE INSURANCE CO. June 10, 1946.

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No. 68. THOMPSON *v.* UNITED STATES. June 10, 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.

No. 667. WEST *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 668. WEST *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 669. ESTATE OF WEST ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 670. WEST *v.* COMMISSIONER OF INTERNAL REVENUE. June 10, 1946. Third petition for rehearing denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Ante*, p. 877.

No. 880. ALKER ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. June 10, 1946. The motion for leave to file a third petition for rehearing is denied.

AMENDMENT OF ADMIRALTY RULES.

ORDER.

IT IS ORDERED that the portion of Rule 46 of the Rules of Practice for the Courts of the United States in Admiralty and Maritime Jurisdiction which was adopted by the Supreme Court of the United States on June 8, 1942, and provides for the impounding of proceedings in admiralty cases be, and the same is hereby, suspended.

IT IS FURTHER ORDERED that the following provision be, and the same is hereby, added to Admiralty Rule 46:

"Neither the plain language nor the coded text nor the exact translation of any message or dispatch encoded or encyphered by any department or agency of the United States or by any government allied with the United States in war shall be placed of record in pleadings, evidence, or testimony or disclosed in any manner in any proceeding without the prior consent of the department or agency of the United States or allied government which encoded or encyphered such message or dispatch. A paraphrase of the substance of such message or dispatch, prepared and certified as such by an officer of such department or agency, shall be admissible for all purposes for which the plain language message or dispatch would, save for this rule, have been admitted."

MAY 6, 1946.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS, AT CONCLUSION OF OCTOBER TERM—1943, 1944 AND 1945

	ORIGINAL			APPELLATE			TOTALS			MISCELLANEOUS*		
Terms	1943	1944	1945	1943	1944	1945	1943	1944	1945	1943	1944	1945
Number of cases on dockets	11	11	12	1,107	1,382	1,317	1,118	1,393	1,329	------	------	131
Cases disposed of during terms	1	0	0	960	1,249	1,161	961	1,249	1,161	------	------	131
Number remaining on dockets	10	11	12	147	133	156	157	144	168	------	------	0

	TERMS		
	1943	1944	1945
Distribution of cases disposed of during terms:			
Original cases	1	0	0
Appellate cases on merits	211	278	218
Petitions for certiorari	749	971	943
Miscellaneous cases*	------	------	131

	TERMS		
	1943	1944	1945
Distribution of cases remaining on dockets:			
Original cases	10	11	12
Appellate cases on merits	85	86	102
Petitions for certiorari	62	47	54
Miscellaneous cases*	------	------	0

*Miscellaneous docket was originated at the October Term, 1945.

JUNE 10, 1946.

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